



[4] Mr Keith Docherty, a director of Waltons, was the first witness examined at the investigation meeting. He sensibly and frankly acknowledged at the very beginning of his evidence that Mr Short had been dismissed by Waltons and that the dismissal was unjustified.

[5] Mr Docherty conceded that Waltons was unable to maintain its earlier contention that Mr Short had been employed under a fixed term agreement and that termination of employment was by operation of that agreement rather than by dismissal or any act of the employer.

[6] Leaving aside the provisions of the Employment Relations Act 2000 as they relate to fixed term agreements, Mr Short's written individual agreement of employment is difficult to read as being a fixed term contract. Although it is provided at the beginning of the document that "*this contract starts on the 15/10/07, and shall continue until 21/12/07 unless terminated by either party,*" several other clauses provide for various entitlements to accrue to Mr Short only after employment for periods far longer than two months. There is a sick leave provision that operates "*after six months continuous service*" and an annual leave provision that operates "*at the end of each year of employment.*" Also in the agreement bereavement leave is provided "*after six months employment*" and there is a requirement for the employer to review remuneration "*on the yearly anniversary of this contract.*"

[7] There would be no purpose in having those provisions if the employment had been intended to end after two months.

[8] The inference to be taken from several terms of the agreement is that it is not fixed to a term of only two months as suggested by clause 1. Even that provision does not expressly say that the contract is to end on 21 December 2007. It simply provides that the contract shall continue "*until*" the second date, and performance of the contract may therefore run on past that date.

[9] The usual approach to construction of a contract requires that all of the terms of it must be made sense of and given effect to and that the agreement should be read in its entirety rather than by having regard to the meaning of one provision in isolation from all others. From the express terms of the agreement I find that the employment was intended to run between 15 October and 15 December and then to continue indefinitely beyond the second date.

[10] If there was any doubt about the proper construction to be given to the agreement, s 66(4) of the Employment Relations Act 2000 puts it beyond dispute that the agreement can have no effect as a purported fixed term employment agreement. That is because it does not comply with s 66(4) which requires the reason for ending the employment to be stated in writing.

[11] Through his representative Mr Short had invoked s 66(6)(a) by notifying Waltons of his election to treat the purported fixed term as ineffective. Accordingly the employer could not rely on that term as having brought to an end Mr Short's employment on 21 December 2007.

[12] All of this came about because unfortunately Mr Docherty, who had only recently purchased the business, relied on the fixed term expressed on the face of the agreement without being aware of the statutory restrictions on fixed term employment. Consequently Mr Short on 17 December 2007 was simply given a brief letter stating that as per the agreement, Waltons would not be offering him further employment beyond 21 December 2007. He was given one week's notice but told that there was no requirement for him to serve out that period. Mr Short was thanked for the time he had spent with the firm.

[13] Mr Docherty said in evidence that his reasons for wanting to invoke the fixed term were related to the parlous financial state of the company rather than to any conduct or performance issues with Mr Short, who he said had been a good employee. Mr Docherty said that in his mind he had seen the situation as being one of redundancy.

[14] With the acknowledgment readily made on behalf of the employer that Mr Short had a personal grievance because of his unjustified dismissal, the Authority turned to examine the question of the remedies sought by Mr Short to resolve his claim.

[15] It was again readily conceded on behalf of Waltons that Mr Short had not contributed to the situation that gave rise to his grievance and that there could be no reduction to remedies for that reason.

[16] The reimbursement of lost wages sought was based on a period of 23 weeks and the earnings Mr Short would have received from Waltons in that time, less

payments of a benefit from WINZ and a small amount of earnings from a few days employment immediately after the dismissal.

[17] For Waltons it was submitted that Mr Short was not entitled to recover anything for lost wages as he had failed to adequately mitigate his loss. In particular, it was claimed that he had declined an opportunity to have paid work for at least six weeks immediately after his dismissal. It was claimed that he had not made proper and sufficient efforts to look for other suitable work that was available.

[18] Mr Short, I find, had no real comprehension of the contents of his purportedly fixed term employment agreement. He did not seek advice about it and he did not ever sign the document during his brief two months of employment. For this reason, the termination of his employment came out of the blue and just days before the Christmas/New Year period. I find that the offer of work made to Mr Short by Mr Philip Game of PG Hydraulics was in the nature of a favour to Mr Short's father and was made out of sympathy for a young man who would otherwise have had little or no money to spend during the holiday break.

[19] For some odd-job work he did for Mr Game, Mr Short was paid cash. There was no attempt to formalise arrangements under an employment agreement, although I am satisfied that Mr Game did indicate to Mr Short that there could be up to six weeks' work more of the same kind of work available after Christmas. Beyond that, no expectation of work was given to Mr Short by Mr Game.

[20] In the circumstances I consider that Mr Short did not fail in his duty to mitigate his loss by not returning to work for Mr Game after the holiday period. He had been dismissed just before Christmas and had already made plans to travel to Mount Maunganui and stay there with friends until a date in the New Year. Also, the work Mr Game had generously offered Mr Short was not really work that would progress the career he wanted in automotive-related work. Mr Short had relocated from Hamilton two months earlier to take the job with Waltons and it was therefore reasonable for him to decide to go back to Hamilton and pursue work opportunities there rather than stay in Auckland under a tenuous arrangement with Mr Game.

[21] I find that it was reasonable for Mr Short, after his holiday, to return to Hamilton and explore enrolment on a training course which eventually he did not start because of the fees involved. Mr Short was a young man who had followed a career

path since leaving school and he was entitled to take enough time to look carefully for a job that might offer advancement and one in which he could feel reasonably secure in. I am satisfied from Mr Short's evidence that in the circumstances, which were not of his making, he made reasonable attempts to find work appropriate to his skills and ambitions. WINZ required him to search for work, and he pursued opportunities over the internet as well as going to the site of possible jobs.

[22] I have considered whether there was a redundancy situation just below the surface of the termination in this case and, if so, whether account should be taken of that in assessing lost wages.

[23] I accept that Mr Docherty did have genuine concerns about the financial situation of his business and its ability to continue trading with the number of employees he had in December 2007. However, I do not think I can take any account of that in assessing lost wages, because even if a genuine redundancy situation had arisen, I am not satisfied that Mr Short would or should have been chosen for redundancy. There was nothing wrong with his performance and there was no reason why, as a longer serving employee, he should not have stayed while another employee with shorter service was selected ahead of him for redundancy. That other employee is still employed by Waltons. Also, Waltons was able to advertise for more staff at the end of January 2008, an indication that it was not fully in retrenchment mode by that time at least.

[24] I consider that the appropriate award for lost wages should be for the period of 13 weeks. Over that time Mr Short would have earned \$7,540 at the rate of his basic weekly pay of \$580. Mr Norton made allowance for the WINZ benefit received of \$3,988 in total and an additional the \$200 that Mr Short acknowledged he had received from Mr Game for two or three days work straight after his dismissal. Waltons is therefore ordered to pay \$3,352 in total to Mr Short for wages lost as a result of his unjustified dismissal.

[25] In fixing compensation for humiliation, hurt feelings and loss of dignity, I take into account the fact that Mr Short believed with good cause that he had been doing a good job for Waltons and that he could continue in that work, before being suddenly told he had to finish. He was dismissed just a few days before Christmas without any warning or prior consultation or any discussion at all. Compounding matters was the dismissal of Mr Short's father by Waltons on the same day, after a much longer

period of service in the business. There was no direct discussion with Mr Short and he was simply handed a letter by the office administrator. I accept that Mr Short felt it was unfair for a private discussion to have taken place about the future of his employment without involving him.

[26] I consider in the circumstances that an award of \$3,750 is appropriate compensation, which is to be paid by Waltons pursuant to s 123(1)(c)(i) of the Act.

[27] Walton Special Vehicles and Conversions Limited is therefore ordered to pay the above amounts to Mr Luke Short to resolve his personal grievance claim. The company is also to pay \$70 for the cost of commencing the Authority investigation.

[28] Mr Norton may file and serve a memorandum outlining his charges to Mr Short for representation, unless an amount can be agreed with Mr Wagg as to payment of a reasonable sum to compensate for costs.

[29] Any application for costs by Mr Norton is to be made within 21 days of the date of this determination and Mr Wagg may reply to it within a further seven days.

A Dumbleton  
**Member of the Employment Relations Authority**