

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 268
5289008

BETWEEN	TIMOTHY GRAHAM NEILL Applicant
AND	MICHAEL WILLIAM NOORD First Respondent
AND	M & S NOORD CONTRACTING LTD Second Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Steven Franklin, Counsel for Respondent

Investigation Meeting: 22 March 2011 in Whakatane

Determination: 22 June 2011

DETERMINATION OF THE AUTHORITY

- A. Tim Neill was unjustifiably dismissed by Michael Noord.**
- B. In settlement of Mr Neill's personal grievance Mr Noord must pay the following amounts to Mr Neill:**
- (i) \$372.06 for unpaid wages plus interest of 8.4 per cent on that amount for the period from 5 November 2009 to the date of payment; and**
 - (ii) \$2332.80 as compensation for lost wages under s123(1)(b) of the Employment Relations Act 2000 (the Act); and**
 - (iii) \$4000 as compensation under s123(1)(c)(i) of the Act; and**
 - (iv) \$70 in reimbursement of the Authority application fee.**

Employment relationship problem

[1] The Authority has investigated Tim Neill's claim he was dismissed from a part-time job driving a tractor for Michael Noord. Mr Neill said the dismissal resulted from an argument about the length of hours he was required to work and arrangements for breaks.

[2] By determination AA321/10 (12 July 2010) the Authority found, as a preliminary matter, that Mr Neill was an employee rather than an independent contractor and was entitled to proceed with his personal grievance application against Mr Noord. Mr Noord had not disclosed the company owned by him and his wife Shona Noord as the principal in the employment relationship with Mr Neill. The Authority had joined M & S Noord Contracting Limited as the second respondent.

[3] The remaining issues for determination were:

- (i) Whether the terms of Mr Neill's employment were for casual or ongoing part-time work?
- (ii) Whether Mr Neill was dismissed by Mr Noord or had resigned or abandoned his employment by not accepting work offered to him?
- (iii) If Mr Neill was dismissed whether that dismissal was unjustified?
- (iv) If there were an unjustified dismissal, what remedies should be awarded to Mr Neill, considering lost wages (subject to mitigation and distress compensation)?
- (v) Should any remedies ordered be reduced for contribution?
- (vi) Costs.

The investigation

[4] For the purposes of this investigation written witness statements were lodged by Mr Neill, Mr Noord and Mrs Noord. I have also referred to written statements lodged for the investigation of the preliminary matter by these witnesses and Mr Neill's wife, Lorraine Neill.

[5] Each witness, under oath or affirmation, confirmed their statements and

answered questions from me. Both parties had the opportunity to ask additional questions and provide closing arguments.

[6] As allowed under s.174 of the Employment Relations Act 2000 (the Act) this determination does not set out a full record of the evidence or submissions, but states findings of fact and law and expresses conclusions on matters for determination. In making this determination I have reviewed the statements, answers to questions, documents provided and submissions made.

[7] The Authority's conclusions are reached on the balance of probabilities, that is what is more likely than not. Where there was a conflict in the evidence, as there was between Mr Neill and Mr Noord on what was said between them on 4 November 2009, I have relied on documents created at the time or soon after this matter arose between the parties. Particularly important in that respect are notes written by Mr Noord in a work diary under the date of 4 November 2009 and his letter of 27 November 2009 to Mr Neill.

How the problem arose

[8] Mr Neill had answered an advertisement in the *Whakatane Beacon* seeking tractor drivers for the harvesting season. He had the necessary licence but no harvesting experience and was not initially selected by Mr Noord. However the selected applicant for the job left to take up work elsewhere and Mr Noord contacted Mr Neill. Mr Neill attended a two hour training session with Mr Noord on 20 October 2009. The job comprised various tasks necessary to cut and bale grass used to feed stock.

[9] On 30 October Mr Neill continued training with Mr Noord for six-and-a-half hours. This involved Mr Neill observing Mr Noord work on various harvesting tasks and doing some of that work himself.

[10] Mr Neill worked again on 2 November from around 9.30am. He and another man, John Haultain, were to work on several properties that day. Mr Noord worked with Mr Neill initially and then left. Mr Neill was told to follow Mr Haultain who would show him where to work. Around 8.30pm Mr Noord returned to where the two men were still at work. About an hour later Mr Neill stopped the tractor he was driving to clear a blockage in the baler. Mr Noord came to help and Mr Neill asked when work would finish for the day. He was upset when Mr Noord said it would be

some hours before they finished as there was another job still to do that day at Mr Haultain's property. Mr Neill complained that he had worked all day without a break. Mr Noord then arranged for Mr Neill to go home.

[11] The two men next spoke on 4 November when Mr Neill rang and asked Mr Noord why he had not called him for work on 3 or 4 November. A heated argument developed. Mr Neill's evidence was that when he complained about the long hours worked on 2 November and not getting a break, Mr Noord said Mr Neill was not competent and should look for work elsewhere. Mr Noord denied this and said he offered Mr Neill work on 6 November and said Mr Neill could take breaks when needed. While there is much dispute about what was said during a ten or fifteen minute telephone conversation and in what order, Mr Noord agreed he said near the end of the conversation that things were not working out and it was not worth persevering.

[12] There was no further contact between the two men until Mr Neill raised a personal grievance by sending Mr Noord a letter dated 23 November 2009. Mr Noord replied by letter on 27 November.

[13] The matter was not resolved in mediation which the parties attended twice – once prior to and once after the Authority's determination of the preliminary matter.

The terms of employment

[14] There was no written employment agreement recording terms agreed between Mr Neill and Mr Noord.

[15] Mr Neill's evidence was that he was promised a steady stream of work from late October 2009 and that Mr Noord had told him this work was likely to continue through to the end of the harvesting season in February 2010.

[16] Mr Noord denied work was promised on a continuous basis and said Mr Neill was "*only ever employed on a casual as and when required basis*".

[17] The Employment Court has described the distinction between casual and ongoing employment in this way: ¹

¹ *Tracey Jinkinson v Oceana Gold (NZ) Ltd* (unreported, EC, CC9/09, 13 August 2009, Judge Couch) at [40] [41].

... Whatever the nature of the employment relationship, the parties will have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If these obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.

The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.

[18] The Court noted the following analysis by the Canadian Labour Relations Board as helpful:²

What is a genuine casual employee? In the notion of casual work, there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have work done. Conversely, as soon as the need is foreseeable, only part-time work is automatically created: the employee is not a casual worker but a part-time one. Moreover, as soon as an employee's availability is guaranteed and assured, a part-time job is automatically created.

[19] The Court concluded that where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.

[20] The evidence in this matter, I find, showed Mr Neill and Mr Noord had made arrangements which gave rise to such legitimate expectations and mutual obligations.

[21] The terms, agreed in conversations between the two men in late October were that:

- (i) Work was not guaranteed each day but was on a *weather permitting* basis. Some days would be too wet or too dry for harvesting work.
- (ii) Mr Noord would call Mr Neill each morning during the harvesting season to let him know if there was work that day. I find this term was

² *Bank of Montreal v United Steelworkers of America* 87 CLLC 16, 044

not indicative of a casual relationship but was a matter of business practicality specific to the needs of the industry. Wet grass could not be baled and a decision on weather conditions could not be made until the morning of each day.

- (iii) Mr Neill would be available for work when required each morning. Mr Neill had his own plant nursery business but had told Mr Noord that he would do the nursery work outside of the hours he was required for harvesting work. Mr Neill had arranged a plant sale in the weekend of 24-26 October before he agreed to work for Mr Noord and was not available that weekend, but had agreed to be available when he was needed to work on any days after then.
- (iv) Mr Neill would be paid \$13.00 per hour while training and \$18.00 per hour thereafter. I find that term was likely to have been agreed because Mr Noord's 27 November letter refers to those rates as "*agreeable with me*". They were the rates the two men discussed before the training began. Mr Neill was left to work on his own on 2 November and the training rates cannot be said to apply to the hours he worked on that day.

[22] I do not accept Mr Noord's evidence that this was only casual employment, and Mr Neill was free to decline work offered to him, withstands any objective assessment. Mr Neill had undertaken to be available for any work offered to him, and Mr Noord had agreed to supply him with work when Mr Noord had orders from landholders to do harvesting work and the weather was suitable for work that day. However it was not full-time work. Throughout his evidence Mr Neil had agreed he understood that the job was a part-time one and depended on Mr Noord getting in orders and the weather being right for the work required.

Did the employment end by dismissal or abandonment?

[23] Mr Neill contended he was dismissed by either or both of Mr Noord's actions in, firstly, not calling him about work on the mornings of 3 and 4 November, and, secondly, what was said in their telephone conversation on 4 November.

[24] However Mr Noord said he did not have work to offer on those mornings but he did offer Mr Neill more work during the telephone conversation and Mr Neill

failed to turn up for that work on 6 November, thereby abandoning the employment.

[25] While Mr Noord did offer Mr Neill work on 6 November during their 4 November telephone conversation, the decisive point was how that discussion ended. Having heard Mr Neill's complaints about the working hours and arrangements for breaks, Mr Noord declared the employment relationship to be at an end by describing it as not worth persevering with. He did so because he wanted someone able and willing to work the hours and in the way he regarded as necessary for the role without complaint and did not consider Mr Neill was likely to do so. I reach that conclusion, on the balance of probabilities, on the basis of the evidence from Mr Noord's diary entries and correspondence written at or closer to that time than the written and oral evidence he gave to the Authority's investigation meetings.

[26] The page for 4 November 2009 in a work diary used by Mr Noord included this note which Mr Noord said he made that day:

"Got call from Tim Neil [sic]. Was upset I had not contacted him. Told him that we had some more work fri. He then went on about not enough training not having a smoko or lunch break. Said I pressure him into not taking breaks. Said I had not heard the end of this and I would be hearing from him. I told him his performance was not good enough and he was too slow. Advised him there was another employee starting Monday and I would see how he goes."

[27] In his letter to Mr Noord of 23 November 2009 raising a personal grievance Mr Neill said: *"When I telephoned you to discuss this matter, you told me that I was incompetent and should look for another job"*.

[28] In his reply dated 27 November Mr Noord stated that during the 4 November telephone conversation he had told Mr Neill there was some work for him on 6 November and continued:

*However you then spoke to me in a derogatory manner and launched into a personal attack on me. In lite [sic] of this **I have since chosen not to avail myself of your services** because of the obvious personality clash and your poor opinion of me. ... You state in your letter that I called you incompetent this is not true and I have never told you to look for another job. The comments I made were that your output was very slow i.e. 19 bales in two hours and after your personal attack against me **I said this is not working out**. ... **As I said to you on the telephone it was simply not working out and I felt it was best that we no longer persevered**. We have since had a large downturn in work and are doing far less work than expected due to the dry conditions. [emphasis added]*

[29] I am satisfied this confirms that by the end of the 4 November telephone conversation Mr Neill would have reasonably understood that the employment relationship had been terminated at the employer's initiative. And if that conclusion were not correct Mr Noord's letter confirms that, at the latest, he made a decision following the telephone conversation not to use Mr Neill's services again. Either way, it was a dismissal.

Was the dismissal justified?

[30] I find Mr Noord's decision to end the employment relationship with Mr Neill and how it was carried out did not meet the statutory test of justification under s103A of the Employment Relations Act 2000 (the Act).

[31] Faced with complaints about whether he was keeping to the arrangements they had made about providing work and whether rest breaks could be taken, Mr Noord responded by telling Mr Neill that his performance was inadequate and ending the employment. Even allowing for the possibility that Mr Neill was mistaken about why Mr Noord had not rung him about work on 3 and 4 November and whether Mr Noord did allow breaks to be taken during the working day, Mr Noord nevertheless did not act as a fair and reasonable employer would have in dealing with what he saw as inadequate performance by Mr Neill. In answer to a question at the Authority investigation Mr Noord said it usually took "*about a week*" to get the knack of driving the harvesting equipment and that he knew Mr Neill would not be as quick as a fully experienced driver. Despite these limitations, Mr Noord ended the employment after Mr Neill had worked through two training sessions and one full day on his own.

[32] Mr Neill was not fairly informed of what Mr Noord saw as the problem with his work to date and was not provided with the means and opportunity to improve before Mr Noord made the decision to end the relationship with an employee he now saw as troublesome.

[33] The same result is reached by considering the alternative argument that Mr Neill had in fact resigned or abandoned the employment by not accepting work offered to him for 6 November. Even though Mr Neill may have been hot headed in the 4 November telephone conversation in how he put his complaints about the hours and working arrangements, I find a fair and reasonable employer could not have relied on those words as amounting to a resignation without allowing a 'cooling off' period

and checking with him again. Mr Noord's letter of 27 November stated he had decided "*since*" the 4 November conversation to end his use of Mr Neill's services. If that were so, he took that decision without making the simple effort of a telephone call to Mr Neill in the following day or week to check his state of mind and intentions. However I consider it more likely that Mr Noord did not do so because he had already dismissed Mr Neill by the end of the 4 November conversation.

[34] In doing so he had not acted in good faith towards Mr Neill – that is in a way not likely to mislead or deceive him – in two important respects.

[35] Firstly, Mr Noord had employed Mr Neill on the basis there would be work for him running through to February 2010. Mr Noord did not say until the 4 November conversation that he had employed another driver – a fact that would inevitably impact on the amount of work that could be provided to Mr Neill. During questioning at the Authority's investigation Mr Noord revealed he had agreed on 14 September to employ another driver, Ben McPherson, with a start date to be confirmed later. Mr McPherson subsequently started work on 9 November.

[36] Secondly, Mr Noord's letter of 27 November suggested the stream of work which might have been available for Mr Neill had since dried up. However a work diary produced during the Authority investigation, and some time and pay records subsequently provided at the Authority's direction, show there was enough work for Mr McPherson to work more than a 40 hour week in most weeks from 9 November to the Christmas break. During that period varying additional hours were also worked by Mr Noord himself and two other workers – Zaire Brake and one referred to in the evidence only as Richard. Further information from a 2010 work diary, produced at the Authority's direction, showed contract harvesting work continued through late January, February and early March. But for the termination of his employment, Mr Neill would reasonably have been expected to be involved in some portion of that work on the agreed part-time basis.

Determination

[37] For the reasons given I find Mr Neill was unjustifiably dismissed by Mr Noord on 4 November 2009. He has a personal grievance which requires remedies.

Remedies

Wages

[38] There are two separate wage matters – firstly, arrears not paid to Mr Neill for work he did prior to his dismissal and secondly, reimbursement of wages lost as a result of the grievance.

[39] Mr Neill is owed \$13 an hour for two hours of training on 20 October and a further six-and-a-half hours of training time on 30 October. On 2 November he worked without training supervision and should be paid at the agreed ordinary rate of \$18 an hour for 13 hours. The gross amount due, including an eight per cent loading for holiday pay, is \$372.06. Interest is to be paid on that amount at the rate of 8.4 per cent for the period from 5 November 2009 to the date of payment.³

[40] For earnings he lost as a result of the grievance, the calculation is less capable of precise calculation.

[41] Mr Noord said during the Authority investigation that Zaire Brake did the work that Mr Neill would otherwise have done. A copy of an invoice from Mr Brake showed this was 21.5 hours in December 2009, 40 hours in January 2010, five hours in February and 6.5 hours in March.

[42] However I consider it more likely than not that Mr Neill's hours, if he had continued in the job from early November 2009 to early March 2010, would have totalled a larger number and included some of the hours done by Mr McPherson, many of the hours done by Mr Noord and all the hours done by Richard. No longer period is required as Mr Neill's work would have finished with the end of that harvesting season in any event.

[43] I take a doubling of the hours worked by Mr Brake as a starting point to determine Mr Neill's lost earnings.

[44] From that allowance of 146 hours some deduction must be made for the contingencies and vicissitudes of life, such as the prospect that Mr Neill may not have continued with the work in any event due to dissatisfaction or pursuit of other

³ The current applicable interest rate under clause 11 of Schedule 2 of the Act.

opportunities.⁴ I was satisfied from his evidence that Mr Neill made reasonable endeavours, in the limited job market in the Whakatane district at that time, to minimise his loss of earnings by actively seeking other work. Although he did not get a new job until November 2010, no deduction is required for lack of mitigation.

[45] After weighing those factors of contingency and mitigation, I consider Mr Neill should be awarded \$2332.80 as compensation for lost wages under s123(1)(b) of the Act, calculated on the basis of 120 hours at \$18 an hour plus holiday pay.

Distress compensation

[46] I accept Mr Neill's evidence he was hurt and humiliated by how he was treated and dismissed by Mr Noord. The abrupt end to that job undermined his confidence in seeking other work. Taking account of the particular circumstances of this case, and the general range of awards, I consider Mr Neill should be awarded \$4000 as compensation under s123(1)(c)(i) of the Act.

Contribution

[47] I do not consider the evidence disclosed any blameworthy conduct by Mr Neill that contributed to the situation giving rise to his grievance and would require reduction of the remedies awarded to him.

Respondent liability

[48] Mr Noord is personally liable to meet the orders for remedies as Mr Neill opted to pursue Mr Noord in respect of his grievance as M & S Noord Contracting Limited was an undisclosed principal. As a director of M&S Noord Contracting Limited Mr Noord may be indemnified by the company for such liabilities but that is a matter between him and the company.

Costs

[49] Costs are reserved but I do not anticipate any application for costs as Mr Neill appeared in person and told me he did not incur any legal costs for assistance in preparing or presenting his case through two Authority investigations. He is entitled to reimbursement of the fee paid to lodge his application in the Authority so Mr Noord is ordered to reimburse the \$70 fee.

⁴ *Telecom NZ v Nutter* [2004] 1 ERNZ 315 at [84] (CA).

[50] If either party considers there are matters of costs that the Authority should determine, they may lodge and serve a memorandum within 14 days of the date of this determination and the other party would then have 14 days to lodge a reply memorandum. No matter of costs will be considered outside this timetable without prior leave.

Robin Arthur
Member of the Employment Relations Authority