New Zealand Employment Relations Authority Decisions

Stewart v Lee-Jones (Wellington) [2017] NZERA 2100; [2017] NZERA Wellington 100 (6 October 2017)

Last Updated: 22 October 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 100
3000175

BETWEEN PHIL STEWART Applicant

AND DAVID LEE-JONES First Respondent

AND CATHY DOUGLAS Second Respondent

Member of Authority: M B Loftus

Representatives: Rowland Ingram, Advocate for Applicant

David Lee-Jones and Cathy Douglas, on own behalf

Investigation Meeting: 7 July 2017 at Wanganui

Submissions Received: At the investigation meeting along with further submissions up to and including 19 July 2017

Determination: 6 October 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Phil Stewart, claims he was unjustifiably dismissed by the second respondent, Cathy Douglas, on or about 23 October 2016. There is also a poorly articulated penalty claim.

[2] The respondents, who jointly employed Mr Stewart, deny he was unjustifiably dismissed. They say he was engaged on a *temporary casual employment agreement* and cessation was the result of the agreement running its course. The respondents have also raised various counterclaims and seek $5,000 to cover the cost of damage

and cleaning they attribute to Mr Stewarts failures, along with reimbursement for items they say he removed.

Background

[3] Mr Stewart was employed as a farmworker on a property owned and managed by Ms Douglas and Mr Lee-Jones.

[4] Mr Stewart first became aware of the position when informed about it by his ex-girlfriend and he then contacted Ms Douglas. Mr Stewart says Ms Douglas advised him they needed a farmworker, they had a lot of work, fences needed repairing and she wanted someone with good dogs. The conversation was followed by a job interview with both respondents on 11 September 2016.

[5] Mr Stewart says, in his written statement, Mr Lee-Jones advised the previous worker had not come *up to the mark* and they were looking for a replacement. He says Mr Lee-Jones advised *if someone like you comes out of the woodwork and can do a good job you might be the man for the job*. Mr Stewart says he was told the respondents wished to trial someone for the job

and see if the relationship worked out. He says he was then offered a position he believed to be full time with a trial period.

[6] Mr Stewart took the job on 17 September 2016. He says when he arrived he was given an employment agreement which he signed. He says *I didn't notice that the agreement was entitled 'Casual employment agreement'* and claims he was not given an opportunity to get advice before signing.

[7] The agreement was for an initial period of two weeks. It was subsequently renewed twice with each extension also being for two weeks.

[8] 23 October 2016 was a rostered day off for Mr Stewart. He says he was attending his dogs when Ms Douglas approached and advised *I'm just letting you know we're not renewing your contract* and *you may as well spend the next few days packing up*.

[9] Mr Stewart says he was shocked and stunned by this but managed to ask why. He states Ms Douglas replied *I didn't like the way you brought a new animal (one dog) on the farm without consulting me*.

[10] Mr Stewart complains he had several dogs and was not given any warning or notice he could not bring an extra dog onto the farm. Ms Douglas accepts there was an issue about Mr Stewart's dogs but denies it had anything to do with the cessation

[11] Within two days Mr Stewart had raised his personal grievance. [12] Mr Lee-Jones responded on the same day. He said:

You were not dismissed. You were employed on a short term contract which was for a duration of two weeks. We chose to not renew that contract for a further two weeks. You will be aware that we are currently working to select a permanent person to look after Waituna Farm. You were invited to apply. To our knowledge you didn't apply. Once again you were not dismissed and you are perfectly entitled to work the remaining week in the present two week contract. If you want to work the remaining days in the contract we are happy for you to do so. We were giving you advance warning your two week contract would not be rolled over for a further two weeks. I am not sure seeking mediation is your best course of action in this situation.

Determination

[13] As already said Mr Stewart claims he was unjustifiably dismissed. The respondents say Mr Stewart was employed as a casual and cessation was therefore a preordained outcome.

[14] It is those positions that highlight the key question which will determine the outcome of this application. What was the nature of Mr Stewart's engagement – casual or otherwise?

[15] I say this because if the employment were casual then Mr Stewart could have no expectation of on-going employment as he had effectively agreed termination will occur at the end of each engagement. If the employment was something other than casual the respondents will face some difficulty. That is because if the arrangement was not one of casual employment it must be either fixed term or ongoing.

[16] In the event the arrangement is found to be ongoing, as Mr Stewart's written brief now says he considered it to be, the respondents will face problems for the following reasons.

[17] There can be no doubt the respondents brought the arrangement to an end and advised Mr Stewart accordingly. In such circumstances, and if the arrangement was

permanent, there would be an obligation upon them to justify their action both substantively and procedurally. There is no evidence they would be able to do so – indeed they do not try.

[18] With respect to a substantive justification the respondents rely on the fact there was no permanency. With respect to procedure there is no attempt to try and convince me anything occurred which might constitute compliance with the requirements of s 103A(3)(b) to (d).

[19] These deficiencies do not, however, pose a problem to the respondents in this case. Mr Stewart's oral evidence bore little resemblance to his written brief, at least in respect to his claim the employment was permanent. When faced with his ex-girlfriend's evidence he was well aware the arrangement was temporary, he readily accepted. He also accepted he was well aware why there was no guarantee of permanent employment and that the ongoing position would be advertised. Indeed he went on to say that was explained by both his ex-girlfriend and Ms Douglas. He also noted he knew he could apply and his view at the time was that while there was no guarantee of appointment his presence would put him *in the box seat*.

[20] As events transpired he did not apply despite being prompted to do so by the respondents. When asked to explain why not he said by then he had formed the view his temporary appointment should be considered a trial for the permanent one (as is claimed in his written brief) though he was unable to say how he reached this conclusion as he accepts neither respondent told him that was the case.

[21] The above leads me to conclude the arrangement entered into was not intended to be an ongoing one.

[22] Turning to a fixed term arrangement. If the arrangement is found to be fixed term this too will cause problems for the respondents.

[23] Section 66 of the Employment Relations Act 2000 (the Act) imposes various requirements in respect to fixed term agreements. In particular there must be a written employment agreement which specifies the way in which the

employment will end and the reasons for ending the employment in that way.[1]

1 Section 66(4) of the Employment Relations Act 2000

[24] If an employer fails to comply with the above requirements it cannot rely on the fixed term nature of the agreement to bring about its end.2

[25] Nowhere in the employment is there any mention of s 66, the existence of a fixed term arrangement or the reason why Mr Stewart's employment was of finite duration. That means that if the arrangement is found to be fixed term as opposed to casual the resulting termination must be unjustified.3

[26] While I have dismissed the idea this was intended to be an ongoing arrangement the question of whether it was casual or fixed term remains. That is a vexed one with the outcome reliant on the facts of the situation.

[27] In *Muldoon v Nelson Marlborough District Health Board*4 the Chief Judge observed:

[36] Although not the case in which to determine this important question, if only because it was not so argued, this case does highlight some difficult questions about the distinctions between casual and fixed term employment and indeed what those are. Case law has yet to tackle the not altogether easy question of where casual and fixed term employment intersect. That will always depend upon the parties" definitions of these employment relationships where, as here, they have been provided for expressly. Therefore I will only venture comment on these questions in the context of this case. It does not depend for its decision on them.

[37] The difficulty is that both casual and fixed term employment are "temporary" employment in the sense of being an engagement by the employer of the employee for a specified period at the conclusion of which that employment will end in way that is agreed in advance, does not amount to a dismissal of the employee and a does not entitle the employee to unjustified dismissal personal grievance rights. Given that temporariness is a common feature of both types of employment, their distinguishing characteristics include both the length of the arrangement but, most importantly, the absence or presence of predictability and regularity. Casual employment is characterised by irregularity of engagements and the shortness of their limited durations, in this case being potentially as short as a shift or a few shifts. That is to be contrasted with fixed term employment which has set hours and days of work (albeit for a finite period) so that the employee and the employer may predict and rely upon when the employee will be at work.

[38] The other difference is that, unlike casual employment, fixed term employment must be related to a specified project or situation such as the replacement of an employee on parental leave or long

2 Section 66(6) of the Employment Relations Act 2000

3 *Shortland v Alexander Construction Company Ltd* [2010] NZEmpC 41 at [20]

4 [2011] NZEmpC 103 at [36]. [37] and [38]

term accident or sickness. That said, however, some short casual engagements are to cover short and unexpected periods of sickness and like absences from work.

[28] In this instance the parties written agreement identifies the arrangement as casual but there any similarity to what the Chief Judge indicated as indicative of a casual relationship ends.

[29] Each of the three agreements was for a specified period of two weeks. That is somewhat more than a single engagement. Each of those terms was adopted due to the existence of a specific event or project – namely the procurement of an employee to fill the position on an ongoing basis. That is the language used in s 66(1) of the Act as being the rationale for a fixed term agreement. Furthermore I note that when answering questions Ms Douglas continually referred to the arrangements as temporary as opposed to casual. That, I conclude, is also language indicative of a fixed term.

[30] In terms of operation it is Mr Stewart's evidence he expected to work each day and would ring Ms Douglas each morning to ascertain what tasks he was required to perform. Ms Douglas originally agreed Mr Stewart rang each morning but added he was always free to refuse the work if he so chose. When questioned further she accepted work was always available and the calls were more often in the nature of this is the first task tomorrow. Whether or not it would be performed was not raised by either party and the expectation was that it would.

[31] Finally I note Mr Stewart was engaged to fill in pending the appointment of a permanent employee and perform the tasks thereof. That strongly suggests something other than a casual arrangement.

[32] For the above reasons, and when comparing what was occurring here to the guidance provided by the Court in *Muldoon*, I conclude this was a series of fixed term arrangements. For reasons already explained the respondents must therefore be found incapable of justifying the dismissal. Their agreement does not comply with the requirements of s 66.

[33] The conclusion the dismissal was unjustified raises the issue of remedies. Mr

Stewart seeks lost wages and $15,000 as compensation pursuant to s 103(1)(c)(i).

[34] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Mr Stewart seeks $7705 being the difference between what he says he would have earned had he remained with the respondents for three months and what he actually received though various casual engagements during that period. He supported his claim with bank statements and evidence of numerous job applications. Given s 128(2) I must conclude the amount sought is payable.

[35] Turning to compensation. Notwithstanding the oft reached conclusion there must be some hurt emanating from an unjustified dismissal that is not, in this instance, an approach with which I agree. I reach this conclusion for two reasons. First Mr Stewart tendered little evidence in support of his claim and nothing which would warrant an award of the magnitude sought. His written evidence was three paragraphs and despite being asked no oral evidence was offered.

[36] Second, and perhaps more importantly, it is difficult to conclude how Mr Stewart could have been hurt and humiliated by the occurrence of an event he accepts he knew was both intended and coming. This must be especially so when it is considered his termination became inevitable when he chose not to apply for the ongoing role despite being prompted to do so. This is, I conclude, one of those rare situations in which it is not appropriate to award compensation for hurt and humiliation despite there being an unjustified dismissal.

[37] Turning to the penalty claim. As already said it was poorly articulated, being raised in an e-mail a week before the investigation. It appears to be based on a claim Mr Stewart was disadvantaged by the fact the respondents briefs were produced later than scheduled. When asked about the claim and the nature of the disadvantage allegedly suffered, Mr Stewart advised he was unaware the claim had even been made on his behalf. He offered no evidence of any issues or disadvantage that may have arisen from the late filing of the respondents witness statements. I take the matter no further.

[38] Finally there is the counter claim. Again it was poorly supported with only a couple of photos which do not, in my view, show the damage or uncleanliness they purport to show. There was very little oral evidence tendered in support and no accounts. Finally I note the respondents accepted they could not prove Mr Stewart

took the items alleged. The claim fails for a lack of evidence and is accordingly dismissed.

Conclusion and orders

[39] For the above reasons I conclude Mr Stewart has a personal grievance in that he was unjustifiably dismissed.

[40] As a result I order the respondents, Cathy Douglas and David Lee-Jones, pay the applicant, Phil Stewart the sum of $7,705.00 (seven thousand, seven hundred and five dollars) gross as recompense for wages lost as a result of the dismissal.

[41] Both Mr Stewart's penalty claim and the respondent's counter claim are

dismissed.

[42] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority
