

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 1
3016276

BETWEEN MICHAEL BAIRD
First Applicant

AND KING ORCHARDS LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Alex Kersjes, Advocate for the Applicant
Andrew Gallie, Counsel for Respondent

Investigation Meeting: 14 November 2017 at Napier

Submissions Received: 28 November and 11 December 2017 from Applicant
6 December 2017 from Respondent

Determination: 15 January 2018

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Michael Baird, claims he was unjustifiably dismissed by the respondent, King Orchards Limited (King), on 29 September 2016. Mr Baird also asked King be penalised for having allegedly breached the duty of good faith and failing to provide a written employment agreement.

[2] King is of the view Mr Baird chose not to return to its employ after a period of absence. King denies it breached the duty of good faith and says Mr Baird was supplied an employment agreement but failed to sign and return it.

Background

[3] Mr Baird was employed by King in September 2015. He was engaged to perform a range of duties on what, he says, was a permanent full-time basis. King says he was engaged as a seasonal worker.

[4] In his statement of problem Mr Baird also alleged he was never given a written employment agreement.¹ King's response was that he was given one but failed to return it. In reply Mr Baird revised his position. In his brief of evidence he says he cannot recall being given an employment agreement² and adds Matthew King (King's sole Director and majority shareholder) openly stated he did not like contracts. Mr Baird also says notwithstanding that and after a heated discussion in which he demanded an agreement he was given one asserting casual employment. Mr Baird says he advised Mr King that was inappropriate and the issue was never discussed again.

[5] Mr King maintains an agreement was given to Mr Baird on the day he was interviewed and never returned. He accepts he made a comment along the lines of not liking contracts and says that occurred during the interview. He has no recollection of any further discussion over the issue though his evidence in this respect was ambivalent.

[6] On or about 7 June 2016 Mr Baird suffered what he describes as a significant injury while at work. He suffered a major sprain while alighting from a forklift and was required to wear a moon boot for three months.

[7] Mr Baird says when he advised Mr King his absence might be prolonged the latter did not take it very well. Mr King accepts that saying it was two weeks from the end of the busy season and he was concerned about covering the absence and worried about the injury's effect on King's ACC status.

[8] There is debate about the adequacy of communication between the two over the following period. King says that while it got sporadic updates they were inadequate. Mr Baird says he was told his ACC case manager would deal with it and assumed that happened. There was also an issue over the fact Mr Baird could have performed light duties but he says King was of the view he could not return until one hundred percent fit. Finally, there was some confusion over the payment of wages and particularly the first week of absence due to the accident though has now been resolved.

¹ Statement of Problem at [4]

² Brief of evidence at [13]

[9] In late September Mr Baird received a full clearance to return to work with effect 4 October 2016. He says he understood Mr King was advised of this by ACC and thought it would be a good idea to go and see him so as to arrange for his return.

[10] The two met at an orchard on either 27 or 29 September 2016. Mr Baird says Mr King was combative during the conversation and advised he did not want Mr Baird to return and hurt himself again. Mr Baird says the first weeks' wages were discussed and Mr King repeated a view he didn't want to be liable should Mr Baird hurt himself again. Finally, Mr Baird claims Mr King expressed dissatisfaction over ACC's level of communication.

[11] Mr Baird claims the conversation ended with Mr King advising *I'll get back to you*. Mr Baird says he found this strange and it was then he began to think his employment might be at risk. That he felt that way is reflected in the ACC case notes.

[12] Mr Baird says the conversation was followed with an unsuccessful attempt to telephone Mr King though the later did reply soon thereafter. Mr Baird says the conversation was short and during it Mr King advised *I can't have you back*. He says Mr King also expressed the view he had been let down and said Mr Baird was a risk to him.

[13] Mr King has a different view of the conversation. He says he was given little warning of Mr Baird's ability to return and at that time had no work for him. He says he advised accordingly adding there would be ample work available in November and Mr Baird could recommence then. He says he did so firmly but denies being combative.

[14] Mr King goes on to say:

Mike Baird expected to be straight back at work, but I was not able to accommodate this. At this point we were in a critical time of year for spraying...a very busy time of year. This is critical chemical thinning involving specialised thinning agents and skilled operators. We were fully staffed at this time – there was myself and another employee. MB was not fully skilled in this area of work and we could not afford the risk of a mistake through introducing him on an unmanaged basis, even had we needed another operator, which we didn't.³

[15] Mr King also accepts he was annoyed by Mr Baird's expectation he would return and perform spraying duties especially as he (King) had spent considerable time over winter repairing equipment he says Mr Baird broke. He takes issue with this and the

³ Brief of evidence at [3.12]

allegation he would not allow a return till Mr Baird was 100% fit saying Mr Baird could have worked repairing the equipment himself.

[16] Mr King adamantly denies telling Mr Baird the employment was over and says that in addition to saying work was available in November he would call if anything else arose in the interim. He says if he did use the words *I can't have you back* it would have been in the context of an immediate return.

[17] Mr King is of the view Mr Baird chose not to avail himself of the offer of continuing employment from November and that was the cause of the cessation.

Determination

[18] I shall deal with the penalty claims first if only because their disposal is strait forward. Both were discussed at the commencement of the investigation.

[19] With respect to the claim for a penalty for an alleged breach of s63A of Employment Relations Act (a failure to provide a written employment agreement) Mr Baird further amended his position in respect to what happened. He advised he could not actually recollect even asking for an agreement after he commenced employment in September 2015. He definitely did not do so after January 2016. Mr Baird also accepts the claim for a penalty was not raised until his claim was lodged on 1 August 2017. That is more than a year after the alleged breach occurred meaning the claim is out of time and its pursuit precluded by s135(5) of the Act. Mr Baird and Mr Kersjes were advised accordingly.

[20] The allegations supporting the claim for a penalty for failing to comply with s4A of the Act were not specified in the Statement of Problem. When questioned Mr Baird advised they related wholly to the conversations he had with Mr King over his return and a view he was not sufficiently apprised of the situation. These allegations are more appropriately dealt with via a consideration of the personal grievance claim and Mr Kersjes conceded that was so.

[21] Mr Kersjes indicated the penalty claims would no longer be pursued and this has proven to be the case with neither being mentioned in submissions. They shall be treated accordingly and considered no further.

[22] That leaves the dismissal claim. As already said Mr Baird claim to have been unjustifiably dismissed when he told Mr King he was capable of returning from ACC. King is of the view Mr Baird was employed on a seasonal basis. In closing submission it is stated the agreed season ran from September through to June.⁴ It follows that as the season for which Mr Baird was employed had ceased there was no obligation to facilitate his return when it was raised. Notwithstanding that King advised work would be available in November but Mr Baird chose not to avail himself of that opportunity.

[23] At one stage there was an inference the employment might have been considered casual. That is reflected in notes taken by the ACC case manager but answers offered by Mr King preclude the possibility. He agreed the employment was full time (40 plus hours a week) and there was an expectation Mr Baird would work when required.

[24] The argument Mr Baird's employment was seasonal, at least in respect to justifying what occurred here, faces difficulty. Seasonal employment must be considered to be fixed term with the term being the season.

[25] In order for an employer to rely on the fixed term nature of an arrangement in order to bring it to a conclusion the employer must comply with the provisions of s66 of the Act. Included therein and central to this dispute is a requirement the arrangement be confirmed in a written employment agreement.⁵ Irrespective of who is correct about the cause of the situation, there is no signed written employment agreement.

[26] Therefore I need not decide whether or not the arrangement was actually fixed term. The lack of a written agreement means King simply cannot rely on that to justify what occurred here though I note further points which undermine King's position. The suggestion Mr Baird could have returned and fixed damaged equipment while off on ACC is inconsistent with King's position as the period in question was out of the season it claims to have agreed. Second, and if King was to have any chance of relying on the fixed term argument it would have to show it made every endeavour to have Mr Baird complete the agreement it says it provided and he failed to sign. Mr King says he might have asked a couple of times but is uncertain. He also concedes he did little or nothing after Christmas 2015 despite admitting he had been made aware of the importance of concluding an agreement. Third I note Mr King's evidence that at least on paper Mr Baird's skills lent themselves to year round employment.

⁴ Closing submission at [6.1]

⁵ Section 66(4) of the Employment Relations Act 2000

[27] Given King cannot rely on the existence of a seasonal / fixed term arrangement the employment must be deemed to have been continuous. That means Mr Baird was entitled to return once cleared to do so. He couldn't due to a decision of Mr King which must, in the circumstances, be considered to constitute a dismissal. It was, at least at that time, a sending away by the employer. It is a dismissal that cannot be justified given an inability to rely on the only rationale offered.

[28] For the above reasons I conclude Mr Baird was dismissed and the dismissal is unjustified. As remedies he seeks wages lost as a result of the dismissal and \$15,000 as compensation for hurt and humiliation.

[29] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of that actually lost or 3 months ordinary time remuneration. Mr Baird was cleared to return with effect 4 October 2016. He also fell ill at that time and was hospitalised. While he says his illness was linked to stress caused by the dismissal there was no evidence tendered in support of that contention. To the contrary the evidence Mr Baird did offer strongly suggests the issue was caused by a pre-existing condition. The illness meant he could not have returned before 14 October. He commenced with a new employer on 28 October 2016. The loss for the intervening period during which he could have worked was is \$1,440. That is payable.

[30] Mr Baird also asks I recognise the fact his new job pays less than he earned at King's and reimburse him accordingly. I think not. To be eligible for lost wages there is a duty to mitigate the loss. Mr Baird has done nothing to mitigate this loss admitting he is very happy with his new employer and done nothing in respect to seeking alternate employment.

[31] Turning to compensation. Mr Baird seeks \$15,000 but offered little evidence in support of the claim. What evidence he did offer was limited to a reference to his illness and his supposition if was linked to the dismissal before tendering a statement which read *I felt let down and was very upset and sad. I was totally gutted and felt very lost for a number of weeks.*⁶

[32] As already said the evidence supports a conclusion the illness had nothing to do with the dismissal but was attributable to a pre-existing condition. The remaining statement was not enhanced upon when Mr Baird had a chance to do so via questioning

⁶ Brief of evidence at [50]

during the investigation. If anything it was undermined to some extent by evidence that contrary to his claim he was lost for a number of weeks he was capable of obtaining the offer of a replacement job within ten days of being able to commence his search on release from hospital.

[33] While I accept some harm must emanate from an unjustified dismissal the evidence proffered here can support little more than a token award. Having considered that evidence I consider \$2,500 appropriate.

Conclusion and orders

[34] For the above reasons I conclude Mr Baird has a personal grievance in that he was unjustifiably dismissed. As a result I order the respondent, King Orchards Limited, pay the applicant, Michael Baird:

- a. \$1,440.00 (one thousand, four hundred and forty dollars) gross as recompense for wages lost as a result of the dismissal; and
- b. A further \$2,500.00 (two thousand, five hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i).

[35] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority