

[4] What arrangements existed between the parties in regard to continuing employment? Did Mr Fenton fail to make contact with the Respondent? Did the Respondent leave messages for Mr Fenton to return about returning to work? Did the employer do enough to contact Mr Fenton, if it was necessary to do so?

Background and Nature of the Business

[5] The Company processes mussels and scallops in Whitianga. It is largely a seasonal business. The processing season ceases during late August and November.

[6] On 17 April 2005 Mr Fenton commenced work with the Company to work as a '*despatch co-ordinator*' during the mussel season. Mr Fenton believed Mr Cleal, the general manager at the time, offered him permanent employment. At the time there was no written employment agreement signed off. Mr Cleal says he created the position to help relieve the Company's Operations Manger, Mr Johnny Robust, and his idea for the position was formed "off the cuff", on the basis of a job specification dated 14 June 2004. Mr Fenton had not seen the job specification prior to the Authority's investigation and Mr Cleal accepted that. Mr Cleal says he envisaged a trial for the position but conceded he never discussed any trial with Mr Fenton who knew nothing about it.

[7] Mr Fenton was initially paid \$14.50 per hour and this increased to \$15.00 per hour. Between 17 April and 28 November 2005 Mr Fenton was engaged to work during the season and off season work was provided at the end of the season.

[8] Mr Fenton obtained this employment by word of mouth. He says he had moved to the district for a life style choice from Auckland and his financial commitments meant that he had made it clear to Mr Cleal that he needed permanent employment to survive financially.

Seasonal Employment Arrangement and Agreement

[9] The parties agreed to a new seasonal employment agreement (dated 28 November 2005) called the Centre Island Seafoods Limited t/a Op Columbia-seasonal employees' individual employment agreement when Mr Fenton commenced the 2006 season. Both parties assigned their names to that agreement and signed an offer of employment. That agreement purported only to relate to seasonal employees. It is not clear that they actually signed the document. However Mr Fenton says that when he assigned his name to it he was confident that he believed Messrs Robust

and Cleal accepted that he had a full time permanent job, despite the agreement making clear it was in respect of season, or a fixed term.

[10] The agreement contained the following relevant clauses that I quote verbatim:

Centre Island Seafoods Limited t/a OP Columbia

Seasonal employees' individual employment agreement.

3 Application

- (a) *The terms and conditions herein replace any express or implied terms that may have applied prior to the date of this agreement.*
- (b) *Nothing in this agreement shall prevent the parties agreeing in writing to vary any or all of the provisions contained herein.*
- (c) *This agreement relates to Seasonal Employee's only.*
- (d) *There is no guaranteed start or end date for either the mussel or scallop season however approximate months for the mussel season are from November to July and scallops July to December.*

4 Terms of Employment

- (a) *The employee is engaged as a seasonal worker on an as needs be basis. The employer is under no obligation to offer the employee work at any time.*
- (b) *Nothing in this agreement shall expressly or by implication be read as providing entitlement to an expectation of on-going employment.*
- (c) *The fact that the employee, in any week, may work 40 hours or more shall not, of itself, change the status of the employee from that of a seasonal employee.*
- (d) *The employer retains the discretion to send the employee home in the event of a force closure of OP Columbia. Refer page 6.*
- (e) *The employer will provide work as and when work becomes available. There is no guarantee of on-going employment, however the employer will provide as much work as possible for those employee's who are reliable and available to work. This agreement will terminate at the end of the shellfish season.*

[11] That above extract from the agreement refers to "p.6". Page 6 refers to "closure" and I quote the provisions verbatim:

- (i) *As determined by the New Zealand Maritime Biotoxin Programme; or*
- (ii) *Where lysteria monocytogenes or any other pathogenic bacterium is detected in the environment or product.*
- (iii) *Rainfall closure: determined by the amount of rainfall in a harvesting area as is provided by the Shellfish Harvesting Regulations.*
- (iv) *The employee acknowledges the fluctuating nature of the industry and that spawning, weather conditions, or biological matters may restrict the availability of work and the employer may declare its harvesting and processing season closed and lay off staff for this reason. There may be several closures in any 12 month period.*

- (v) *Mechanical breakdown: where it is necessary to cease normal activities due to major mechanical breakdowns of any plant and/or equipment required for productivity and where safety is compromised.*
- (vi) *Where there is a shortage of raw material, and OP Columbia is unable to source product for processing. (Employees will be notified at least two hours prior to the start of a shift of unavailability of work.)*

[12] Another clause referred to “**Extended Down-Time Period**”. That clause reads verbatim as follows:

- (a) *The employee’s employment is conditional upon work being available. Where there is insufficient work to keep the employees occupied in gainful employment, the employer may place the employee on a period of stand down.*
- (b) *The stand down period will be advised in advance with as much notice as is practicable.*
- (c) *The employee may request to take the time as annual leave and only be paid if they have annual leave entitlement due. At all other times, the stand down period will be treated as leave without pay in terms of this agreement.*

[13] The next clause that may be relevant is clause 13: “**Absence From Work**”, and reads verbatim as follows:

- (a) *If for any reason the employee cannot attend work on a day that has been organised with the employer, the employee must advise at least one hour before the organised start time of the company of their unavailability.*
- (b) *Absence from work for more than three days without notification is considered abandonment of employment. In the event the employer is unable to make contact with the employee by phone and/or mail after three days absence has occurred, instant employment termination may result.*

[14] There is a “**Termination of Employment**” provision contained in the agreement at clause 22. This reads verbatim as follows:

- (a) *Either party shall give one week’s written notice of termination. Where the notice period is not given, the notice period shall be paid in lieu or forfeited in lieu of notice. Nothing contained herein shall prevent the employer from summarily dismissing an employee for serious misconduct.*

The End of Mr Fenton’s Employment

[15] Mr Fenton says that towards the end of the 2006 season he asked Messrs Cleal and Robust what they planned for him to do at the end of the season. Mr Robust says that at the end of the 2006 season he told Mr Fenton he had some upcoming work in the store area but could not tell him how long the work would last for or what work would be available after that. Mr Fenton says that Mr Robust subsequently advised him there would probably not be enough work for him to remain at the factory. I am satisfied Mr Fenton understood that at the time.

[16] Mr Robust says that after that conversation Mr Fenton left and did not return to work and did not communicate his absence and any intention to return to work.

[17] Mr Fenton says that he started to search for work early because he knew there was not going to be any further work offered to him. He was able to find part time work through an agency and he commenced as a driver on 20 September 2006 in Auckland.

[18] Mr Fenton says he was sick on 21 August 2006 with a flu virus and that his partner telephoned Mr Robust that he would be absent from work on Wednesday 21, Thursday 22 and Friday 23 August. Mr Robust says he has no recollection of Mr Fenton's partner telephoning him but thinks they are getting confused with another telephone call made by Mr Fenton's partner at another time. He could not produce any details of such conversation and the time and date it apparently took place.

[19] Mr Fenton says that he expected to hear from the Company after 23 August. He says the Company's receptionist would contact workers by telephone at the start of the new season. He says he overheard her doing this on one occasion. Messrs Robust and Cleal accept that the receptionist did contact some workers by telephone. They say that the Company also advertised and relied on word of mouth to engage labour.

[20] Mr Robust says that attempts were made to contact Mr Fenton without success to find out if he was going to come back to work and request him to return his keys. Mr Robust says he left a message on Mr Fenton's cell phone but it was not returned. He understood the Company's receptionist tried to contact Mr Fenton. There was no other evidence to support this.

[21] Mr Fenton says he learned from his partner, who had learned from her friends, that the factory had reopened. He says he immediately returned from Auckland but was unable to find Mr Robust at his home. He made personal contact with two drivers and says he learned from them that someone else had taken his job. He made no further attempt to contact the company.

[22] Mr Fenton continued his part time job driving. He found alternative employment at Placemakers in Whitianga from 8 January 2007. He is still employed there.

Determination

The Nature of the Employment Arrangement

[23] This matter turns on what was agreed between the parties when the employment commenced. The absence of a written employment agreement has not been helpful. During the Authority's investigation meeting the Company produced a signed offer of employment dated 24 March 2005 that purported to be for a fixed term. It had no reference to seasonal employment and how the fixed term would end. The role that Mr Fenton was offered was as a '*despatch co-ordinator*', which was consistent with Mr Cleal's job description. However Mr Fenton's work was associated with the mussel production and he says he understood other work would have to be found for him in the off season. The offer of employment had no reference to how the employment would end if it was for a fixed term. Those legal requirements were not met. Given that Mr Fenton continued working including during the off season in 2005 I conclude he was engaged on an indefinite basis at that time.

[24] Mr Fenton's evidence that he moved to Whitianga from Auckland for life style reasons and his financial situation supported him being given 'permanent employment' is not decisive and the above conclusion that he was engaged on an indefinite basis at that time related to the technical requirements of the law rather than a conscious mutual understanding of both parties.

The Nature of the Employment Agreement

[25] I was requested by the Respondent to assume that a more detailed agreement would have existed. I am not prepared to do that. The employer has had ample opportunity to produce any such document. The issue that there was no employment agreement in that first season has been around since the employment relationship problem was raised. I was informed that the Authority had been provided with all relevant documents. Mr Cleal says he checked the file the night before the Authority's investigation meeting and the only extra document produced was the offer of employment. Mr Fenton accepted he had signed that.

[26] The effect of the 2006 agreement was to bind the parties to a seasonal arrangement and a fixed term under another offer of employment, but Mr Fenton's expectation was that he would be provided with work during the off season so he signed that agreement and the offer anyway.

[27] That agreement purported to be for a fixed term and met the requirement of saying what the need for it was and how it would end. It was needed for seasonal work purposes. It ended at the

close of the mussel season. Mr Fenton's holiday pay owing was paid out at the end although he had taken some accrued days. Specifically I am supported in my conclusions by the following provisions from the two documents where the relevant agreement states:

- *This agreement relates to Seasonal Employee's only.*
- *There is no guaranteed start or end date for either the mussel or scallop season however approximate months for the mussel season are from November to July and scallops July to December.*
- *Nothing in this agreement shall expressly or by implication be read as providing entitlement to an expectation of on-going employment.*
- *...This agreement will terminate at the end of the shellfish season.*

[28] I am also supported in my conclusion by the fact that Mr Fenton started to look for alternative work when he knew from Mr Robust that there would not be enough work for him. This was consistent with work ending after the season and the agreement stating that "*....This agreement will terminate at the end of the shellfish season.*"

[29] Furthermore the 2006 agreement superseded any other arrangements and in this way impacted on what Mr Fenton thought was his permanent/indefinite employment. This is because he agreed to the provision in clause 3 Application that states: "*The terms and conditions herein replace any express or implied terms that may have applied prior to the date of this agreement*".

[29] Closure provisions in the agreement add confusion to the purported fixed term nature of the agreement based on the season and the off season shut down. I am satisfied that the references to closure are contingency provisions in the event of a closure where work is not available during the season including for the reasons provided. These provisions are the 'Extended Down-Time' and 'Closure' provisions referred to above. Their existence has to be read in the context of the entire agreement.

[30] There was a discussion between Messrs Fenton and Robust at the end of the 2006 season about what Mr Fenton would do when the season finished. It was common ground that there would probably not be enough work for him to remain at the factory and he was told that. These are all factors consistent with seasonal employment. There is not enough evidence that there was any agreement for Mr Fenton to work permanently other than a commitment by Mr Robust to provide him off season work if it was available. Mr Robust went further than that to imply that if the work was available it would be given to Mr Fenton.

[31] Mr Fenton could not have come to a reasonable understanding that he had been employed permanently/indefinitely.

[32] Mr Cleal has confused matters with his idea of an “off the cuff job” and related it to the 14 June 2004 job description. However that related to the first season and before Mr Fenton accepted the seasonal employment agreement in 2006. It emerged during the Authority’s investigation meeting that another employee from the night shift was provided with the work that was available during the off season and employed in a similar role to that given to Mr Fenton in 2006. I accept the explanation provided by Mr Cleal that this happened because somebody else had to do the work when Mr Fenton did not return.

Did Gina Porter Telephone Mr Robust to Inform Him That Mr Fenton Was Sick?

[33] For completeness Mr Fenton was sick on 21, 22 and 23 August (which was not challenged) and he did not return to work before the close of the season. I accept that Gina Porter telephoned Mr Robust. Mr Robust did not recall it but that does not mean it did not happen. Mr Robust could not provide any details of another telephone conversation he says happened at a different time. Mr Fenton and Ms Porter were very clear about the telephone call being made by Ms Porter and when she made it.

[34] Mr Fenton did not make any further contact with either Mr Robust or Mr Cleal. The employer has not relied upon the abandonment clause contained in the employment agreement because it says it would have provided Mr Fenton with whatever work was available and would have re-employed him for the next season if he had contacted the Company. Mr Robust believed Mr Fenton had left for other work. It was entirely open to him to come to that conclusion.

[35] Even if I am wrong and Mr Fenton’s employment was indefinite he cannot succeed on a personal grievance because I am satisfied he left his employment by not contacting his employer about what he was doing, especially since the season had not quite finished.

Did Mr Robust Leave a Message for Mr Fenton To Contact Him?

[36] The evidence is inconclusive because the employer could not provide any records, and did not wish to incur the expense of obtaining any such records from the phone company. Also, Mr Robust during his evidence could not recall every detail and made a concession that he said he had hired Mr Fenton when it was Mr Cleal that hired him and that he only left one phone message and

not “messages” as he said in his statement of evidence. This has no impact because there was no contractual requirement on Mr Robust to contact Mr Fenton.

Was It the Employer’s Responsibility to Contact Mr Fenton to Re-Employ Him?

[37] There was no formal arrangement that the receptionist would telephone Mr Fenton to re-engage workers. The receptionist did occasionally contact workers. There was nothing in writing. There was no other formal arrangement made by Mr Fenton. The employment agreement is silent on the matter.

[38] There was no provision for the employer to contact workers to re-engage them for a new season. There was an ad hoc arrangement but that did not imply any obligation on the employer, I hold. Therefore, Mr Fenton can not rely on his claim that his employer failed to re-employ him for a personal grievance.

The Abandonment Clause

[39] I was requested to consider the provision of the abandonment clause that requires the employer to try and contact the employee if they have not turned up for work. I am satisfied that the employer was not relying on that clause in Mr Fenton’s absence because work was available and the employer left it up to Mr Fenton to decide to work or not. Moreover, for the following reasons, Mr Robust had come to a conclusion that Mr Fenton had decided to leave: Mr Fenton made no further attempts to contact the Company, the time that elapsed, Mr Fenton’s failure to return the work keys, Ms Porter notifying Mr Robust that the keys were available if he wanted to collect them; Mr Robust learning that Mr Fenton had gone to Auckland and Mr Fenton understanding that although there might have been some work there would not have been enough work to fill the entire off season. Mr Fenton did not return to finish the short amount of time left in the season and this does not assist his claim.

Conclusion

[40] Mr Fenton was not employed permanently from the 2006 season when the parties agreed to an individual seasonal employment agreement that purported to be for a fixed term and superseded all other arrangements. His seasonal employment existed in a lawful fixed term arrangement that met the requirement of providing how it would end. If I am wrong in this conclusion the indefinite nature of any employment was affected by Mr Fenton leaving and not making any further contact with his employer until he raised a personal grievance through his lawyer. It was open to Mr

Robust to reasonably conclude that Mr Fenton had decided to leave and not to return upon his getting other work. There were no sufficient contractual terms to require the employer to re-employ Mr Fenton and to contact him for that purpose.

[41] The Applicant's claims are dismissed.

[42] Costs follow the event. The Company has been put to the expense of this matter. There was nothing exceptional to justify direct solicitor client costs. I accept that there was a genuine dispute between the parties about the nature of the employment and the arrangements around the seasonality of job opportunities and whether or not the employment was permanent or indefinite employment. Therefore I assess a reasonable contribution to be \$1,500. I require Frank Fenton to pay \$1,500 to Centre Island Seafoods Limited.

P R Stapp
Member of the Employment Relations Authority