

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Matthew Leckie (Applicant)

AND Barney Theyers t/a Alexandra Blocklaying/Plastering Services
(Respondent)

REPRESENTATIVES Toni Brown, Counsel for Applicant
Gillian Clarke, Counsel for Respondent

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING 10 May 2001

DATE OF DETERMINATION 17 May 2001

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Mr Matthew Leckie's employment relationship problem is his claim that he was unjustifiably dismissed on 15 December 2000. The central issue is whether Matthew was an employee or engaged as a trainee at the relevant time.

Relevant Findings of Fact

2. I find:
- (a) In August 2000, Matthew Leckie was at secondary school but was keen to get a job and leave school.
 - (b) Mr Michael McFelin is a Training Co-ordinator for Central Otago Training Services Limited. That company is contracted by Skills New Zealand to administer work based training schemes and apprenticeships. There is a limit to the number of trainees that Mr McFelin can have in place at any one time. Mr McFelin knew that the respondent (Mr Colin Edward Theyers) was looking for "... a strong boy to do a job ..." in his blocklaying and plastering business. Both men knew they were talking about a youth for work based training 40 hours per week for a period of time that could lead on to paid employment.
 - (c) On or about Tuesday 8 August 2000, Matthew was interviewed by Mr McFelin. At the interview with Mr McFelin, Matthew completed an "Application for Work Based Training" form. Mr McFelin then took Mr Leckie to meet Mr Theyers. All three were happy with arrangements so Matthew commenced with Mr Theyers on or about Wednesday 9 August 2000. Matthew thought he had started on Monday 7 August 2000 but the diary, the date on the application form and the date of the school leaving certificate suggest he probably started on 9 August 2000. Everyone understood it was work based training which could lead on to paid employment.

- (d) Matthew worked with Mr Theyer's 2 employees and was under their supervision and direction most of the time.
- (e) Matthew thought he was on a 12 week course. Mr McFelin did not have a vacant trainee place so he thought Matthew was commencing training with Mr Theyers for a couple of weeks until a place became available. Mr McFelin was then away from Friday 11 August and returned on Monday 28 August 2000. Mr McFelin formally entered Matthew into the work based training programme commencing Wednesday 30 August which is when Central Otago Training Services Limited had a vacancy in its contracted places.
- (f) At some point Mr McFelin arranged for Matthew to receive a travel allowance that is paid to some trainees.
- (g) A written training agreement was signed by Matthew, Mr McFelin and Mr Theyers on 21 September 2000 that in part said "*The training shall commence on the 30th day of August 2000 and shall be completed on or about the 15th day of December 2000*".
- (h) Mr Theyers gave Matthew \$100.00 at about the time the agreement was signed. This resulted from some discussion between Mr Bruce Leckie (Matthew's father) and Mr Theyers. Mr Leckie had expressed some dissatisfaction about his son working without pay.
- (i) Despite that payment, Matthew became increasingly dissatisfied with working without pay. He asked the 2 employees if he would get a paid job and spoke to Mr McFelin about getting a paid job.
- (j) Mr Theyers was out of New Zealand for a time and arrived back just before 30 October 2000.
- (k) 12 weeks from 7 August 2000 is 30 October 2000, so on that day Matthew thought he had completed his training. He had heard no response on the question of a paid job so he was doing his work without enthusiasm. This was apparent to the 2 employees. By chance, Mr McFelin arrived about lunchtime and was told of Matthew's "go-slow" by the employees. Mr McFelin took Matthew aside who said he was disheartened. Mr McFelin dropped Matthew home for lunch but Matthew said he did not intend to go back.
- (l) Mr Leckie, with natural sympathy for his son's situation, went to see Mr Theyers who he located at the Fire Station that same day. Mr Theyers is the Chief of the Volunteer Fire Brigade. Mr Theyers was aware of Matthew's departure and unlikely return at lunchtime.
- (m) Mr Theyers cannot recall these events. However, I find that the two men discussed Matthew's dissatisfaction with unpaid work and some issues Mr Theyers had concerning Matthew's performance. Mr Theyers said he was prepared to pay Matthew for a two week trial. Mr Leckie asked if that would be at youth rates. Mr Theyers said he would pay good wages. Mr Leckie said that he would discuss this with Matthew and would ring back with a yes or no. No reference was made to the training agreement.
- (n) Mr Leckie did phone Mr Theyers shortly after 5pm with a "yes".
- (o) Matthew resumed work on 31 October 2000. He was given a tax certificate to complete and asked to commence filling in time sheets, both of which he did. From then on he was paid weekly by cheque at \$8.50 per hour less tax, all of which was recorded in wage records. No written employment agreement was offered or requested.
- (p) Mr McFelin was unaware of these events at the time. Later in the week, he became aware that Matthew was receiving some money but continued to monitor the arrangement as if it was still governed by the training agreement. This included regular workplace visits every week or so.
- (q) Mr McFelin would normally visit shortly before the conclusion of a training agreement to see if employment was to follow and to deal with the expiry of the training agreement. On this occasion, other commitments prevented him visiting until 15 December 2000.
- (r) Mr Theyers told Mr McFelin that he did not want to keep Matthew on and left it to Mr McFelin to convey this to Matthew. Mr Theyers thought the training agreement was at

an end and he was not intending to take Matthew on as a permanent employee. Mr McFelin told Matthew that there was no job and took him home.

- (s) Matthew was visibly upset.
- (t) Matthew's last pay cheque was received on 8 December 2000 for the period ending that day.

Relevant findings of Law and Determination

3. The applicant was not initially an employee. A similar conclusion was reached in *Shirtcliffe v Green* [1992] 1 ERNZ 121. See also *Webster v Mount Cook Group Limited* unreported, Palmer J, 25 September 1997, CEC 27/97. The present facts are not materially different. Although the written training agreement was not signed until after the training commenced, all parties clearly understood from the outset that the engagement was for work based training with the possibility of employment upon completion of the training. It would be unduly technical to characterise the \$100.00 given at the time of the Blossom Festival as anything other than a gift.

4. However, the legal arrangements changed. Viewed objectively, on 30 October 2000 the respondent offered and the applicant accepted employment pursuant to a contract of service. The features of this employment match those of many employment relationships. The applicant performed work. He was paid an hourly rate. There was discussion about a trial period. The respondent got the applicant to provide his IRD number, paid him weekly, deducted PAYE tax, filled in wage records and got him to fill out a time sheet. The applicant was not given an opportunity to seek advice and the agreement was not recorded in writing (sections 64 and 65 of the Employment Relations Act 2000) but neither is significant in the context of this case.

5. It was explained to me that Central Otago Training Services Limited is contracted by Skills New Zealand to place and monitor trainees not employees. However, Mr McFelin continued to monitor the placement. The training agreement was not referred to on 30 October 2000 and Mr McFelin was not part of the discussions. Whether or not the training agreement had any continued legal efficacy after 30 October 2000 does not detract from my finding above.

6. It follows that the summary dismissal of the applicant on 15 December 2000 is unjustified. There was no proper reason for the dismissal and the manner of the dismissal was also unfair. Indeed, counsel for the respondent recognised the difficult position she was in trying to argue justification when the respondent said there was no employment relationship. However, the question of contribution was raised. There was only one incident of any significance that could potentially be relevant. I find the applicant did leave the trailer unchocked creating a potentially dangerous situation. This was about late November 2000. However, the applicant was not dismissed because of poor work performance. The respondent, having little recollection of the arrangements with Mr Leckie, thought he was entitled to just let the training period end without more. That is the situation which gave rise to the personal grievance and the applicant bore no responsibility for it. Accordingly, no reduction is required.

7. As to lost wages, the applicant is entitled to receive the wages for his last week of work together with the holiday pay for the entire duration of the employment. This totals \$354.33 gross. He should also receive lost wages and holiday pay for the 8 weeks after the dismissal as claimed, amounting to \$2332.00 gross. There should also be an award as compensation for the distress suffered as a result of the dismissal. I assess from the evidence that the distress suffered is at the lower end of what one usually sees. Consistent with this, it cannot be said that the employer behaved brutally or otherwise aggravated the situation. I think a modest award is called for which I assess at \$2,000.00.

Orders

8. The respondent is to pay the applicant the sum of \$2,686.33 for lost wages and holiday pay.
9. The respondent is to pay the applicant \$2,000.00 as compensation for the humiliation, injured feelings and lost dignity suffered.
10. Costs are reserved. My present thinking is that costs should follow the event on the basis of a reasonable contribution. If the parties cannot agree on costs, the applicant may file and serve an application within 21 days and the respondent may file and serve a reply within a further 7 days. I will then determine costs.

Philip Cheyne
Member of Employment Relations Authority