

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 136/10
5289707

BETWEEN NATHAN PEARSON
Applicant

AND AOTEAROA COOLSTORES
LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Phillip Drummond for the Applicant
Nigel Petersen for the Respondent

Investigation Meeting: 8 July 2010 at Palmerston North

Determination: 27 August 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Pearson claims that he was unjustifiably dismissed from his employment as a cool store worker at Aotearoa Coolstores Limited (Aotearoa) without being given reasons as to why his employment was terminated. He seeks lost remuneration, compensation for humiliation, loss of dignity and injury to feelings etc, and costs.

[2] In response, Aotearoa claims that it justifiably terminated his casual employment agreement following seven days' absence without leave, *mucking around* at work and ongoing failures to do his share of overtime.

Statements in Reply

[3] In its original statement in reply, filed by a Ms Karen Forrest, Aotearoa indicated that Mr Pearson was dismissed in accordance with his casual contract as Aotearoa no longer required as many staff. This statement in reply was also

consistent with Ms Forrest's reply to a letter from Mr Pearson's then solicitor raising a personal grievance. However, in an amended statement in reply filed by Mr Nigel Petersen, another employee of Aotearoa, it advised that the original statement in reply was not accurate due to the site manager, Ms Marlene Waara, not being available to supply evidence at the time and Ms Forrest not having the full facts available to her when replying to Mr Pearson's statement of problem.

[4] I note for the record that this is simply an unacceptable state of affairs. A statement in reply is required by law to respond to the statement of problem and give enough details to ensure that the Authority and the applicant are fully, fairly and clearly informed about a respondent's view in relation to the problem specified in the application, together with the respondent's account of the relevant facts. Clearly, in its original statement in reply, Aotearoa, through Ms Forrest, completely failed in that task, which is unacceptable.

Credibility

[5] Three witnesses were expected for this case: the applicant, Mr Ken Thurston, the managing director of Aotearoa, and Ms Marlene Waara, the previous site manager.

[6] Mr Thurston did not attend, although he had previously provided a witness statement and was expected to attend. According to Mr Petersen Mr Thurston had *more important things on*. Whatever those more important things were, I have given Mr Thurston's written evidence no weight and accept Mr Pearson's evidence over his.

[7] By contrast, I have preferred Ms Waara's evidence over Mr Pearson's wherever there is a contradiction. Ms Waara, who is a friend of Mr Pearson, had no reason to support Aotearoa, having previously brought a personal grievance successfully against it in the Authority, which is currently on challenge before the Employment Court. She also made concessions in her evidence, unlike Mr Pearson, who did not for example accept the reasonable proposition that the level of his absences was substantial.

[8] Therefore, the facts found below are made on the basis of what little documentary evidence exists, the evidence of Ms Waara and where such evidence is not inconsistent with that of Ms Waara, the evidence of Mr Pearson.

The Facts

[9] As its name implies, the respondent, Aotearoa, operates a cool store in Feilding. Mr Pearson was employed as a cool store worker on an individual employment agreement. The employment agreement came into effect from 9 April 2008. It was entitled a *casual employment contract*. It states, amongst other things, that starting times and hours of work may be varied by the company subject to workloads and may include no work being available, together with the need to work extended hours and weekend work. Because of the casual nature of the contract, the employee did not have any guaranteed hours or days of work.

[10] Clause 6 is entitled *contract duration*. It states:

Subject to clause 7, this contract is for an indefinite duration with work being provided on an “as needed” basis. Nothing in this contract, either expressly or impliedly, is intended to operate as a guarantee of ongoing and regular employment.

[11] Clause 7 is entitled *termination of employment*. It states:

You may resign at any time by giving one day’s notice.

The company may terminate your employment for cause by giving you one day’s notice of termination of employment. Cause includes, but is not limited to, poor performance and general misconduct. You will be given at least one warning before your employment is terminated on these grounds.

[12] While Mr Pearson was regularly provided with work over the period of ten weeks during which he was employed, he did not take up the availability of that work on a consistent basis. Because of his poor attendance, his poor work ethic and his failure to do his share of substantial overtime required so that meat could be shifted to meet the needs of Aotearoa’s clients, Mr Pearson could not be described as a satisfactory employee. For instance, on at least seven occasions during this period of ten weeks, Mr Pearson was absent without prior notice, claiming ill health. He was told off by Ms Waara about this, as well as about the impact of his refusal to do overtime that he had previously agreed to (leading to greater pressure on other staff) and over his *slacking off* at work. On none of these occasions, however, was Mr Pearson ever given a formal warning as required under the employment agreement. Thus while Ms Waara made it clear to Mr Pearson that his behaviour in all these areas was unacceptable, there was never any formal disciplinary process

undertaken or any specific warning given to Mr Pearson that unless his attitude and performance improved, his employment would be terminated.

[13] By 11 June 2009, Ms Waara had got to the point where she had been discussing with her second in charge about *letting Mr Pearson go*, because of his behaviour. She told other staff that she had to get hold of Mr Pearson urgently when he did not turn up to work as expected that day. Ms Waara decided then to terminate Mr Pearson's employment and arranged for him to attend work. She told him that he no longer had a job at Aotearoa any more, in part due to his unreliability and not advising her of his absences.

[14] The next day, Mr Pearson rang up Mr Thurston and inquired of him whether in fact, given that he was the owner of Aotearoa, he had lost his job. Mr Thurston confirmed that he had lost his job and that he had done his *dash* this time. Mr Pearson was not given his one day's notice as required under the employment agreement.

Determination

[15] This decision has been on hold awaiting notice as to whether it has been settled. Notice not having been forthcoming the determination can now be issued.

[16] While it was accepted by Mr Pearson that he had no guarantee of ongoing employment, he was entitled to fair and reasonable treatment, which includes Aotearoa adhering to the parties' employment agreement. In Mr Pearson's case it failed to do this in two significant aspects. First, it failed to give him any warnings before terminating his employment; and second, it failed to pay him the one day's notice as required.

[17] Furthermore, an employer, even when engaging staff on so-called casual employment agreements, is required to treat its employees fairly and reasonably. In dismissing any employee, what it does and how it acts must be what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[18] Not only did Aotearoa summarily dismiss Mr Pearson for performance-related matters, which almost always require an opportunity for the employee to improve after a formal warning is given, it held no proper investigation into the concerns it had that led to Mr Pearson's dismissal.

[19] There is no telling whether, had he been given a formal warning, Mr Pearson may indeed have improved his performance, which after all is the purpose of giving a formal warning. Aotearoa clearly acted on the belief that because the agreement had been headed a *casual employment contract* and that because no hours and days of work could be guaranteed, it was simply entitled to terminate Mr Pearson's employment without any notice, investigation or discussion with him. That is simply incorrect as a proposition of law. Just because there was no certainty of ongoing employment, it did not mean that Mr Pearson was not entitled to the normal protections of employees as to fair and reasonable treatment. That would have involved the giving of a warning, following a proper investigation, and a subsequent opportunity for Mr Pearson to improve, all of which he was denied.

[20] It therefore follows that what Aotearoa did and how it acted were not what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal. I therefore determine that Mr Pearson's dismissal by Aotearoa was unjustified.

Remedies

[21] It took Mr Pearson almost four months to gain alternative employment. In the meantime he had applied for a job with three different employers, together with a temporary employment agency and a recruitment agency. His attempts to seek work were quite inconsistent, as he failed to follow up potential employment with Drake, as Ms Waara had advised him, and as when she referred him to jobs he was sometimes very keen, but on other occasions she felt (and I accordingly accept) he was not really trying hard to find work. Similarly, Mr Pearson declined work from a personnel agency because there was no guarantee of full time employment, but instead only a few days here and there, and he did not register with Work & Income.

[22] An employee is under a legal obligation to mitigate his or her loss if claiming lost remuneration. Here it is clear that Mr Pearson failed to pursue work hard enough, for instance not even registering with Work & Income, and even turning down work opportunities. In these circumstances, I conclude that lost remuneration must be limited to four weeks' pay. Mr Pearson's expected ordinary time earnings during that period would have been \$2,080 gross. Given his regular failure to work overtime and his many absences, I decline to make any order for loss of expected overtime.

[23] Mr Pearson gave limited evidence as to humiliation, loss of dignity and injury to feelings. He simply stated that the dismissal caused him

... hurt, humiliation and injury to feeling. I had financial obligations such as board to meet. I found it difficult to get work.

... It[the work] was important to me. I accept the job would not have lasted forever but to be terminated in the way that I was, was in my view completely unfair.

[24] I accept that Mr Pearson was upset by the way his employment was terminated without notice or warning, but note that his evidence of humiliation etc was fairly light and was not corroborated by any other witness. Furthermore, Mr Pearson could not have expected his employment with Aotearoa to continue beyond a period of a few months and in any event he had not been in Aotearoa's employment for very long.

[25] In all the circumstances of this case, I consider that an award of \$4,000 compensation is appropriate.

Contribution

[26] Mr Pearson could not have contributed to the failures of Aotearoa to follow the parties' employment agreement such as giving him a warning before being dismissed or giving him a day's notice. On the other hand, I accept that Mr Pearson's work attendance and output were poor, and that these blameworthy actions significantly contributed to the situation that gave rise to his unjustified dismissal. There is no doubt that had Mr Pearson been given a formal warning and had his performance not improved, he would have been liable to dismissal. No employer can expect to put up with an employee whose attendance, attitude and work performance was as poor as Mr Pearson's. On the other hand, Mr Pearson's performance may have improved if he had been given a formal warning

[27] Given the significant failings on Mr Pearson's part, I conclude that he was just as responsible for the unjustified dismissal as was Aotearoa, and therefore reduce his remedies by 50% accordingly.

[28] I therefore order the respondent, Aotearoa Coolstores Limited, to pay to the applicant, Mr Nathan Pearson, the sum of \$1,040 gross in lost remuneration, plus compensation under s.123(1)(c)(i) of \$2,000.

Costs

[29] Costs are reserved.

G J Wood
Member of the Employment Relations Authority