

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 178
5342437

BETWEEN TONI TAYLOR
Applicant
AND CLEAR INVESTMENTS
LIMITED
Respondent

Member of Authority: M B Loftus
Representatives: Vivienne Gillan, Counsel for the Applicant
John Brensell, Representative of the Respondent
Investigation Meeting: 30 June 2011 at Dunedin
Submissions Received: At the investigation meeting
Determination: 22 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Toni Taylor, claims she was unjustifiably dismissed from her employ with the respondent, Clear Investments Limited (Clear) on 27 June 2010.

[2] Clear contends Ms Taylor could not have been dismissed given her status as a casual employee. As such she was engaged on an as and when required basis and her cessation was the natural conclusion of one such engagement.

Background

[3] Clear operates a Paper Plus franchise in Dunedin. Ms Taylor was engaged therein as a casual employee. Her employment contract describes a casual as

... one who does not work specified hours on a regular basis and is employed to work as and when required. From time to time the nature of the Employer's business may require a period of continued

work but this does not change the underlying casual nature of the employment.

[4] Notwithstanding the agreement's content Ms Taylor is of the view she worked regular weekly rostered shifts and her status had therefore changed to that of part time employee.

[5] Ms Taylor goes on to say:

On or about 27 June 2010 I arrived at work to discover Mr Brensell was waiting to talk to me.

I was ushered into "the back room" where a co-worker was also present.

Mr Brensell informed me that there had been a complaint made, by a member of staff, about my attitude and behaviour.

Mr Brensell asked me if it was true that I had told various members of the staff that I was boycotting cleaning.

I explained to Mr Brensell that yes I had made this statement, however, it was purely in jest and I had still done the cleaning duties stipulated in my job description.

Mr Brensell then asked me to return my uniforms and told me that I would be paid out for the rest of the day.

[6] As already said, Clear's position is Ms Taylor was a casual and there was no obligation to offer further work. Notwithstanding that, Clear raises two other issues. In mid March Ms Taylor had advised she would be unavailable for the months of August and September. Clear therefore had to find replacement staff and Mr Brensell states that was in his mind when he terminated the relationship with Ms Taylor.

[7] The second issue was Ms Taylor's purported refusal to perform her duties. Mr Brensell had received a report Ms Taylor had told other staff she was *boycotting the cleaning* because she was annoyed part timers were expected to clean at the weekend yet full timers did not seem to be cleaning during the week.

[8] Mr Brensell says when he initially asked Ms Taylor about this she denied any knowledge of her purported refusal. He says he then asked the complainant to give her view of events. Ms Taylor then changed her story and accepted the allegation was correct.

- [9] Mr Brensell says this led to a consideration of four additional points:
- a. It meant he had to employ other staff to perform a job Ms Taylor was failing to do despite being paid for the task;
 - b. He was concerned she was undermining a senior staff member's ability to give instructions;
 - c. Ms Taylor had initially lied when confronted with the allegation and that raised issues of trust; and
 - d. Immediately prior to the discussion with Ms Taylor, he had reviewed CCTV footage and had noted a distinct lack of activity on her part.

[10] He goes on to say:

Ms Taylor was told that we could not offer her work with this deteriorated attitude and dishonesty. During our discussion on this incident, Miss Taylor was reminded that the uniforms belonged to the shop and would have to be returned. Given the dishonesty I had encountered, I was concerned our property would not be returned.

Issues for determination

- [11] There are, potentially, three issues to be determined. They are:
- i. What was the nature of Ms Taylor's relationship with Clear – casual, as stated in the employment agreement, or something different;
 - ii. Was there a dismissal; and
 - iii. If so, can Clear justify it?

Determination

[12] Underpinning Ms Taylor's application is her belief that notwithstanding her initial engagement as a casual, the nature of the arrangement changed. She asserts the change is confirmed by the fact she was regularly rostered to work Fridays and Sundays. That such changes can occur is well accepted; see, for example, *Barnes (formally Kissell v Whangarei RSA (Inc.))* [1997] ERNZ 626 and, more recently, *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225.

[13] To ascertain whether or not the arrangement had changed requires an examination of issues such as intent, work patterns and the obligations imposed on the parties.

[14] When questioned about her hours Ms Taylor states there was a general expectation she would be available to work Friday evening, and weekends as required. She also states an absence required the furnishing of what she described as a leave form and that rosters were prepared two weeks in advance. However further questioning ascertained the form was a simple *yes* (I'm available) or *no* (I'm not). She also accepts she is unaware of anyone being told they could not be absent when they indicated non-availability. As to her own hours she stated she had worked most weekends over the previous two years but there were exceptions. An examination of the timesheets made available show the hours actually worked were not as regular as Ms Taylor thought. In her last six weeks she worked 3 Fridays, 1 Saturday and 5 Sundays and the number of hours worked on those days also varied.

[15] When I consider the lack of set hours, the irregularity in respect to those actually worked, the agreement's content and the flexibility with which Clear might offer an engagement along with Ms Taylor's freedom to indicate availability or otherwise, I conclude the relationship remains a casual one.

[16] Notwithstanding the conclusion Ms Taylor remained a casual the issue of whether or not she was dismissed remains. That is because a dismissal is an arbitrary sending away, as opposed to an agreed and planned act as would occur with the scheduled termination of a casual agreement (which is what Clear contends occurred).

[17] Ms Taylor's employment was terminated during an engagement. The agreed period of engagement could not be completed as a result. That must be a dismissal, as opposed to the natural cessation of a previously agreed term of employment.

[18] The question then becomes whether or not Clear can justify the dismissal.

[19] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least used to state, that the question of whether a dismissal is justifiable

... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[20] The above test is used as the cause of action arose prior to the present version coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless they specifically provide otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[21] Having just said the test of justification applicable as of 1 April 2011 is not that to be applied here, I believe it appropriate it be referred to. I do so as its content, or at least subsections (b) to (d) inclusive, succinctly codify that which case law has, for many years, considered the basic requirements of a fair process. The test now requires that:

(3) In applying the test in subsection (2), the Authority or the court must consider—

...

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[22] Clear does not come close to complying with the above requirements. Clear had a primary concern, namely that Ms Taylor was refusing to perform her normal duties. The evidence shows that was raised and discussed – it was the reason why Mr Brensell and Ms Taylor met.

[23] Mr Brensell says that discussion led to four further considerations which were in his mind when he decided to bring the arrangement with Ms Taylor to an end (see 9 above). There was also the further issue of Ms Taylor's pending unavailability.

[24] Mr Brensell's evidence is that he raised the question of honesty as a result of the initial denial and did not receive an answer. When answering questions during the investigation Ms Taylor accepted she initially denied the claim and Mr Brensell had subsequently challenged her honesty.

[25] There is, however, no evidence the first issue (that Clear had to employ others to perform a job Ms Taylor was improperly failing to perform) was directly raised,

though it may have been discussed as an adjunct to the primary concern regarding failure to perform normal tasks. There is absolutely no evidence the other three considerations were raised or discussed either directly or indirectly.

[26] It is clear that of the six points considered by Mr Brensell as justify the dismissal three, and probably four, were never raised. There could not therefore have been an opportunity to respond and obviously a non-existent response could not be considered. This must render the dismissal unjustified though that is not a surprise given Clear's belief Ms Taylor was a casual and they need not therefore worry about the obligations and requirements that might apply when dismissing a permanent employee.

[27] The conclusion Ms Taylor's dismissal was unjustified means the question of remedies must be considered. She seeks wages in lieu of notice and compensation for the loss of wages in the immediate future. There is no claim for compensation for hurt and humiliation.

[28] The conclusion Ms Taylor remained a casual employee means there is no entitlement to notice other than completion of the shift upon which she was engaged. She has received that. Similarly there can be no expectation of future employment so no recompense is possible in that respect. As already said, there was no claim for compensation pursuant to section 123(1)(c) of the Employment Relations Act 2000 (the Act) and no evidence that would have supported such a claim.

[29] That leaves a situation where I might possibly conclude Ms Taylor has been unjustifiably dismissed yet no remedies occur. That would be unfair in the circumstances. I could either say the dismissal was unfair and while no claim was made, some injury justifying an award under s.123 of the Act must naturally have followed. Ms Taylor would not have taken her claim otherwise.

[30] Alternatively I can consider s.122 of the Act. It permits a conclusion the facts support a grievance other than that claimed. Ms Taylor has had her relationship with Clear brought to an end as a result of an unjustified dismissal. That occurred as Mr Brensell made a decision by unfairly taking account of various considerations. It was unfair as they were never aired with Ms Taylor in a conversation which occurred whilst she was still employed. That must, I conclude constitute an unjustified

disadvantage which, given following events, affected Ms Taylor's employment to her disadvantage.

[31] That said, and given the lack of evidence, any award must be minor. I consider the sum of \$2,000 to be appropriate.

[32] Finally I must, in accordance with the provisions of s.124, address whether not Ms Taylor contributed to the situation in which she found herself and reduce the remedies accordingly. Whilst it is clear there were criticisms of Ms Taylor's performance I must conclude the investigation's deficiencies are such Clear is unable to provide the evidence required for a finding of contribution.

Conclusion and Orders

[33] For the above reasons I conclude Ms Taylor has a personal grievance in that she has been both unjustifiably dismissed and unjustifiably disadvantaged in her employment.

[34] As a result the respondent, Clear Investments Limited, is ordered to pay Ms Taylor the sum of \$2,000.00 (two thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[35] Costs are reserved.

Mike Loftus
Member of the Employment Relations Authority