

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 709
3183539

BETWEEN	ROBERT BLUNSDON Applicant
AND	FARMER'S FIRST LIVESTOCK LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Applicant in person No appearance for the Respondent
Investigation Meeting:	1 October 2024 in Christchurch
Further Information:	20 November 2024 from the application
Date of Determination:	29 November 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Robert Blunsdon was engaged by Farmer's First Livestock Limited (FFL) and worked as a truck driver for several months. He then suffered an accident while at work and was hospitalised. FFL stopped paying Mr Blunsdon and he did not return to work. FFL had not deducted any PAYE from its weekly payments to Mr Blunsdon and he did not receive any earnings related compensation from ACC.

[2] In this claim, Mr Blunsdon seeks a determination that he was an employee. He says that he has personal grievances against FFL of unjustified disadvantage and unjustified dismissal and he seeks compensation and reimbursement to settle the grievances. Mr Blunsdon also says that FFL did not provide him with a written

employment agreement and did not retain a written employment agreement, in breach of s 65 and s 64 of the Employment Relations Act 2000. He seeks penalties. Mr Blunsdon says that FFL breached its good faith obligations owed to him. No specific remedy is claimed for the alleged breach.

[3] FFL did not lodge a statement in reply.

The Authority's investigation

[4] The application was lodged in August 2022 and served on FFL. Counsel for FFL sought and was granted an extension to lodge a statement in reply. At the same time, Mr Blunsdon through his representative sought and the Authority directed the parties to mediation. The Authority's investigation was suspended and Mr Blunsdon was directed to advise the Authority following mediation whether its investigation needed to continue.

[5] Eventually in March 2024 Mr Blunsdon advised the Authority the matter was not resolved and he wished to proceed. The matter was then assigned to me and a case management conference was arranged. Mr Blunsdon was no longer represented and Leonard Bourton as the company's principal represented FFL.

[6] Mr Blunsdon and Mr Bourton participated in a case management conference and directions were made for an investigation meeting set for August 2024. Later, FFL sought and was granted an adjournment. A new date was set for the investigation meeting.

[7] Mr Blunsdon attended the investigation meeting in October 2024 but FFL did not appear.

[8] During the investigation meeting, I asked Mr Blunsdon about documents referred to in correspondence from his representative but not included in the material provided to the Authority. Mr Blunsdon said he could provide them, but not immediately. I formalised that in a direction on 2 October 2024. Mr Blunsdon provided documents on 20 November 2024. His response did not include all the requested documents and included material that had not been requested.

[9] Despite the incomplete response, I will determine the claims based on the material available. It is helpful to first set out what happened before turning to the issues for determination.

What happened

[10] Mr Blunsdon saw an advertisement on TradeMe in November 2021 for a “linehaul truck driver”. It mentioned “good gear easy work this job is for a proper driver”, “80 – 105k” and “late model units”.

[11] Mr Blunsdon phoned and spoke to Leonard Bourton and they met the following day on 16 November 2021. Mr Blunsdon gave Mr Bourton a copy of his CV, they had a brief discussion and Mr Bourton engaged Mr Blunsdon to drive a truck to Auckland later that day. Mr Bourton said that he pays well, but otherwise did not mention terms and conditions of the engagement.

[12] The truck carried FFL branding. Travel arrangements had all been made by FFL and Mr Blunsdon drove the load to Auckland and then returned to Christchurch.

[13] After returning, Mr Blunsdon contacted Mr Bourton to ask if he had the job. Mr Bourton told him “Hope so, you’re booked on the interisland ferry”.

[14] Mr Blunsdon then worked regularly for FFL driving that company’s trucks and delivering its freight, as directed by Mr Bourton. Most trips were between Christchurch and Auckland but some were to other locations. FFL arranged documentation required at some locations. FFL supplied a fuel card which Mr Blunsdon used to pay for fuel. Sometimes FFL paid for motel accommodation if Mr Blunsdon was stuck, often he would sleep in the truck and occasionally Mr Blunsdon paid for a motel.

[15] FFL paid Mr Blunsdon \$1,600.00 weekly by direct credit into his bank account. The payments were from “Farmer’s First” account, except one showed “Bourton LP” as the payer. They all recorded “wages” in the “Particulars” field. Mr Blunsdon was not asked for and did not provide any invoices to be paid for his work. He completed a logbook as required by law but did not otherwise complete any timesheet.

[16] I accept Mr Blunsdon’s evidence that he took two weeks off over Christmas. He was still paid \$1,600 weekly.

[17] At some point Mr Blunsdon took up with Mr Bourton his concern that FFL's schedule and demands were not possible under road transport rules. Mr Blunsdon's evidence is that he told Mr Bourton that he "quit", but Mr Bourton prevailed on him to stay, offered him a week off on pay so Mr Blunsdon agreed to stay. Mr Bourton promised that things would change. In a txt exchange at the time Mr Bourton said he needed "a little more notice" if Mr Blunsdon was to stop work.

[18] Mr Blunsdon returned to work after that break.

[19] Mr Blunsdon later drove a truck to Auckland to deliver a load to a business, arriving there on 1 February 2022. He was injured when some of the load fell from the truck. Mr Blunsdon was admitted to hospital and stayed there until he was discharged on 22 February 2022.

[20] Mr Blunsdon reported the accident to Mr Bourton on 1 February 2022.

[21] While in hospital, Mr Blunsdon reported the accident to WorkSafe.

[22] On 10 February 2022 Mr Blunsdon contacted ACC. ACC told Mr Blunsdon that it had no record of him working for FFL. Mr Blunsdon contacted IRD and received the same response. Mr Blunsdon then phoned Mr Bourton, who told him he was speaking with FFL's accountant but he was covered by ACC.

[23] On 14 February 2022 Mr Blunsdon messaged FFL's accountant. The accountant responded the same day to say that as Mr Blunsdon was a sub-contractor the ACC claim would be in his own name. Mr Blunsdon answered "Ok, it is news to me I'm a subcontractor ...". There followed a txt exchange between Mr Blunsdon and Mr Bourton. Mr Blunsdon said that Mr Bourton had never told him he was a sub-contractor who had to pay his own tax out of his weekly pay. Mr Bourton did not contradict that.

[24] Mr Blunsdon engaged a representative. On 25 February 2022 the representative sent an email to FFL, Mr Bourton referred them to FFL's lawyer and the representative forwarded their email to the lawyer. The representative asked for the company's view about whether Mr Blunsdon was an employee or a sub-contractor. The email was incorrectly addressed, so was not delivered.

[25] The documents provided by Mr Blunsdon do not identify when, but at some point the representative resent the email to the correct address for FFL's lawyer. It appears that FFL's lawyer contacted the representative on 10 March 2022 and again on 25 March 2022. The first contact was to say that the lawyer was taking instructions, while the second contact was to say that Mr Blunsdon had subcontracted his services to FFL and was never an employee.

[26] Mr Blunsdon's representative wrote to FFL's lawyer on 12 May 2022. Grievances of unjustified dismissal and unjustified disadvantage were raised.

[27] On 11 July 2022 a barrister then acting for FFL wrote to Mr Blunsdon's representative to say that FFL engaged him under a contract for services, not as an employee. FFL did not accept that Mr Blunsdon could make an application to the Employment Relations Authority. It would protest jurisdiction and apply to strike out any application.

[28] However, Mr Blunsdon lodged this application. FFL did not lodge a statement in reply or formally answer the application.

[29] The following issues arise:

- (a) Was Mr Blunsdon employed by FFL under a contract of service?
- (b) If yes, did Mr Blunsdon raise personal grievances within time?
- (c) If yes, does Mr Blunsdon have any personal grievance against FFL?
- (d) If yes, what remedies should be ordered to settle any personal grievances?
- (e) If Mr Blunsdon was an employee, should penalties be imposed on FFL for breaches of s 64 and s 65 of the Employment Relations Act 2000?

Was Mr Blunsdon employed by FFL under a contract of service?

[30] The Authority has exclusive jurisdiction to make determinations about matters about whether a person is an employee. An employee is a person employed by an employer under a contract of service. In deciding whether a person was an employee, I must determine the real nature of the relationship, having regard to all relevant matters,

including matters that indicate the parties' intention, without treating as a determining matter any statements by the parties about the nature of their relationship.

[31] There was no written agreement to indicate the parties' intention as to the nature of their relationship. While having a written agreement is a legal requirement when an employer employs an employee, the absence of a written agreement does not necessarily indicate that a contract for services was intended.

[32] Mr Blunsdon was paid a weekly salary and did not need to invoice FFL to be paid. FFL labelled it "wages". Mr Blunsdon had paid time off over Christmas. The agreed payment arrangements point strongly towards employment, rather than a contract for services. While FFL did not deduct or account to IRD for PAYE, that was not known by Mr Blunsdon until after he was injured. Not deducting PAYE suggests that FFL might not have intended an employment relationship with Mr Blunsdon.

[33] FFL controlled what work Mr Blunsdon performed and when he did it. FFL provided the equipment used by Mr Blunsdon in performing his work. The costs incurred such as fuel and ferry charges were met by FFL. Mr Blunsdon performed FFL's work on its behalf at its direction. The work was integral to FFL's business. Mr Blunsdon carried no financial risk and could not profit from the work except by way of the weekly payment. These factors point strongly towards an employment relationship.

[34] Mr Blunsdon had previously worked as a contractor for other businesses, was GST registered, invoiced for his work and operated business on his own account. Despite that experience, he did not treat his work for and payments from FFL as if it was his own business. He worked only for FFL and did not advertise his services. All that indicates that Mr Blunsdon intended an employment relationship.

[35] In summary, most factors strongly indicate an employment relationship and point away from a contract for services. I find that FFL employed Mr Blunsdon as an employee under a contract of service.

[36] I turn to the other aspects of Mr Blunsdon's employment relationship problem.

Did Mr Blunsdon raise personal grievances within time?*Unjustified disadvantage*

[37] The unjustified disadvantage claim is based on FFL not providing written terms of employment in breach of s 65 of the Employment Relations Act 2000 and not retaining a signed copy of an employment agreement.

[38] The statement of problem lodged by the representative for Mr Blunsdon included a copy of a letter dated 12 May 2022 setting out that grievance. Documents provided later by Mr Blunsdon included copies of a similar letter, but dated 9 May 2022. The version dated 9 May 2022 was probably a draft provided to Mr Blunsdon, while the 12 May 2022 copy with some minor changes was the letter sent to FFL's lawyer that day by email.

[39] I find that Mr Blunsdon first sought to raise this unjustified disadvantage personal grievance with FFL on 12 May 2022.

[40] Under s 114 of the Employment Relations Act 2000, an employee must raise a grievance with their employer within 90 days beginning with the date on which the action alleged to amount to a grievance occurred or came to their attention, whichever is later.

[41] Mr Blunsdon knew that FFL had not provided him with a written employment agreement from the very start of the employment in November 2021. Equally, he knew from the same time that FFL would not be able to retain a signed copy of an employment agreement. Assuming the action alleged to amount to a personal grievance included FFL not treating him as an employee for IRD and ACC purposes, that came to Mr Blunsdon's attention on 10 February 2022 at the latest. Based on that, Mr Blunsdon had until 10 May 2022 to raise a personal based on non-compliance with s 65 and s 64 of the Employment Relations Act 2000.

[42] Mr Blunsdon did not raise his unjustified disadvantage personal grievance within the time permitted by s 114 of the Employment Relations Act 2000.

[43] FFL did nothing in response to the 12 May 2022 letter or the application to the Authority which could amount to it impliedly consenting to Mr Blunsdon raising this personal grievance out of time.

[44] This aspect of Mr Blunsdon's employment relationship problem is not properly before the Authority, so I am not able to further investigate and determine it.

Unjustified dismissal

[45] FFL did not expressly dismiss Mr Blunsdon and he did not expressly resign. The first point at which it was said that the relationship had ended was on 12 May 2022 when Mr Blunsdon's representative claimed an unjustified dismissal.

[46] The dismissal claim is based on FFL's failure to respond substantively in March and April 2022, after Blunsdon learnt that FFL had not deducted PAYE, regarded him as a sub-contractor, had not paid him the first week's compensation and that ACC was not treating him as an employee of FFL for earnings related compensation purposes.

[47] I find that through his representative's letter on 12 May 2022, Mr Blunsdon accepted FFL's repudiatory conduct. The action alleged to amount to a grievance crystallised on 12 May 2022, so Mr Blunsdon's personal grievance of unjustified dismissal was raised within time in accordance with s 114 of the Employment Relations Act 2000.

[48] I now consider whether this personal grievance claim is substantiated.

Did FFL unjustifiably dismiss Mr Blunsdon?

[49] FFL presented no justification for its actions giving rise to Mr Blunsdon's dismissal.

[50] It is not necessary to repeat FFL's breaches. No fair and reasonable employer could have acted in the way that FFL did at the time.

[51] I find that Mr Blunsdon was unjustifiably dismissed and is entitled to remedies to settle his personal grievance of unjustified dismissal.

What remedies should be ordered to settle the personal grievance?

[52] There is a claim for compensation for humiliation, loss of dignity and injury to feelings suffered by Mr Blunsdon as a result of the unjustified dismissal.

[53] There is evidence that Mr Blunsdon is upset and very annoyed as a result of his treatment by FFL, but that includes the injury he suffered on 1 February 2022 and its

continuing effects. Mr Blunsdon is able to claim remedies for the unjustified dismissal, but cannot claim compensation in the Employment Relations Authority for damages arising directly or indirectly for personal injury cover by the Accident Compensation Act 2001.¹

[54] Discounting the effects on Mr Blunsdon arising from his injury, I conclude that the proven loss to Mr Blunsdon attributable to the unjustified dismissal falls in the lower level of the mid-range of such harm.² FFL will be ordered to pay compensation of \$15,000.00 to Mr Blunsdon.

[55] Mr Blunsdon provided a June 2024 letter from ACC to confirm that he has not received any weekly compensation from ACC from 1 February 2022 until the date of the letter. However, Mr Blunsdon's lost remuneration both before and after the May 2022 dismissal is properly attributable to the injury, not his personal grievance. Section 317 of the Accident Compensation Act 2001 prevents the Authority from awarding compensation to cover that loss.

[56] FFL did not pay Mr Blunsdon his wages for his first week's absence from work due to the injury. Mr Blunsdon was entitled to compensation payable at the rate of 80% of his earnings for the first week, as it was a work injury.³ FFL had a duty to pay that compensation.⁴ The first week compensation is recoverable as arrears of wages under s 131 of the Employment Relations Act 2000.⁵ On a weekly salary of \$1,600.00 net, 80% is \$1,280.00 net.

[57] The claim was advanced as a remedy for a personal grievance, not as a claim for arrears. However, the Authority is not bound to treat the matter in the way described by the party, but should concentrate on resolving the problem.⁶ FFL is not prejudiced by the claim being resolved under s 131 of the Employment Relations Act 2000. FFL will be ordered to pay \$1,280.00 (without deduction) in arrears.

¹ Accident Compensation Act 2001 s 317.

² *GF v Comptroller of NZ Customs Service* [2023] NZEmpC 101.

³ Accident Compensation Act 2001 s 97.

⁴ Accident Compensation Act 2001 s 98.

⁵ Accident Compensation Act 2001 s 99.

⁶ Employment Relations Act 2000 s 160(3).

Should penalties be imposed on FFL for breaches of s 64 and s 65 of the Employment Relations Act 2000?

[58] Section 65 of the Employment Relations Act 2000 required individual employment agreements to be in writing and to include specified matters and other agreed terms. An employer who failed to comply with the section is liable to a penalty in an action brought by the employee concerned. Section 64 of the Act required the employer to retain a signed copy of the agreement or the intended agreement, when s 63A of the Act applied. An employer who failed to comply with s 64 is liable to a penalty in an action brought by the employee concerned.

[59] Section 63A of the Act applied because no collective agreement covered the work done by Mr Blunsdon. FFL was required to provide Mr Blunsdon with a copy of the intended agreement.

[60] I find that FFL breached s 64 and s 65 of the Employment Relations Act 2000 by not providing and retaining a written employment agreement for Mr Blunsdon.

[61] The breach of s 64 adds nothing additional the breach of s 65 of the Act so I globalise FFL's default to a single breach of s 65 of the Act. FFL is liable to a penalty of up to \$20,000.00 for the breach.

[62] Requirements about written employment agreements are central to the scheme of the Act. There was no reasonable basis on which a business such as FFL could think its contract with Mr Blunsdon was not employment, given the arrangements it entered into with him. I find the breach was probably intentional. It caused significant harm to Mr Blunsdon, given his treatment by ACC as self-employed. It also facilitated FFL not accounting to IRD for PAYE for Mr Blunsdon. FFL avoided the cost and administration associated with employment. However, there is no evidence to establish that FFL has been found to have engaged in similar conduct previously by the Authority or the Employment Court. I fix \$2,500.00 as an appropriate penalty.

[63] Mr Blunsdon asks that the penalty be payable to him. He has no other remedy to address the harm caused by the breach. It is appropriate to require the penalty to be paid to Mr Blunsdon.

Summary and orders

[64] Farmer's First Livestock Limited employed Robert Blunsdon as an employee under a contract of service between November 2021 until his dismissal in May 2022.

[65] Farmer's First Livestock Limited unjustifiably dismissed Robert Blunsdon and he has a personal grievance. To settle that grievance Farmer's First Livestock Limited must immediately pay Robert Blunsdon compensation of \$15,000.00 under s 123(1)(c)(i) of the Employment Relations Act 2000.

[66] Farmer's First Livestock Limited must immediately pay Robert Blunsdon arrears of wages of \$1,280.00 (without deduction), under s 131 of the Employment Relations Act 2000.

[67] Farmer's First Livestock Limited must immediately pay a penalty of \$2,500.00 to Robert Blunsdon for the breach of s 65 of the Employment Relations Act 2000.

[68] Mr Blunsdon is entitled to recover the cost of lodging this application, but did not mention any other legal costs incurred. Farmer's First Livestock Limited must immediately pay Robert Blunsdon cost of \$71.55 in costs.

Philip Cheyne
Member of the Employment Relations Authority