

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 179/10
5286173

BETWEEN ADAM MARK COSGRIFF
 Applicant

A N D HARREX CONTRACTING
 LIMITED t/a DUNSTAN
 SPRAYERS
 Respondent

Member of Authority: Philip Cheyne

Representatives: Owen Johnstone, Advocate for Applicant
 Don Rhodes, Advocate for Respondent

Investigation Meeting: 12 August 2010 at Alexandra

Determination: 3 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Harrex Contracting Limited operates a business known as Dunstan Sprayers which undertakes spraying, weed and wilding pine control and related work under contract for clients around Central Otago.

[2] Adam Cosgriff was employed by Dunstan Sprayers from September 2008 until his employment was terminated in April 2009. Mr Cosgriff says that he never had a written employment agreement and that he was dismissed in a procedurally unfair manner when Dunstan Sprayers restructured its business. To remedy this grievance, Mr Cosgriff is claiming reimbursement of lost remuneration and compensation for distress.

[3] Dunstan Sprayers says that Mr Cosgriff was employed on a casual employment contract providing for 24 hours' notice of termination. He was given a week's notice of the cessation of work. It is unaware of any procedural defects arising from the termination of Mr Cosgriff's employment.

[4] There is a dispute about the nature of Mr Cosgriff's employment which I shall resolve first. I will then apply the statutory test for justification to the situation that resulted in the termination of Mr Cosgriff's employment.

Mr Cosgriff's employment

[5] Paul Harrex is the principal of Dunstan Sprayers and Mark Edgar is the operations manager. In about August 2008, approaches were made to Mr Harrex to see about work for Mr Cosgriff. Mr Harrex's evidence is that he said at the time that almost all of their employment was casual but they did not have anything available just then. A further inquiry was made in about the beginning of September 2008, which resulted in Mr Cosgriff commencing employment on 22 September. There is a dispute about whether Mr Cosgriff was provided with a written employment agreement.

[6] It is common ground that Mr Edgar dealt with Mr Cosgriff's employment arrangements and induction, tasks that he commonly performs for Dunstan Sprayers. There is a document headed *workplace introduction checklist* that was signed by Mr Cosgriff and Mr Edgar on 11 September 2008. There are a number of statements and corresponding check boxes organised under various headings. One heading is *employment conditions* under which is listed *work times and meal breaks, rates of pay and how payment is made, leave entitlements, and sick leave and who to call if sick*. There are ticks in the associated check boxes. Mr Edgar's evidence, not disputed by Mr Cosgriff, is that he ticked each box as a record of having dealt with each item during the induction process. That is a company requirement.

[7] There is a second form, undated and unsigned, headed *Dunstan Sprayers*. It has Mr Cosgriff's name on it in handwriting and is a checklist to record completion of tasks associated with the induction process. For example, there are ticks alongside *workplace introduction checklist* and *new employee form* to confirm that these matters were attended to. One of the tasks is *contract agreement*. Mr Edgar's evidence is that he ticked this item to record having given Mr Cosgriff a copy of the proposed employment agreement to take away. Mr Edgar says that he definitely would have written in the relevant pay rate and may have filled in some of the other blank spaces on the form of agreement given to Mr Cosgriff.

[8] The only evidence about the induction process that is disputed by Mr Cosgriff relates to the provision of an employment agreement. He says he was not given one.

[9] The best evidence about what happened in September 2008 is the written record made by Mr Edgar to the effect that he gave Mr Cosgriff a copy of the proposed employment agreement. Accordingly, I accept Mr Edgar's evidence. Perhaps Mr Cosgriff has forgotten this now given the passage of time.

[10] Although he did not return a signed employment agreement, Mr Cosgriff did not dispute any of the terms. He must be taken as having agreed to those terms by his conduct in commencing and continuing work for Dunstan Sprayers.

[11] The written agreement that Mr Edgar gave Mr Cosgriff is a single page form with some standard terms and some blank spaces to be filled in. It is headed *Dunstan Sprayers INDIVIDUAL EMPLOYMENT AGREEMENT FOR A CASUAL AGRICULTURAL WORKER (less than three months)*. There are other references to casual and seasonal employment. There is also space for the commencement date, the duration in weeks and a latest termination date to be filled in by hand. There is insufficient evidence to conclude that these blanks were actually filled in by Mr Edgar. If they were, it is a reasonable inference that Mr Edgar would have complied with the heading of the document and entered a duration no greater than three months. The agreement provides for its termination on 24 hours' notice by either party. It specifies that there are no established days or hours of work and that the employee may be called upon to work on a casual basis as and when required by the employer.

[12] In *Jinkinson v. Oceana Gold (NZ) Ltd* [2009] ERNZ 225, the Employment Court analysed the terms of the comprehensive written employment agreement, some of which imposed ongoing obligations, but noted that they were not sufficient to create an ongoing contract of employment in the absence of any obligation on the employer's part to provide work. However, the Court further found that, in practice, the nature of the relationship had changed to become that of ongoing employment.

[13] In the present case, casual or seasonal work under the terms of the written agreement must have ended three months after it commenced (or earlier if so recorded in the agreement). Dunstan Sprayers cannot say the maximum duration provision was not binding but that the stipulations about seasonal or casual employment remained

effective. I conclude that none of the provisions about seasonal or casual employment were effective as at April 2009 when Mr Cosgriff was dismissed.

[14] I also find that the real nature of the employment relationship differed from the label contained in the written employment agreement. What happened in practice is that Mr Cosgriff reported for work each morning Monday to Friday at the same time as instructed at the outset of the employment. He sometimes worked on Saturdays in addition if asked. He did not work on public holidays but was paid a day's pay for the holiday. He mostly worked about 90 plus hours per fortnight. He was paid sick leave in one pay period and was granted annual holidays in advance during two other pay periods. His holiday pay accumulated. Apart from public holidays, sick days and annual leave in advance, the only days Mr Cosgriff did not work were *rain days*. On these occasions, he reported for work and sometimes his team travelled to the job location but if work was cancelled because of the weather conditions, he was not paid. Mr Cosgriff completed time sheets and was paid fortnightly by direct credit.

[15] Overall, the picture is of an ongoing employment relationship with actual hours of work subject to weather interruption and other agreed variations.

The termination of Mr Cosgriff's employment

[16] On Saturday, 4 April 2009, Mr Harrex learned that Dunstan Sprayers had lost its grounds maintenance contract at Jack's Point. Around the same time, William Hill Winery went into receivership causing a substantial loss to Dunstan Sprayers. Mr Harrex's evidence, which I accept, is that the business had to quickly cut staff numbers. He obtained some advice about how to do this.

[17] On Tuesday, 7 April 2009, Mr Harrex met with Mr Cosgriff and two other staff members. Also present was Mr Edgar. None of the staff were told why they were required for this meeting. Mr Cosgriff's evidence is that the meeting lasted about one minute. They were told that there was no more work and they were being laid off. Mr Cosgriff asked *from when* and Mr Harrex said *right now*. One of the other employees asked if there would be any work in October and Mr Harrex said there could be. The meeting then ended and the employees departed. Mr Cosgriff was later paid as if he had worked a 40 hour week.

[18] There is other evidence of the brevity of the dismissal meeting. The employees promptly involved a union official who met with Mr Harrex later on 7 April and there

was subsequently an exchange of correspondence in which the union official recorded *you confirmed that no consultation had taken place with Adam, Ron and Peter before termination and the termination meeting took less than a minute*. Mr Harrex did not take issue with that statement in his letter in response.

[19] Mr Harrex's evidence is that he told Mr Cosgriff and the others *what had happened* and that he no longer had work for them. He told them that they would be given a week's notice on pay and that if they wanted to discuss anything they should come back to him. When questioned during the investigation meeting, he essentially repeated this evidence saying *I told them we were laying them off with a week's notice*. Mr Edgar's evidence is to similar effect except that he says Mr Harrex specifically referred to losing the Jack's Point contract and the William Hill receivership.

[20] There is other evidence that bears on what was said. In the correspondence mentioned above, the union official states *I asked for an explanation regarding the termination of Adam, Ron and Peter. You stated that the reason for termination was because the business needed to restructure to remain viable in the current economic environment*. In his response, Mr Harrex writes *I also made you aware that on the 3rd of April we had been advised by William Hill Winery that they were not going to be paying an outstanding debt of \$40,000. This factor significantly contributed to the timing of the decision*. It is clear that the union official did not know about the relevance of the receivership until told that by Mr Harrex later on 7 April and I infer that none of the employees had mentioned the receivership to the union official because that had not been mentioned to them when they were dismissed.

[21] From all this evidence, I find that Mr Harrex had decided before the meeting on 7 April to dismiss Mr Cosgriff because of the redundancy situation; during the very brief meeting he may have referred to the loss of the Jack's Point contract but did not mention the William Hill receivership when announcing the decision to Mr Cosgriff and the other two employees; he told the employees that they were being laid off *right now* and that they would be paid a week's wages; and he indicated that there might be some further work in October.

Justification

[22] Justification for the dismissal must be assessed objectively by considering whether Dunstan Sprayers' actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[23] I am satisfied that there existed a genuine redundancy situation that needed to be dealt with promptly. A fair and reasonable employer would nonetheless comply with its statutory obligations in such a situation. Section 4(4)(e) of the Act states that the duty of good faith applies when making employees redundant. As part of the duty of good faith s.4(1A)(c) requires an employer who is proposing to make a decision that will have an adverse effect on the continuation of an employee's employment to provide that person with access to relevant information and an opportunity to comment on the information before the decision is made.

[24] Mr Harrex did not comply with this statutory duty. He met with Mr Cosgriff simply to announce the decision, already made by him, to terminate Mr Cosgriff's employment on a week's notice. He neither intended nor attempted to consult with Mr Cosgriff about a proposal. There were a number of now disputed points susceptible to proper consultation. It would have become apparent before any dismissal that there was no applicable written employment agreement setting out the obligations between the parties. There was an opportunity to discuss and perhaps agree on an appropriate notice period. Mr Cosgriff could have been given the full reasons rather than part of the reason for the redundancy situation. There could have been some dialogue about the reason for selection.

[25] There are other difficulties with how Dunstan Sprayers acted. Normally in a redundancy situation there should be some support offered to affected employees, such as an opportunity to be supported or represented at relevant meetings, some assistance with job search and an offer of a reference. Telling an employee who is leaving his job through no fault of his own that he is being laid off *right now* and having him leave the premises more or less immediately falls short of implementing a redundancy decision in a fair and sensitive way, the obligation recognised in cases such as *Aoraki Corp Ltd v. McGavin* [1998] 1 ERNZ 601.

[26] It follows that Dunstan Sprayers' actions and how it acted were not those of a fair and reasonable employer. Mr Cosgriff was unjustifiably dismissed and he has a personal grievance.

Remedies

[27] As noted, I accept that there existed a genuine redundancy situation in that Mr Cosgriff's position was surplus to Dunstan Sprayers' needs because of the loss of work at Jack's Point and the need to reduce expenditure because of the receivership. It is unlikely that Mr Cosgriff's employment would have continued beyond the notice period even if Dunstan Sprayers had properly consulted with him before the dismissal. In these circumstances, the loss of remuneration suffered by Mr Cosgriff after the dismissal is not attributable to his personal grievance and no compensation can be awarded: see *Aoraki Corp Ltd*.

[28] I should note also that about four weeks after the dismissal there was an offer made to Mr Cosgriff to re-employ him. Mr Cosgriff rejected the offer because he was then planning to move to Nelson and because of some confusion over the work on offer. If I had to assess compensation for lost remuneration, I would take this into account.

[29] In his evidence, Mr Cosgriff makes something of the suddenness of his dismissal coming *out of the blue*. That caused him a high degree of anxiety and stress, although that was no doubt partly because of his loss of position which is not compensatable. It left him at a loss to understand why he was automatically selected for dismissal and why there was no consultation with him.

[30] These proven effects call for a modest compensation award, which I fix at \$2,500.

[31] Mr Cosgriff did not contribute in a blameworthy way to the situation giving rise to his grievance.

Summary

[32] Mr Cosgriff has a personal grievance. To remedy his grievance, Harrex Contracting Limited must pay him compensation of \$2,500 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[33] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days. The other party may then have a further 14 days to lodge and serve a reply.

Philip Cheyne
Member of the Employment Relations Authority