

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 55
5583769

BETWEEN	MICHAEL MOMO Applicant
A N D	MOUNT RILEY WINES AND ESTATES LIMITED Respondent

Member of Authority: David Appleton

Representatives: Craig Knowles, Counsel for Applicant
John Buchanan, Advocate for Respondent

Investigation Meeting: 21 April 2016 at Blenheim

Submissions Received: 21 April 2016 from both parties, with written copy of
applicant's submissions received on 27 April 2015.

Date of Determination: 2 May 2016

DETERMINATION OF THE AUTHORITY

- A. Mr Momo's dismissal was both procedurally and substantively unjustified.**
- B. Mr Momo is entitled to the remedies set out in this determination.**
- C. Costs are reserved.**

Prohibition of publication order

[1] Evidence was presented to the Authority about an employee who was accused of fraud by the respondent. As this person took no part in the proceedings, I prohibit from publication the name of this individual. He will be referred to in this determination as Mr X.

Employment relationship problem

[2] Mr Momo claims that he was unjustifiably dismissed by the respondent.

[3] The respondent concedes that the dismissal was procedurally unjustified but argues that it was substantively justified and that Mr Momo was a participant in fraudulent activity, and so should receive no remedies.

Brief account of events leading to the dismissal

[4] The respondent owns and operates vineyards in the Marlborough area. Mr Momo has been employed by the respondent between 2012 and 2015 on a series of fixed term contracts. He was initially employed to do pruning, but in the 2015 season, he was employed as a painter/nailer/pruner. His last seasonal worker's employment agreement with the respondent commenced on 13 May 2015 and was stated to be for a fixed term of three months. The specific term of this agreement relating to the fixed term stated as follows:

3. **Term**
- 3.1 *Your employment in this position is for a fixed term (the "Term") of 3 months from _____ until its expiry on _____. And then from _____ until its expiry on _____ or unless terminated earlier by either party under the provisions of this agreement.*
- 3.2 *The reason for the fixed term nature of your employment is that the nature of the work is seasonal and cannot be carried out year round.*
- 3.3 *You confirm that unless otherwise expressly agreed in writing and signed by the parties, there is no expectation that your employment will continue beyond the end of the fixed term, and nothing in this agreement shall be interpreted to give any expectation that this agreement will be renewed, or that any subsequent agreement will be entered into.*

[5] The employment agreement also contained a trial period clause which the respondent purported to rely upon when dismissing Mr Momo but which it now concedes was not applicable to Mr Momo's employment because he did not fulfil the definition of employee in s.67A(3) of the Employment Relations Act 2000 (the Act) as Mr Momo had clearly been employed previously by the respondent.

[6] Mr Momo worked under the supervision of Michelle Johnstone throughout his employment under the 2015 employment agreement. Ms Johnstone had also been employed by the respondent from 2012 to 2015. On 5 June 2015, Ms Johnstone told

Mr Momo that she had been suspended while some issues were investigated. She eventually left the employment of the respondent under the terms of a confidential settlement agreement by way of an agreed resignation it is understood.

[7] Mr Momo says that, on 12 June 2015, a manager (Matt Murphy) and the senior vineyard manager (Kerry Hammond), approached him and asked him whether he had helped another employee to prune any vines since the beginning of the pruning season. Mr Momo says that he explained that he had helped not just Mr X to prune but everybody. He was then asked why and he explained that he helped pruners to do a few bays on their rows to give them a chance to catch up with his work of painting cuts, replacing nails in posts, fixing irrigation and tidying the vine heads. He says that he explained that, otherwise, he would be being paid to stand around doing nothing. Mr Momo says that he asked if he was in trouble and he was told no, and to carry on doing what he was doing.

[8] It is worth noting at this point that the respondent, in common with many vineyards, had two methods of payment for its workers. Mr Momo was paid an hourly rate whereas the pruners, once they had become proficient, were paid on a piece basis per vine.

[9] The reason for the inquiry that was made of Mr Momo was that the respondent was concerned that there was an arrangement between Mr X and Ms Johnstone whereby she would prune some of his vines in return for what might be colloquially be called a backhander. Prior to the conversation with Mr Momo on 12 June 2015, Mr Hammond had been conducting what was essentially a covert investigation during which he observed the times when workers were pruning and what they were claiming for.

[10] Mr Hammond showed the Authority a diary note for 26 May 2015 in which he noted the following:

12.05pm Michael Momo worked on rows 23 to 24 which are marked down for Mr X and Mr X working on 27 to 28.

[11] Mr Momo says that, on 15 June 2015, it started raining and the pruners left the vineyard as pruning is not carried out in rain. He asked Mr Hammond if he could leave too and was told that he could but was handed two pieces of paper, one of which was a letter which read as follows:

Dear Mike,

Re: Termination of your employment

Mount Riley Wines & Estates Limited have decided to terminate your employment and this letter constitutes notice of termination. In accordance with your employment contract, we are willing to offer one week's further work. Thank you for your efforts and all the best.

*Regards,
Kerry Hammond
Senior Vineyard Manager*

[12] Mr Momo said that when he read the letter later, he felt upset, shocked and embarrassed. He was also worried about how he would support his family and visit his children in the North Island. He says that he had no idea why he had been dismissed and nobody had ever told him that he had done anything wrong.

[13] Mr Knowles raised a personal grievance on behalf of Mr Momo on 20 July 2015 and requested a s.120 statement as to the reasons for the dismissal. The General Manager of the respondent, Amy Murphy, responded by way of a letter dated 24 July 2015. The relevant parts of this letter state as follows:

You have requested a s120 statement. The reason for Mr Momo's dismissal was because he was seen pruning vines on numerous occasions when he ought to have been painting. The vines that Mr Momo pruned were claimed by other employees on a piece basis and so we were effectively paying for vines to be pruned twice – once to the pruner on whose row Mr Momo was pruning and then Mr Momo's hourly wage.

[14] The letter also referred to the 90 day trial period clause and a clause which enabled the employment agreement to be terminated on one week's written notice.

[15] The parties attended mediation unsuccessfully. The statement of problem was lodged on 23 September 2015 and the statement in reply followed. In that statement in reply, the respondent stated the following:

The Respondent terminated the Applicant's employment due to the standard of the Applicant's work being unacceptable, concerns over the Applicant's work ethic and suspicions that the Applicant was pruning rather than performing his primary work responsibilities for personal gain, in collaboration with former employees of the Respondent.

The issues

[16] The Authority must determine the following issues:

- (a) Notwithstanding the fact that the dismissal was procedurally unjustified, whether it was substantively justified;
- (b) What, if any, remedies should be awarded to Mr Momo?

Was the dismissal of Mr Momo substantively justified?

[17] Having heard evidence from Mr Hammond and Ms Murphy, I am satisfied that the reason for the dismissal was not because of Mr Momo's work performance or work ethic. Mr Momo's work performance and work ethic have been brought into play during the Authority's investigation meeting, I understand, because Mr Momo claims as part of his remedies loss of earnings beyond the end of the fixed term on the basis that there was an expectation that he would be re-employed, or alternatively kept on, for further work. The basis of his claim is that this had occurred in 2012 and 2014, and would have occurred in 2013 but for the fact that Mr Momo had been seriously ill. The respondent says that he would not have been retained because of his poor performance and work ethic. I shall examine this issue under the heading of remedies.

[18] The key issue, therefore, in determining whether Mr Momo's dismissal was substantively justified is whether the respondent had any reasonable grounds for concluding that Mr Momo was working in collaboration with Ms Johnstone and Mr X, amongst others, to defraud the respondent.

[19] I found Mr Hammond to be a credible witness. He conceded that, whilst he had observed Mr Momo pruning the rows of other staff members, in particular Mr X's, he had not asked him to stop doing this at the time.

[20] Furthermore, Mr Hammond conceded that Mr Momo was working directly under the supervision of Ms Johnstone and that it was for Ms Johnstone to tell Mr Momo what work to do or not to do. Mr Momo said that he would not go onto a row to carry out pruning unless he was told to do so by Ms Johnstone and, also, he would not start pruning someone's row unless that person was also pruning it. He therefore contested Mr Hammond's evidence that he had been pruning rows while Mr X was pruning other rows.

[21] It was Ms Johnstone's evidence to the Authority that she would tell Mr Momo to prune rows and that both she and Mr Hammond used to assist the piece workers to

do their pruning. She said that she remembered distinctly Mr Hammond himself assisting one of the workers who gave evidence before the Authority, Bernadi Bernadi.

[22] It seems clear that, whilst the respondent had concerns about the ongoing practice of piece workers being assisted in pruning by other workers, it had no hard evidence of any conspiracy to defraud. It seems that the whole investigation was launched after an unidentified worker reported overhearing a drunken conversation between Ms Johnstone and Mr X some years before in which Ms Johnstone was asking Mr X for money in return for her pruning his rows.

[23] I am unable to conclude safely that the dismissal of Mr Momo was substantively justified. This is for the following reasons:

- (a) No attempt whatsoever was made to conduct an investigation with Mr Momo save for a very short conversation a few days before his dismissal in which Mr Momo was not told what the respondent's concerns were or why he was being questioned. Indeed, he was told he was not in trouble;
- (b) The respondent had no proof that backhanders were being paid to staff for helping piece workers prune their rows;
- (c) The respondent could do no more than infer that Mr Momo was helping Mr X prune his rows for financial benefit because they could not think of any other reason why he would do this. However, it is equally as feasible that Mr Momo was simply helping out in a spirit of collegiality, or that he did so because he had been directed to do so by Ms Johnstone;
- (d) Even if a dishonest scheme had been going on, everyone agreed that Mr Momo had to do what he was directed to do by Ms Johnstone and it is equally feasible that Mr Momo had not been aware that that scheme was going on;
- (e) If there was any unlawful gain made by anyone, it appears to have been made by Mr X, who may have been paid for rows he did not prune.

[24] In other words, Mr Momo's knowledge of a dishonest scheme and his active participation in it is only one of a number of possible explanations for him helping Mr X to prune his rows. I cannot justly conclude that that explanation is more likely than any other on the basis of the evidence that was put before me.

[25] Whilst I accept that the respondent had genuinely made an error in respect of its reliance on the trial period provision, the consequences of that error cannot be borne by Mr Momo. As an employee fully protected by the Employment Relations Act, he had every legitimate expectation of being treated in accordance with its terms.

[26] Therefore, I must conclude that the dismissal was substantively unjustified as, in all the circumstances, no fair and reasonable employer could have reached the conclusion, and taken the action of dismissal that the respondent did¹.

What remedies is Mr Momo entitled to?

[27] Having established that Mr Momo was unjustifiably dismissed by the respondent, I must now turn to remedies.

[28] Section 123 (1)(a) to (c) 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:

[29] Section 128 provides as follows:

128 Reimbursement

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

¹ This refers to the mandatory test of justification set out at s. 103A of the Act.

- (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.

Lost earnings

[30] Mr Momo was paid one week's notice, up to 21 June 2015 and found new employment immediately or soon afterwards. However, he earned less than he would have done had he not been dismissed. Had he not been dismissed, he could legitimately have expected to have earned wages from the respondent until 13 August 2015. That means he would have legitimately have expected to earn wages for another seven weeks and four days.

[31] During the six weeks of his employment under the last individual employment agreement Mr Momo earned an average of \$666 per week, gross. Adopting this figure, he would have earned a further \$5,042.57 gross between 22 June and 13 August. From this figure must be deducted the gross earnings he earned during this period, which amounts to \$2,405.59. Therefore, Mr Momo suffered a loss of \$2,636.98 gross.

Further loss?

[32] Mr Momo argues that, as in previous years, he would also have been employed for a further five weeks until mid-September had he not been dismissed. This date appears to accord with the evidence of Mr Hammond, who says that no one would have been employed past bud burst, which occurred in mid-September in 2015.

[33] The respondent argues, however, that Mr Momo would not have been re-employed because both Mr Hammond and Mr Bernadi, who took over as supervisor once Ms Johnstone left the employment of the respondent, found Mr Momo's work to be poor. They both gave evidence to the Authority that they would not have re-employed him.

[34] However, Mr Hammond agreed, as did Ms Murphy, that the respondent provided support and training to employees who are seen not to be performing adequately. It seems to be the case that no one did tell Mr Momo, throughout his four years of employment with the respondent, that the respondent regarded his work as substandard. Mr Hammond agreed that he had never done so, and Ms Johnstone, who was his direct supervisor and whose role therefore would have been to have addressed performance issues with him, said that she found his work to be of a good standard.

[35] In light of this, even if Mr Momo's work was of a poor standard, he had never been told that that was the case and, if he had been, it is as likely as not that he would have addressed those shortfalls by the time the end of his fixed term contract had occurred in August 2015.

[36] However, it appears that Mr Momo and Mr Bernadi did not get on. Mr Momo said during cross-examination that, if he had not been dismissed, he would not have worked under Mr Bernadi's supervision. The respondent argues, therefore, that Mr Momo would have left in any event and would not have worked beyond August 2015. However, during re-examination, Mr Momo said that, even if Mr Bernadi had been his supervisor, he would not have just left without having a new job to go to.

[37] However, what I note is that Mr Momo did find new work very soon after being dismissed and I cannot discount the possibility that Mr Momo's anticipated disgruntlement at being asked to work under Mr Bernadi would have led him to seek new work. It is certainly the case that there was plenty of work for experienced vineyard workers at the material time and I conclude that Mr Momo would have been successful in finding that work very quickly, as he actually did.

[38] Therefore, on the balance of probabilities, I agree with the respondent that it is not likely that Mr Momo would have stayed working under the supervision of Mr Bernadi at the end of the fixed term period. I therefore restrict his loss of earnings to the period remaining under the fixed term agreement.

[39] Mr Knowles submitted that Mr Momo's fixed term agreement was not valid under s.66 of the Act as, inter alia, the three months period specified was just an estimate of the time that Mr Momo would be needed, and so he should not be treated as being bound by the fixed term stated in the agreement. However, in light of Mr Momo's evidence that he would not have worked under Mr Bernadi, and my

finding that he would have been able to have found new work very quickly once he knew that Mr Bernadi would be his new supervisor after Ms Johnstone left, I conclude that it is not necessary to determine the validity of the employment agreement under s.66 of the Act. In other words, I believe that Mr Momo would not have worked longer than a total of three months in any event.

Compensation for humiliation, loss of dignity and injury to feelings

[40] Turning to compensation under s.123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings, Mr Momo gave evidence of the effect on him, as did his partner, Beth MacKenzie. Mr Momo seeks \$25,000 compensation. He said that he had not known initially why he had been dismissed and that, when he did find out, he saw that he had been accused of *robbing the company*. He said he had never been sacked before and he had been working in vineyards for 16 years.

[41] Mr Momo said that, as a result of his loss of income, he had to cancel a trip to see his children which has caused a rift between him and his 9 year old child. He also said that he had to increase his blood pressure medication due to his stress.

[42] Ms MacKenzie said that Mr Momo was moody and *a little bit depressed* when he was dismissed and *a little angry* and that he got a bit more depressed as time went on. He also became distant but that he was better when he got his new job. She said that he went to the doctor due to his stress-related anxiety.

[43] Mr Buchanan, on behalf of the company, stated that Mr Momo had been employed for only one month when he was dismissed and that it is not proportionate to award \$25,000. He also pointed out a discrepancy in the evidence between Ms MacKenzie and Mr Momo as to the reason that he visited his doctor after his dismissal.

[44] I certainly do accept that being dismissed suddenly, with no warning whatsoever, would cause Mr Momo humiliation, loss of dignity and injury to his feelings. I also accept that when he found out what the company's suspicions were, namely that he had been dishonest, that would have increased those feelings. However, I am not satisfied that there is enough persuasive evidence that a substantial sum of compensation is warranted.

[45] On the other hand, I do not accept completely Mr Buchanan's submission that Mr Momo had only been employed for a month and so the effect on him must have been not very great. I bear in mind that this was Mr Momo's fourth year of working for the company and that he had had an expectation that he would be employed beyond the expiry of his fixed term.

[46] It seems that the effect on Mr Momo of being dismissed was relatively short lived and, whilst it appears there is still a rift between him and his 9 year old child, that cannot be laid solely at the door of the respondent and could have arisen out of all sorts of other issues for which the respondent bears no responsibility. Standing back, I believe that an appropriate sum of compensation for Mr Momo's dismissal is the sum of \$8,000.

Contribution

[47] 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).

[48] Just as I have found that there was not enough cogent evidence to persuade me that Mr Momo's dismissal was substantively justified, I cannot find that there is any cogent evidence to enable me to conclude that Mr Momo contributed to his personal grievance in a blameworthy way. I therefore decline to reduce his remedies.

[49] Mr Buchanan drew my attention to the case of *Salt and Fell*, by which I assume he means the Court of Appeal judgement in *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands*². I understand that Mr Buchanan was referring to this case because he was arguing that misconduct discovered after dismissal should be taken into account when assessing remedy. Certainly, that is the principal import of *Salt v Fell*, in which the Court of Appeal stated, at [104]:

The subsequently discovered information could not be taken into account under s 124, but could and should have been taken into account when determining wages reimbursement and humiliation compensation under s 123.

² [2008] NZCA 128

[50] I understand that the misconduct referred to by the respondent is falsifying timesheets, because some of Mr Momo's time sheets referred to him spending all week painting, when it should have referred to him pruning as well. Mr Momo said that he did not complete his own timesheets, but Ms Johnstone did, which she confirmed in evidence. In the absence of evidence to the contrary, I accept this.

[51] The Court of Appeal made clear, at [83], that only subsequently discovered misconduct *of a truly significant nature* can be taken into account in determining remedies. Not only was there no evidence of misconduct by Mr Momo *of a truly significant nature*, I am not convinced that there is any evidence of any misconduct in any event, as he did not falsify his timesheets, as Ms Johnstone completed them for him. Therefore, I am satisfied that the principle enunciated in *Salt and Fell* does not apply to this matter.

Orders

[52] I order the respondent to pay to Mr Momo the following sums:

- a. \$2,636.98 gross in respect of lost wages; and
- b. \$8,000 in respect of compensation under s. 123(1)(c)(i) of the Act.

Costs

[53] I reserve costs. The parties are to seek to agree how costs are to be dealt with, but, if they are unable to reach agreement within 14 days of the date of this determination, Mr Knowles shall have a further 14 days within which to serve and lodge a memorandum outlining the costs sought from the respondent and the basis thereof, and the respondent shall have a further 14 days within which to serve and lodge a memorandum in reply.

David Appleton
Member of the Employment Relations Authority