

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 109
5538809

BETWEEN ANDREW PETER LEARY
Applicant

A N D FERGUSON CIVIL INDUSTRIES
LIMITED
(IN RECEIVERSHIP)
Respondent

Member of Authority: David Appleton

Representatives: Lynn Malin, Counsel for the Applicant
No appearance by the Respondent

Investigation Meeting: 8 May 2015 at Christchurch

Submissions Received: 8 May 2015 from the Applicant, with further
information provided on 8 June and 15 July 2015
None from the Respondent

Date of Determination: 3 August 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Leary was an employee and not an independent contractor.**
- B. Mr Leary was unjustifiably dismissed and is also owed arrears of wages. He is awarded the remedies set out in this determination.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Leary claims that he was unjustifiably dismissed from his employment as a truck driver and labourer on 11 July 2013.

[2] No statement in reply has been received from the respondent and no-one from the respondent appeared at the investigation meeting. However, I am satisfied that the notice of investigation meeting was properly served upon the respondent company at its registered office on 14 April 2015.

[3] Mr Leary was requested to provide to the Authority details of his earnings in the thirteen weeks immediately following his dismissal. This information was not received by the Authority until 15 July 2015, which accounts for the reason why this determination has taken 12 weeks to be issued from the date of the investigation meeting.

Brief account of the events leading to the dismissal

[4] Mr Leary was offered a job in late June 2013 as a truck driver, digger driver and general labourer by the respondent's foreman, Aubrey Tuuta. The rate of pay was \$20 per hour. Mr Leary, who was already employed in Rangiora, resigned from that employment on the basis of the respondent's job offer. The work was to take place in Greymouth. Accommodation was provided by the respondent, which Mr Leary was to share with Mr Tuuta, Mr Tuuta's son and another employee. The work commenced on Monday 8 July 2013 when Mr Leary met with Mr Ferguson, the director and owner of the respondent company.

[5] Mr Leary's evidence is that, on the first two days he was working, he was accompanying other people to see how the operation ran. He started driving a truck on the third day. His job was to cart heavy, wet clay from a worksite to the Greymouth dump.

[6] Mr Leary did this on two occasions without serious incident (although the truck got stuck in mud on the second trip). However, on the third trip, as Mr Leary started to tip out the load at the dump, the truck started to tip to the left because, in his opinion, it was unevenly loaded. Although Mr Leary attempted to lower the load, the truck tipped over and Mr Leary was knocked unconscious for a few moments. The accident was witnessed by a bystander who called an ambulance and Mr Leary was taken to Greymouth hospital.

[7] It is Mr Leary's evidence that it was not he who loaded the truck with the clay, but that the truck had already been loaded ready for him when he returned to the worksite from his second trip. He also said that it was not obvious because of the

nature of the load that it was uneven and, in his opinion, it was the responsibility of the employee loading the trucks to ensure that the load had been evenly distributed in the bed of the truck. Mr Leary said that loose loads usually settle themselves down during the road journey, but that, in this case, the load was so heavy and wet that that obviously did not occur. He also said that, because of the nature of the work, he had not been in a position to check the load was evenly distributed because they were under pressure to keep working.

[8] Mr Leary says that Mr Ferguson arrived at the hospital around five hours later and picked him up and drove him to the house he was sharing with Mr Tuuta. Mr Leary said that he ascertained from the general tenor of Mr Ferguson's conversation that he was going to be dismissed because of the accident. He said that this was because Mr Ferguson talked about taking him *back home* which he understood to mean Rangiora.

[9] When he arrived at the house in Greymouth, Mr Leary said to Mr Tuuta words to the effect *I presume this means I don't have a job*, to which Mr Tuuta replied *yep*. Mr Tuuta promised that he would get the company accountant to pay Mr Leary three days' wages, although this never occurred.

[10] Mr Leary's evidence was that he was physically unable to work until around the end of August because of an injury to his back sustained during the accident. An ACC claim was lodged but Mr Leary was later told that he had been refused on the grounds that the company had denied that Mr Leary had been an employee at the time of the accident.

[11] A personal grievance was raised on behalf of Mr Leary by Helmore Bowron & Scott Lawyers within 90 days of the events and the dismissal. The personal grievance raised not only concerns about the dismissal but also about a breach of the company's obligation to provide Mr Leary with a safe workplace. Whilst, on the basis of Mr Leary's evidence, this would appear to be correct, Mr Leary has not included in his statement of problem to the Authority a claim for unjustified disadvantage. I am therefore unable to take that allegation any further. I therefore determine only the claim for unjustified dismissal and arrears of wages.

Determination

[12] Having considered Mr Leary's sworn evidence, and in the absence of any evidence to the contrary from the respondent, I am satisfied that Mr Leary's evidence is credible and accurate.

[13] I therefore find that Mr Leary was an employee of the respondent company, and not an independent contractor. I am also satisfied that he was a permanent full-time employee, and not a casual employee.

[14] I am further satisfied that none of the procedural requirements of s.103A(3) of the Employment Relations Act 2000 (the Act) were satisfied in even the most rudimentary way. I therefore find that no fair and reasonable employer could have acted in the way that the respondent acted in all the circumstances at the time the dismissal occurred, and that the dismissal was therefore procedurally unjustified. In addition, on Mr Leary's evidence, had a proper investigation taken place, a fair and reasonable employer would have concluded that the accident was not the fault of Mr Leary, and so the dismissal was also substantially unjustified.

[15] I am also satisfied that Mr Leary is owed arrears of wages for three days' work in the gross sum of \$600 (calculated at the rate of \$20 per hour, for 10 hours per day).

Remedies for unjustified dismissal

[16] Section 123(1) of the Act provides as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[17] Section 128 of the Act provides as follows:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[18] If Mr Leary had not been dismissed and if the respondent had not falsely or erroneously advised ACC that Mr Leary had not been an employee at the time of the accident, Mr Leary would have been entitled to receive from the respondent First Week Compensation in the sum of 80% of one week's pay for the first week after the accident, as he had sustained a work related injury. Therefore, Mr Leary is entitled to receive the gross sum of \$800 from the respondent in respect of the period from 11 July 2013 to 17 July 2013.

[19] Thereafter, had the respondent not falsely or erroneously advised ACC that Mr Leary was not an employee, ACC would have paid Mr Leary weekly compensation at the rate of 80% of his usual earnings received for the last four weeks before his incapacity. Thereafter, ACC would base its payments on Mr Leary's actual earnings from the 52 weeks before his incapacity.

[20] However, because it was not until after he had ceased to be employed that the respondent falsely or erroneously advised ACC that Mr Leary was not its employee, the Authority does not have the jurisdiction to order the respondent to pay Mr Leary compensation for the lost ACC compensation that he would have otherwise have earned, as the employment had already ceased and there were no longer any relevant duties under the Employment Relations Act 2000 that were owed to him by the respondent. In addition, the Authority does not have jurisdiction to make orders under the Accident Compensation Act 2001, pursuant to s.113(5) of that Act.

[21] Therefore, I invite Mr Leary to provide this determination to the ACC and to consider asking ACC to review its decision to decline payment in the light of the Authority's finding that Mr Leary was an employee of the respondent at the time of the accident and that the accident was therefore a workplace injury.

[22] Mr Leary's evidence was that he was fit enough to start working from 22 July 2013 and started work at Earthworks & Paving 2012 Limited with effect from 11 September 2013. In the three months since his dismissal by the respondent Mr Leary earned a total of \$2,434.32 gross with Earthworks & Paving 2012 Limited. Had he not been unjustifiably dismissed, he is likely to have earned \$11,400 gross in the employment of the respondent, excluding his period of incapacity, during the 3 months since his dismissal. I have no evidence to suggest that this would not have been the case and, as the respondent did not go into receivership until after the expiry of this period, I have no reason to believe that Mr Leary would not have continued to have been employed and paid until the expiry of the three month period.

[23] With respect to this period, therefore, Mr Leary incurred lost remuneration in the sum of \$8,965.68 (\$11,400 - \$2,434.32).

[24] Mr Leary gave no evidence about the effect on him of the dismissal, but I am prepared to infer that its sudden nature would have caused him a modicum of humiliation, loss of dignity and injury to his feelings. Mr Leary was not employed very long at the respondent company and so I believe that compensation in the sum of \$1,000 is an appropriate sum to award Mr Leary.

[25] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act).

[26] Having taken evidence from Mr Leary as to how the accident occurred, I am satisfied on a balance of probabilities that the accident was not Mr Leary's fault. I therefore decline to reduce the remedies I have awarded.

Orders

[27] I order the respondent to pay to Mr Leary the following sums:

- (a) Arrears of wages in the gross sum of \$600 for the period 8 to 10 July 2013;
- (b) Arrears of wages in the gross sum of \$800 for the period 11 to 17 July 2013 (First Week Compensation);
- (c) Lost remuneration arising from the unjustified dismissal in the gross sum of \$8,965.68;
- (d) Compensation under s.123(1)(c)(i) of the Act in the sum of \$1,000.

Costs

[28] Mr Leary has not advised the Authority what, if any, legal costs he has incurred and I therefore reserve costs, save that I order the respondent to reimburse Mr Leary with the cost of the Authority's lodgement fee of \$71.56. If Mr Leary wishes the respondent to be ordered to pay a contribution towards his legal costs his counsel is to file and serve a memorandum of counsel within 14 days of the date of this determination. The respondent shall have a further 14 days to respond.

David Appleton
Member of the Employment Relations Authority