

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 415/10
5282944

BETWEEN

MICHELLE DAWSON
Applicant

AND

TOP FREIGHT LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Mark Nutsford for Applicant
Lorne Campbell for Respondent

Investigation Meeting: 21 July 2010

Submissions Received: 30 July 2010

Determination: 16 September 2010

DETERMINATION OF THE AUTHORITY

[1] Top Freight Limited (“TFL”) is a small employer operating 10 trucks and 4 drivers. There are three employees employed in the office. Ms Marilyn Hyde is the Office Manager and there is also an Operations Manager.

[2] Ms Dawson began working for TFL on 2 June 2009 as a part-time office assistant working Monday to Friday each week. Ms Dawson’s hours of work were from 4.00pm each day until her work was finished, which was usually 7.00pm. Ms Dawson reported to Ms Hyde.

[3] Ms Dawson’s role included the inputting of consignment notes into the computer system and producing manifests. The manifests set out for each driver the items to be loaded into their truck each evening.

[4] Ms Dawson was provided with a written employment agreement and a letter setting out the terms of her employment. There are inconsistencies between the documents. For example the letter states that the hourly rate was to be \$13.50 per hour, whereas the agreement states an hourly rate of \$15.00 per hour. The letter also

sets out a two week trial period, whereas the employment agreement specifies a one month trial period. Ms Dawson told the Authority that because of the inconsistencies she returned the agreement unsigned.

[5] Ms Dawson became ill and was away from work for two days 22 and 23 June. Even though she was not fully recovered Ms Dawson returned to work on 24 June and continued working until Monday 29 June when she attended her doctor. Ms Dawson was taken by ambulance from her doctor's rooms and hospitalized. She was in hospital until 1 July and diagnosed with pneumonia. On discharge Ms Dawson was provided with a medical certificate stating that she was unfit to work for 2 weeks.

[6] There is no dispute that Ms Dawson kept TFL up to date as to her whereabouts. After her release from hospital Ms Dawson advised TFL that she would not be returning to work for two weeks. Ms Dawson says during that telephone conversation she was dismissed unjustifiably and seeks remedies including lost wages, compensation and costs. TFL denies Ms Dawson was dismissed and claims Ms Dawson breached the Fair Trading Act in that she supplied misleading and deceptive information to TFL prior to her employment and which TFL relied on in offering Ms Dawson employment.

[7] The issues for this determination are:

- whether Ms Dawson was dismissed;
- if Ms Dawson was dismissed was the dismissal unjustified;
- if there is a finding of unjustified dismissal what (if any) remedies should be awarded;
- whether the employment agreement should be declared void pursuant to Fair Trading Act; and
- was the employment agreement cancelled pursuant to the Contractual Remedies Act.

Was Ms Dawson dismissed?

[8] Ms Dawson says that when she contacted TFL on 2 July she was put through to Mr Deryk Webb, a shareholder and director of TFL. Ms Dawson says that when she

explained to Mr Webb that she had to take the next two weeks off on sick leave he told her that that would not work, it was a small company and they needed someone who did not take too many days off work. Ms Dawson says she was shocked by his response and asked if she was being fired. She asked for a letter setting out why she had been dismissed so that she could take it to WINZ. Ms Dawson says Mr Webb confirmed she was being dismissed and told her WINZ would forward the forms and he would fill them in and send them back.

[9] Mr Webb denies he dismissed Ms Dawson on 2 July. Mr Webb admits he commented on the fact that the company was a small company and that he needed staff who did not take too many days off. Mr Webb says he wanted Ms Dawson back but only after she was 100% fit. Mr Webb confirms in his written evidence that he did not make it clear to Ms Dawson that he was expecting her to return to work and says it was a misunderstanding.

[10] I find it is more likely than not that Ms Dawson was dismissed by Mr Webb on 2 July 2009. Mr Webb ignored a letter sent to him by Ms Dawson's representative on 13 July setting out the reasons why Ms Dawson believed she had been dismissed. If it was truly a misunderstanding then surely that was the time to pick up the phone and sort the matter out.

[11] Instead, on 16 September 2009 Mr Webb wrote to Ms Dawson's representative and advised him that he [Mr Webb] had told Ms Dawson on 2 July that TFL "...could not continue her employment as we need some one who was at work continually."

[12] In its statement in reply lodged in the Authority on 24 May 2010, TFL states at paragraph 1(a), that the actions it took "...were what a fair and reasonable employer would have done at the time the dismissal occurred." Further down in the statement at paragraph 2(j) TFL states "...the respondent could not continue to employ someone who had so much time off."

[13] Finally, in the letter of 16 September Mr Webb advised Ms Dawson's representative that during the 4th week of Ms Dawson's employment a meeting was held and the decision was made not to continue Ms Dawson's employment beyond the trial period. This information was not made known to Ms Dawson during her employment.

[14] The letters written by Mr Webb and the statement in reply lodged in the Authority confirm what Mr Webb was intending during the telephone conversation with Ms Dawson on 2 July. These documents support my finding that Ms Dawson was dismissed. Also strongly supporting the finding of dismissal is the conversation Mr Webb had with Ms Hyde before the telephone conversation on 2 July. Mr Webb had already decided he was going to terminate Ms Dawson's employment. Mr Webb was under the misapprehension that the trial period clause in the employment agreement had some effect. As the agreement was not signed, the trial period was of no effect at all.

Was the dismissal justified?

[15] Section 103A of the Employment Relations Act (the Act) requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer¹.

[16] Although the Authority does not have unbridled licence to substitute its decision for that of the employer² it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred³.

[17] The employment agreement offered to Ms Dawson sets out the steps TFL intended to apply in the event a disciplinary process was necessary. That process required TFL, before any form of disciplinary action was taken, to promptly investigate any alleged misconduct.

[18] In this matter there was no investigation. There was also no evidence that Ms Dawson's position could not reasonably be kept open for her during her illness. Indeed it was the evidence of both Mr Webb and Ms Hyde that they employed a temporary employee almost immediately, and that person is still working for TFL.

[19] In submissions the respondent relies on the one month trial period set out in the agreement to justify the dismissal. However, in order for the trial period to have any

¹ *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

² *X v Auckland District Health Board* [2007] 1 ERNZ 66.

³ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

effect the parties must agree to the trial period⁴. There is no evidence that Ms Dawson agreed to the trial period. Indeed, the evidence shows that she was concerned about the inconsistencies between the letter of appointment, which provided for a two week period, and the employment agreement which provided for a one month period. Ms Dawson has not agreed to either.

[20] I find Ms Dawson's dismissal is unjustified. Standing back and looking at the matter objectively, I find the way TFL acted and its actions in dismissing Ms Dawson on 2 July were not the actions an employer acting fairly and reasonably in all the circumstances of this case.

Fair Trading Act

[21] The Authority has jurisdiction to make orders under the Fair Trading Act 1986 (FTA) pursuant to s 162(d) of the Act. TFL claims Ms Dawson breached Section 9 of the FTA when she represented in her CV, and then confirmed at her interview for the position, that she was reliable. Section 9 of the FTA prohibits misleading and deceptive conduct in trade. I think the more relevant section of the FTA is s 12 which is directed at conduct when forming an employment agreement and states:

No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.

[22] FTL claims Ms Dawson engaged in misleading and deceptive conduct because she was not reliable. FTL points to the days Ms Dawson had off sick to support its contentions. There were allegations that apart from taking the days of 22 and 23 June and then the time she was in hospital, Ms Dawson also took a day off during her first week of employment. At the investigation meeting it was pointed out that that week, Ms Dawson was only paid for four days, because she started on a Tuesday due to the Monday being a public holiday.

[23] I am satisfied that when Ms Dawson represented in her CV and then confirmed at her interview that she was reliable the statement was neither misleading nor deceptive. Ms Dawson became ill on 22 and 23 June. She returned to work before fully recovering from her initial illness because she was feeling guilty about not being

⁴ Employment Relations Act 2000, s 67.

at work. Rather than being unreliable, Ms Dawson was doing what she could, to be reliable and to not let her colleagues down.

[24] When Ms Dawson made the representations that she was reliable she had no idea that four weeks later she would be stricken with a serious respiratory illness and require emergency hospitalisation and time off work to recuperate.

[25] TFL's claim with respect to the Fair Trading Act is dismissed.

Contractual Remedies Act.

[26] The Authority has jurisdiction to make orders under the Contractual Remedies Act (CRA) pursuant to s 162(c) of the Act. The CRA allows a party to a contract, to cancel it if another party repudiates the contract⁵. TFL claims Ms Dawson repudiated the contract on 2 July when she advised Mr Webb the doctor told her to take 2 weeks off work to recuperate from her pneumonia.

[27] Ms Dawson was doing what any reasonable employee would do in her circumstances and indeed, many employers require it. She was advising TFL that she had to take 2 weeks sick leave in order to recuperate from pneumonia. This hardly meets the threshold of repudiatory conduct.

[28] TFL says in the alternative, Ms Dawson repudiated the contract on the date she asked for all moneys due to be paid to her. Ms Dawson requested payment of her final pay in the belief she had been dismissed by Mr Webb on 2 July. Mr Webb took no steps to disabuse Ms Dawson of any misunderstandings about her employment status when she made enquiries of him about her final pay. That does not meet the standard of repudiatory conduct.

[29] TFL also claims that the employment agreement can be cancelled pursuant to s 7(3) which allows a party to cancel a contract if the party has been induced to enter into it by a misrepresentation by another party or where a term of the contract is broken or will be broken by another party.

[30] TFL says that it was induced to enter into the employment agreement by reason of Ms Dawson's misrepresentation that she was reliable. I have already found that Ms Dawson's representation that she was reliable was not misleading or deceptive. If that

⁵ Contractual Remedies Act 1979, s 7(2).

was the case, then every employee who unexpectedly becomes ill during a period of employment, having assured an employer that they were reliable, could have their employment agreement cancelled with no rights of redress.

[31] Next, TFL says Ms Dawson broke a fundamental term of the employment agreement by failing to attend work as and when required. This submission seems to ignore the fact that Ms Dawson was sick and unable to attend work. There is no evidence that Mr Webb told Ms Dawson that she was expected to be at work while she was sick.

[32] Lastly, TFL says Ms Dawson was not punctual to work and is therefore in breach of clause 4.4 of the employment agreement, and therefore that term would be broken in the future. This submission completely overlooks the fact that Ms Dawson never agreed to be bound by clause 4.4 of the agreement. The employment agreement was never signed by either party.

[33] TFL's claim with respect to the Contractual Remedies Act is dismissed.

Remedies

[34] Ms Dawson seeks reimbursement of lost wages and gave evidence as to the steps she had taken to find alternative employment. Ms Dawson was ultimately successful in finding alternative employment and commenced that employment on 25 March 2010. Ms Dawson was out of work for 39 weeks.

[35] The evidence as it was produced to the Authority shows that this employment relationship problem may have been resolved much earlier than now if Mr Webb had taken the time to respond to Mr Nutsford's letter dated 13 July 2009. At that date, Ms Dawson was almost out of her recuperation period. If, as he now says, he expected Ms Dawson to return to work after her period of recuperation, and that she had not been dismissed on 2 July, then he had the opportunity at that time to mitigate any further loss on behalf of TFL.

[36] Ms Dawson is entitled to be reimbursed for the period of 39 weeks which equates to an amount of \$8,775.00.

[37] Ms Dawson also seeks compensation for the distress and humiliation she suffered as a result of her dismissal. Ms Dawson gave unchallenged evidence that she

was absolutely devastated by her dismissal suffering from sleepless nights, worry about her finances and would often suffer tearful moments.

[38] Ms Dawson was unable to pay her rent and was given notice to vacate her home unless her arrears were paid in full. She was also unable to pay off a debt she owed to her father which has created a rift between them.

[39] Ms Dawson says that she has been further humiliated by the claims of TFL that she was not a reliable employee. She says they were hurtful and completely untrue. Ms Dawson told the Authority that she was not a particularly sickly person and had never before taken unreasonable amounts of time off work. The illness she suffered in 2009 came on suddenly and since that time has not affected her.

[40] I am satisfied that this is one of those cases in which an award at higher than an average level is warranted. Ms Dawson is entitled to compensation of \$7,000.

[41] I am required by s 124 of the Act, when awarding remedies to take into account any contributory conduct on the part of the applicant. I am satisfied Ms Dawson did everything she could to keep her employer informed about her situation. When she was being taken to the hospital by ambulance, she asked her friend to contact TFL and let her employer know what was happening. She then contacted TFL while she was in hospital and immediately on her discharge. I find no contributory conduct on the part of Ms Dawson and the remedies will not be reduced.

Summary of orders

[42] Top Freight Limited is ordered to pay Ms Dawson, within 28 days of the date of this determination:

- \$8,775 pursuant to s 123(b) of the Act; and
- \$7,000 pursuant to s 123(c)(i) of the Act.

Costs

[43] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Ms Dawson may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply being lodged

within 14 days of receipt. I will not consider any application outside that timeframe without the prior leave of the Authority.

Vicki Campbell
Member of Employment Relations Authority