

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 122  
5147461

BETWEEN            BRIAN MICHAEL ROSS  
                                 Applicant  
  
A N D                 LAZER TECH 2005 LIMITED  
                                 Respondent

Member of Authority:    Helen Doyle  
  
Representatives:         Applicant in person  
                                 No appearance for Respondent  
  
Investigation meeting:    29 March 2012 at Timaru  
  
Further information  
received:                 27 April 2012  
  
Date of Determination:    21 June 2012

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**DETERMINATION OF THE AUTHORITY**

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**The investigation process**

[1]     There has been a period of inactivity with these proceedings that requires some explanation.

[2]     Mr Ross lodged his statement of problem with the Authority on 18 February 2009, and following the lodging of the statement in reply the parties were directed to mediation. After receiving advice that the matter did not resolve at mediation the file shows a senior support officer at the Authority asked that Mr Ross advise the office by 18 September 2009 whether he wished to proceed with the claim. Mr Ross was advised that if he did, a further telephone conference with the Authority would be held to schedule an investigation meeting.

[3] On 14 September 2009 Mr Ross by email advised the support officer that he had engaged a solicitor and would let the Authority know as soon as he heard back from him. The Authority then heard nothing further from Mr Ross until August 2011. My understanding from the senior support officer is that the file was in between times administratively withdrawn.

[4] In or about August 2011 an Oamaru solicitor David Jackson advised that he was now acting for Mr Ross and asked that Mr Ross's personal grievance be reactivated. A Dunedin solicitor John Farrow acted for the company when its statement in reply was lodged in March 2009. He also attended a subsequent telephone conference with the Authority when the matter was set down for an investigation meeting in Timaru on 29 March 2012 and the exchange of statements of evidence timetabled.

[5] On 13 March 2012 Mr Farrow advised the Authority that there would not be an appearance on behalf of the company at the investigation meeting or a statement of evidence. He forwarded with his letter a copy of a letter from the company's accountant referring to the fact that the company no longer trades and has no remaining assets as well as owing a director by way of a shareholder advance of \$313,748.00 which the company has no ability to pay.

[6] Following receipt of that letter Mr Jackson advised the Authority that he was no longer in receipt of instructions and that Mr Ross would appear in person. The Authority was asked and did formally record that Mr Jackson had withdrawn as counsel in this matter.

[7] The matter proceeded therefore on 29 March 2012 with the Authority hearing evidence from Mr Ross.

### **Employment Relationship Problem**

[8] Brian Ross was employed by Lazer Tech 2005 Limited (Lazer Tech) from 24 April 2008. Lazer Tech carries on the business of High Voltage Specialists in High Voltage Transformers and has its workshop based in Otematata and its registered office in Dunedin. There was a written employment agreement entered into between Mr Ross and Lazer Tech which was dated and signed in about May 2008. Mr Ross said that for the first two weeks of his employment he was paid in

petrol vouchers but a fortnight or so after that was paid the amount as set out in his written employment agreement of \$19.44 per hour.

[9] The written individual employment agreement was accompanied by a letter which contained a statement about the casual nature of the employment and there was a similar statement in the body of the agreement itself. Clause 2 of the agreement for example provided:

*A Casual employee is a person who is engaged as required from time to time in order to meet the fluctuating demands of the employer's business. Each engagement will be on either an hourly, daily or weekly basis without any commitment on the part of either party to a continuing employment relationship.*

[10] Mr Ross signed a declaration stating that he had read and understood the conditions of employment on or about 19 May. Mr Ross said even at the start of the relationship the employment was more than just casual. Mr Ross received \$19.44 per hour which included an 8% loading expressed to cover all leave.

[11] Mr Ross provided details of hours that he had worked from the time of his commencement and pay records. He was paid fortnightly and said he worked from Monday to Saturday. I started with the pay period ending 22 June 2008 which would be about a month and a half after Mr Ross started and set out the hours worked per fortnight as below:

- Fortnightly pay period ending 22 June 2008 – 91.5
- Fortnightly pay period ending 6 July 2008 – 81.05
- Fortnightly pay period ending 20 July 2008 – 81.00
- Fortnightly pay period ending 3 August 2008 – 95.25
- Fortnightly pay period ending 17 August 2008 – 64
- Fortnightly pay period ending 31 August 2008 – 78.25
- Fortnightly pay period ending 14 September 2008 -74.75
- Fortnightly pay period ending 28 September 2008 – 43.50

- Fortnightly pay period ending 9 November 2008 - 85.25
- Fortnightly pay period ending 23 November 2008 – 60.25

[12] Mr Ross says that on Wednesday 12 November 2008 he was working at the aluminium smelter at Tiwai Point on a high powered electrical transformer when there was an exchange between him and a contractor to Lazer Tech, Peter Johnston. Mr Johnston had been a former part owner of Lazer Tech. Mr Ross said that he later overheard Mr Johnston speaking by telephone to the manager/director at Lazer Tech Peter Booth about the incident. At the time of the telephone call Mr Ross and Mr Johnston were both at the Invercargill Working Men's Club. Mr Ross confronted Mr Johnston after the call to his employer and said that Mr Johnston advised Mr Ross that he *rubbed him up the wrong way, was incompetent* and he was *didn't know if he had a job for me*.

[13] Notwithstanding the exchange Mr Ross continued to work on the job for a further two days. He described the conditions as shocking with continuous rain and wind and a great deal of pressure to complete the work. He said that Mr Johnston continued to subject him and Mr Ross's foreman at that time, Alan Poole, to abuse. On the Friday afternoon when it was time for Mr Ross to return to Otematata he said that Mr Johnston advised him to *make sure that you take all your gear and all your tools. You will not be coming back*. Mr Ross asked if he was being dismissed and said that Mr Johnston advised him that was up to Mr Booth. Mr Ross said he became alarmed.

[14] On Monday 17 November 2008 Mr Ross was left at the yard in Otematata. Mr Booth was away on business that day expected back the following day.

[15] On Tuesday 18 November 2008 at 9.00am after Mr Ross had presented as usual at work he was called into Mr Booth's office and advised that there was no more work for him and that he was not allowed back on site at the Smelter. Mr Ross asked for a reason for this but Mr Booth did not provide one. Mr Ross says that he was unjustifiably dismissed from his employment on that date. A further approach to the company a week later did not result in other work being offered to him.

[16] Mr Ross originally wanted to be reinstated to his position. That was not one of the remedies set out in Mr Jackson's letter of 15 December 2011. The remedies in

that letter were compensation, lost wages from time of dismissal and interest. Mr Ross also wanted to be reimbursed the sum of \$449 for a heavy traffic licence that he says one of the directors at the company promised to reimburse him for because it would be helpful to the company for Mr Ross to have such a licence. Mr Ross would have liked to be reinstated but accepted that there would be difficulties with that given the situation with the company and indeed the passage of time. Mr Ross also wanted, in the event that the Authority agreed that his employment was permanent, holiday pay paid other than by way of a loading.

[17] The company's view is as expressed in its statement in reply, that Mr Ross was a casual employee and that he worked sporadic hours that fluctuated. Lazer Tech denies that Mr Ross was dismissed constructively or otherwise and reject any claim that he is entitled to compensation.

### **The issues**

[18] The Authority is required to determine the following issues:

- Was Mr Ross dismissed from his employment by Lazer Tech or not engaged for further casual employment?
- If Mr Ross was dismissed, then was that dismissal unjustifiable?
- If Mr Ross was unjustifiably dismissed what remedies is he entitled to and are there issues of contribution and/or mitigation?

### ***Was Mr Ross dismissed from his employment by Lazer Tech or was he not engaged for further casual employment?***

[19] Mr Ross's employment was more than simply intermittent or irregular. He worked from Monday to Saturday and there was a roster which set out where he would be working and on what jobs. Mr Ross said that he was expected to be on site every day and was told the night before what time to attend a particular job. He was also expected to work away from the workshop base at Otematata. Mr Ross said that there was a period during August 2008 when he was sick which accounted for the lower hours for the fortnight ending 17 August 2008 and that he took some time off for the fortnight ending 28 September 2008 with a health problem.

[20] There was no work for a short period Mr Ross recalled from 13 October to 26 October 2008. That period aside he described the work as full-on depending on what job he was doing and he could be working long hours from 6am to 6pm. Mr Ross described the employment as between Monday to Saturday and as well as working in the workshop he would also work away from the workshop and away from his base at Otematata.

[21] Mr Ross considered that his employment became a full time job. Mr Ross said that notwithstanding that, he did not really care about the nature of the employment being described as casual because the important matter for him was that he had a job to go to.

[22] Having considered the wage and time records I agree with Mr Ross that certainly from June onwards the hours worked reflected that there was a pattern of regular and consistent employment. There was a period of two weeks when there was no employment offered, however that aside, the work was regular.

[23] It is recognised that the nature of employment or working relationship can change over time and if casual at the start can become something more permanent in nature - *Jinkinson v. Oceania Gold (NZ) Ltd* [2009] ERNZ 225. The Authority is assessing this relationship at the time when it came to an end in mid November 2008.

[24] There was reference in *Jinkinson* to other cases that assist in determining whether employment is truly casual. *Avenues Restaurant Ltd v. Northern Hotel IUOW* [1991] 1 ERNZ 420 is a case where an employee worked an irregular pattern of days but at least two days each week for six months. The regularity of the work and continuity of employment persuaded the Court that her employment was not casual. In *Barnes v. Whangarei Return Services Association Inc.* [1997] ERNZ 626 it was held that notwithstanding there was a written employment contract defining the relationship as casual, its real nature was changed over time during which the employee was included on a roster and worked regularly three nights a week for several months. It was found that the pattern of work was sufficiently regular and continuous to make the employment ongoing and not casual.

[25] I find when I look at the principles from these Employment Court judgments that whilst Mr Ross's work was defined in a written employment agreement as casual, as at November 2008 the nature of the relationship had changed or varied to become

employment of a permanent nature. It was employment that involved usually about 40 hours worked each week and the place of work and the work was allocated by a roster with a regular pattern of work throughout the seven months of employment. The evidence supports that Mr Ross expected his employment to continue. The evidence about the employment did not fit with the description of a casual employee in the employment agreement as *someone engaged from time to time*. In conclusion Mr Ross was not a casual employee when his employment ended.

[26] I find that Mr Ross's employment ended therefore not by simply the withholding from him of any more work but rather by the termination of his employment on 18 November 2008.

***Was the dismissal unjustified?***

[27] It is likely that the reason for dismissal was because Mr Johnston had complained about Mr Ross. Mr Ross was not given an opportunity to hear what the allegation was or respond properly to it. Mr Ross did not accept as set out in the statement in reply lodged on behalf of the respondent that he was involved in a *potentially serious health and safety incident*. Mr Ross said that that was never said to him and was not the situation at all.

[28] Mr Ross was not treated fairly in accordance with the statutory good faith obligations and the way a fair and reasonable employer would have treated him in the circumstances.

[29] I find that Mr Ross was dismissed by Lazer Tech and that the dismissal was unjustified. He has a personal grievance and is entitled to remedies.

***Remedies***

[30] Mr Ross seeks compensation for his dismissal together with lost wages. He also seeks a re-accounting of his holiday pay in the event that his relationship was not casual.

***Wages***

[31] Mr Ross provided to the Authority after the investigation meeting had concluded a statement from the Inland Revenue Department which provided his earnings from dismissal to 31 March 2009 were \$800 from Mrs A H Munro and

Family. There was some suggestion from the statement in reply that Mr Ross had worked elsewhere, however that is the only entry that appears on the statement from Inland Revenue Department.

[32] After that brief period of employment that was not of a permanent nature, but an attempt to mitigate loss, Mr Ross was without employment from January 2010 to September 2011.

[33] I am satisfied that Mr Ross took steps to obtain other employment. There were of course difficulties given that he was located in the settlement of Otematata and that there were very limited job opportunities. Although Mr Ross seeks reimbursement for lost wages for the entire period he was without employment, his claim I find should be limited to a period of six months as it is unclear to me that the employment relationship would have lasted beyond that period of time.

[34] I have averaged out Mr Ross's earnings for the period from the fortnight ending 22 June 2008 to the end of employment to arrive at an average weekly amount of hours worked as 37.74. I have then multiplied those hours by \$19.44 for 26 weeks or six months to arrive at a figure of \$19075.30 for which I have deducted the sum of \$800 being money earned during this six month period.

[35] I order Lazer Tech (2005) Limited to pay to Brian Ross the sum of \$18,275.30 gross being reimbursement of six months lost wages under s.123(1)(b) of the Employment Relations Act 2000.

#### *Compensation*

[36] Mr Ross said that he was very upset when he was dismissed from his employment. He did not know what he had done wrong and was not given any opportunity to persuade Mr Booth that he should remain in his employment. A considerable amount I find of the hurt and humiliation was the financial implications for Mr Ross of his unemployment.

[37] In all the circumstances I am of the view that a fair and reasonable award would be the sum of \$6,000.

[38] I order Lazer Tech (2005) Limited to pay to Brian Ross the sum of \$6000 without deduction under s. 123 (1)(c)(i) of the Employment Relations Act 2000.

### *Contribution*

[39] The Authority, under s.124 of the Employment Relations Act 2000, if it determines that an employee has a personal grievance, must in deciding the nature and extent of the remedies consider the extent if any to which Mr Ross contributed to the situation that gave rise to the grievance.

[40] I heard evidence from Mr Ross about what occurred on site at the Smelter. He said that the incident was more about Mr Johnston being unreasonable and unfair and said that it was not about a health and safety matter at all. Mr Ross said that it was clear that Mr Johnston did not want to be there and Mr Ross described him as unwell. I heard no other evidence and I am not persuaded that there was contribution and therefore there is no deduction to the remedies awarded.

### **Interest**

[41] Mr Ross seeks interest on the amount of lost wages. There was a delay in progressing the claim so I am prepared to award interest but only from 1 September 2011 until the date of payment.

[42] I order in accordance with clause 11 of the second schedule to the Employment Relations Act 2000 interest on the award for lost wages in the sum of \$18,275.30 at the rate prescribed under s.87(3) of the Judicature Act 1908 of 5% from 1 September 2011 until the date of payment.

### **Payment for obtaining a heavy transport licence**

[43] Mr Ross said that Mr Booth wanted him to obtain a Class 5 licence initially as that would have been advantageous to the company. Mr Booth wrote a letter that was provided in an attempt to get WINZ to pay or at least help pay for that. When it was apparent that would not occur then Mr Booth in the presence of the foreman said that Mr Ross should get a class 2 licence and the company would pay. Mr Ross said that he was booked in to take the test for class 2 on 17 November 2008.

[44] Mr Ross said that Mr Booth then reneged on the deal and he had to pay \$449 for which an invoice was supplied to the Authority.

[45] I find that Mr Ross should be reimbursed for this sum. Mr Ross only got the licence because Mr Booth thought it would be helpful and of advantage to the company.

[46] I order Lazer Tech (2005) Limited to pay to Brian Ross the sum of \$449 being reimbursement of the cost of obtaining a class 2 licence.

### **Holiday Pay**

[47] Section 28(4) of the Holidays Act 2003 provides that where an employer has incorrectly paid annual holiday pay in circumstances under s.28 (1) then the employee becomes entitled to annual holidays and payment accordingly. However this is only in circumstances where the employee's employment has continued for 12 months or so. Mr Ross's employment was for less than twelve months. Holiday pay was paid as an identifiable component of Mr Ross's pay and at a rate of 8% in accordance with the employment agreement and he is not entitled to be paid again because his employment ended before twelve months.

### **Costs**

[48] I asked Mr Ross to make enquiries with Berry & Co as to any costs he may have incurred for the work performed by that firm prior to the investigation meeting. A letter was provided advising that the firm had decided not to issue Mr Ross with a final invoice. Mr Ross is entitled to reimbursement of his filing fee that at that time was \$70. I so order.

### **Summary of findings and orders made**

- I have found that Mr Ross was at the time of his dismissal a permanent employee.
- I have found the dismissal was unjustified.
- I have ordered Lazer Tech pay the following amounts to Mr Ross:

Lost wages in the sum of \$18275.30 gross together with interest on that sum at the rate of 5% from 1 September 2011 until the day of payment.

Compensation in the sum of \$6000 without deduction.

- I have not found any contribution on the part of Mr Ross and therefore there is no deduction from those amounts.
- I have ordered Lazer Tech to reimburse Mr Ross the sum of \$449.00 being the costs of a class 2 licence course.
- I have not found that holiday pay should be paid again under s.28(4) of the Holidays Act 2003 because Mr Ross was not employed for twelve months.
- I have ordered Lazer Tech reimburse the filing fee incurred in the sum of \$70.00.

Helen Doyle  
Member of the Employment Relations Authority