

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 90
5520746

BETWEEN DANIEL BURGESS
 Applicant

A N D CONCRETE4U LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Robert Thompson, Advocate for the Applicant
 Phil Butler, Advocate for the Respondent

Investigation Meeting: 19 June 2015 at Christchurch

Date of Determination: 3 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Burgess) says that he was unjustifiably dismissed from his employment as a concrete placer with the respondent (Concrete4U). He seeks compensation for the alleged unjustified dismissal, lost wages and a penalty for the failure of Concrete4U to provide him with a written employment agreement.

[2] Concrete4U denies that the dismissal was unjustified, but acknowledges that there was no written employment agreement provided. The remedies sought are all resisted.

[3] Concrete4U's governing director is Mr Terry Burgess. He is Mr Daniel Burgess' uncle. It is common ground that Mr Burgess was employed by Concrete4U because of the family connection and again, it is common cause that the engagement process was effected by a handshake. Both Mr Burgess Jnr and Mr Burgess Snr recalled that there was very little discussion about the nature of the employment or

indeed the terms of that employment. Concrete4U concedes there was no employment agreement provided to Mr Burgess nor indeed to any of the other employees of the business at the relevant time.

[4] The work required of a concrete placer necessitates regular attendance at different building sites around Christchurch city and as a consequence, Concrete4U provided a van to each of its staff members (including Mr Burgess) to enable that staff member to attend to his duties.

[5] On 27 July 2014, Mr Burgess had his driver's licence suspended for three months because of excess demerit points.

[6] There is some dispute about when Mr Burgess notified the employer of this fact but it is common ground that the employer was notified and equally common cause that Mr Burgess worked in the business after the loss of his driver's licence for a number of days without incident and without the employer engaging with Mr Burgess on the matter or indeed Mr Burgess seeking to discuss the possible effects of his loss of licence on his ability to fulfil his obligations.

[7] On 1 August 2014, at the end of the working day, Mr Burgess was asked to see Mr Burgess Snr and it is common ground that at that meeting, Mr Burgess was given two documents, a change to the house rules relating to the way in which the company vehicles were to be operated (which has no relevance to the employment relationship problem) and a letter of dismissal.

[8] The letter of dismissal is in the following terms:

1/8/14

Dear Daniel Burgess

Having a driver's licence is a requirement for full time employment as a concrete placer with us.

So this has left us with no option but to terminate your employment.

We can offer part time employment at times when transporting you from home to jobs ... does not interfere with our daily running of business.

We would be more than happy for you to contact us again once you have a licence.

*Kind regards
Terry Burgess*

[9] Again, it is common ground that Mr Burgess Jnr, when presented with this letter, became agitated and angry and there was an intemperate discussion (if one can call it that) between uncle and nephew which ended in Mr Burgess Jnr stumping off, swearing, and indicating that he would take his uncle to Court.

[10] Mediation was attempted by the parties but did not successfully resolve the employment relationship problem and as a consequence the matter came before the Authority in the usual way.

[11] In the telephone conference that I convened with the representatives prior to the investigation meeting, I urged the representatives to use their best endeavours to resolve this matter by agreement, noting the family connection and the likelihood that a determination of the Authority, whatever its terms, would do more harm than good to family relationships even if it resolved the employment relationship problem.

[12] I am satisfied that the able representatives of the parties used their best endeavours to seek a resolution by agreement of this matter but were unable to achieve that desirable outcome.

[13] Again because of the importance of the family connection and my conviction that such relationships have no place in a dispute about employment, at the commencement of the investigation meeting I appealed to the parties to try to resolve matters by agreement (without success) and I repeated those observations in more detail having heard all of the evidence (again without success).

[14] Having used my best endeavours to resolve matters, and with the parties having confirmed that they require a decision of the Authority, this determination resolves the employment relationship problem between these parties.

The issues

[15] The Authority needs to address the following questions:

- (a) Was it a term of the agreement that Mr Burgess be able to drive a motor vehicle;
- (b) Was Mr Burgess unjustifiably dismissed;
- (c) What, if any, are Mr Burgess' entitlement to remedies;

(d) Should a penalty be imposed?

Was Mr Burgess required to drive a motor vehicle?

[16] I am satisfied on the evidence I heard that notwithstanding the absence of a written employment agreement, any reasonable construction of the employment agreement (albeit unwritten) between these parties must include an implied term that the employee be able to legally drive a vehicle. I feel impelled to reach this conclusion because of the fact that every one of Concrete4U's concrete placers was provided with a vehicle to attend various building sites around the city.

[17] It seems to me to follow inexorably from that unchallenged fact that the absence of a driving licence (even for a period as short as three months) must impinge on the terms that the parties must be said to have tacitly accepted even where there is no evidence (as in this case) of a written employment agreement recording the terms of the engagement.

[18] Looking at the matter in a commonsense way, it seems to me impossible to reach any conclusion other than the one that I am impelled to in this matter because everyone knew that vehicles were provided by the employer to enable the employee to do the work the employer was paying those employees for. Indeed, Mr Butler in his closing submissions referred to the vehicles provided as a "*tool of trade*" and I agree with his analysis on that point. The vehicles were indeed part of the toolkit that the employer provided to enable the employee to do the work of the employer for which the employee received wages. The vehicles in question were kitted out with the appropriate tools that a concrete placer would need on the job and the fact of having the vehicle meant the concrete placers had ready access to all of the building sites where the employer had work available.

[19] Mr Burgess Jnr says that he was "*not aware of any requirement on him to hold a driver's licence to maintain his employment*". But that surely cannot be right; it is common ground there was no employment agreement so there was no written document that said that Mr Burgess Jnr was required to have a driver's licence. But it is pure sophistry to claim that he did not know he was required to maintain a licence when he was provided with a vehicle to enable him to do his job and it seems to me the only possible conclusion one is able to reach is that he knew or ought to have

known from the provision of that vehicle that he was required to maintain a driver's licence in order to continue in the employment.

[20] At the very least, I would have expected the fact of the provision of a work vehicle to have put Mr Burgess Jnr on notice that when he lost his licence he should have immediately sought to engage with his employer to discuss the ramifications of that situation.

[21] There is no evidence before the Authority that he did anything of the kind. It is common ground that he did tell the employer that he had lost his licence, although exactly when that information was imparted is not agreed, but I would have thought the good faith obligation that must inform all employment relationships and rest squarely on both parties to the relationship would create an obligation on Mr Burgess Jnr to immediately engage with his employer and seek to tease out what the consequences of this change in circumstances might be.

[22] But Mr Burgess Jnr did not do that; what he did was he entered into an arrangement with a co-worker the effect of which was that the co-worker would drive him around. Mr Burgess said in his evidence that there was no deficit in that respect to the employer because the co-worker and himself were working on the same building sites.

[23] But that is not correct because Mr Burgess Snr's evidence was that when he was making up the wages on the pay day immediately prior to the dismissal of Mr Burgess Jnr, the elder Mr Burgess discovered that the other employee who Mr Burgess Jnr had arranged to provide transport was claiming additional hours against the employer on his timesheet because of the necessity for him to collect and run Mr Burgess Jnr around.

[24] I accept without reservation that Mr Burgess Jnr did not know about that additional cost to the employer but the point I make is that if Mr Burgess Jnr had behaved as I am satisfied he ought to have and promptly sought to engage with his employer to discuss his changed circumstances, there might well have been an ability for the parties to reach some form of arrangement which enabled Mr Burgess Jnr to keep working and which, amongst other things, would have precluded these proceedings.

[25] So my conclusion is that Mr Burgess Jnr knew or ought to have known that the provision of a work vehicle meant that he had a continuing requirement to have an operative driver's licence as an implied term of his engagement as a concrete placer with Concrete4U.

Was Mr Burgess unjustifiably dismissed?

[26] I have no hesitation in concluding that Mr Burgess Jnr was unjustifiably dismissed from his employment. Mr Burgess Snr seemed to accept as much in my investigation meeting. He said that he did not think the procedure that he adopted, with the benefit of hindsight, was particularly "*flash*". I agree.

[27] The letter is ill considered and given the unsatisfactory nature of the letter, and its bald announcement without any preamble that Mr Burgess Jnr had been dismissed from his employment, it is little wonder that Mr Burgess Jnr flew off the handle. The younger Mr Burgess was very open with me in the investigation meeting that he had an anger management problem which he had been getting help with but it seems to me that even if he did not have an anger management problem, the receipt of this letter would have generated one because it simply does not come anywhere near meeting the obligations of a good and fair employer.

[28] Employers are fond of saying that they do not know what the rules are; as a number of learned Judges have remarked regularly over the years, all employers need to focus on is whether the way they are proposing to treat their employee is the way that they would want to be treated if the boot was on the other foot. My conviction is that Mr Burgess Snr would not want to be treated in the way that he treated his nephew if the roles were reversed.

[29] Not only is the letter itself badly worded and not what a good and fair employer could do, but also, and of more importance in my view, is the context in which the letter was delivered. This was not a situation where Mr Burgess Jnr had any warning that this matter was going to be dealt with in this discussion. He was not given any opportunity to get advice and most important of all in the present case, he was not given any opportunity to try to put things right or to propose an alternative way of dealing with this problem. If Mr Burgess Snr had simply engaged with his nephew and said that the loss of the licence created a difficulty that the parties needed to address between them, that could have started a conversation which may have

ended in the same place but would at least have given Mr Burgess Jnr an opportunity to be heard and an opportunity to come up with alternative scenarios which might have been acceptable to the business. There are a raft of possible scenarios but the way in which the employer handled this matter really guaranteed that the only outcome was the negative one that I am now having to deal with.

[30] I make the point again as I already have noted in the earlier section of this determination that of course Mr Burgess Jnr ought to have engaged with his uncle earlier as soon as the problem arose, and himself initiated the discussion rather than wait for his uncle to come to him. But given that did not happen, Concrete4U's process is in my judgment not a process that a fair and reasonable employer could undertake and the outcome of a summary dismissal without any opportunity to be heard or to engage in alternative strategies, is not the conclusion that a fair and reasonable employer could reach in all the circumstances: s.103A of the Employment Relations Act 2000 (the Act) applied.

[31] Mr Burgess Snr says in his defence that he wanted to engage with his nephew about alternatives, that the letter does mention that as soon as he gets his licence back he can have his job back and that the letter also says that there may be an opportunity for part time work if that is consistent with the employer's needs.

[32] I accept those observations at face value; those messages are indeed part of the letter. But the reality is that the letter starts off with the statement that a driving licence is a requirement of the employment (a view that I have already made clear I agree with), that therefore given the driving licence has been lost temporarily, the employment is at an end but that there may be part time or temporary work and that there will be a job on a permanent basis again once Mr Burgess Jnr gets his licence back.

[33] The point I have already made is that the letter is so wrongheaded in the way that it expresses the position and there is no proper measured basis on which the parties have been able to engage on this issue as there should have been, that it was inevitable that it would be difficult if not impossible to have any engagement with Mr Burgess Jnr around alternatives. As I have already made clear, those discussions ought to have been had first before there was any determination to bring the employment to an end by summary dismissal. This is because there may have been a solution which obviated the need for the dismissal to even take place.

[34] However, having chosen to simply act in a peremptory fashion, the employer must take the consequences of treating its staff member in that crude and unjust fashion. I am satisfied that this was an unjustified dismissal and subject to the law relating to contribution, Mr Burgess Jnr is entitled to the consideration of remedies.

What remedies, if any, is Mr Burgess Jnr entitled to?

[35] Mr Burgess Jnr seeks significant compensation and a significant contribution to lost wages as a consequence of the dismissal which I am satisfied was an unjustified one.

[36] The first question I must address is whether Mr Burgess Jnr has contributed in any way to the circumstances giving rise to the unjustified dismissal that I have found. I am satisfied that the very process of the dismissal was so wrongheaded that any criticism of Mr Burgess Jnr's behaviour in swearing at his uncle and generally behaving badly must be set to one side. I think the process of dismissal was so unfair that it would have provoked even the most mild mannered person.

[37] But that is not an end of the matter because given my finding that it was an implied term of the employment agreement that Mr Burgess Jnr have an operative driving licence, I must consider now whether his failure to maintain that operative driving licence contributed to the circumstances giving rise to the dismissal.

[38] The law on this matter is straightforward; there must be a causative link between the contributory behaviour of the employee and the personal grievance.

[39] It seems self-evident that the dismissal was effected by Concrete4U precisely because the younger Mr Burgess had lost his licence, albeit temporarily. The loss of the licence was not, despite the attempts to paint it as such, an unforeseeable accident. It was a consequence of Mr Burgess Jnr failing to meet his obligations to society and eventually such behaviour develops consequences.

[40] Mr Burgess Jnr ought to have ensured that his licence remained current; he ought to have paid his fines or otherwise taken action to ensure that he was not faced with the predicament which he had to confront because of the loss of licence.

[41] But I do not accept the submission advanced that the dismissal was exclusively a consequence of Mr Burgess Jnr failing to keep his licence current.

Certainly that is a factor, but equally Mr Burgess Snr had an obligation as a good and fair employer and that obligation had to include taking steps which fell short of dismissal.

[42] In that regard, I have already been critical of both men for failing to develop alternatives to dismissal. Mr Burgess Jnr ought to have engaged with his uncle as soon as the problem arose to see if they could work something out and Mr Burgess Snr ought to have adopted a less dogmatic stance in engaging with his nephew around the consequences of the loss of licence. Had either of them behaved properly, all of this could well have been avoided.

[43] I consider that, looked at in the round, Mr Burgess Jnr has contributed to the circumstances giving rise to the dismissal to the extent of 25% because he ought to have maintained his licence as current and given my finding that having a current driver's licence was an implied term of the employment agreement, the fact that he did not keep his licence current must sound in a holistic evaluation of the issue of contribution.

[44] It follows from that conclusion that remedies that would otherwise have been available to Mr Burgess Jnr will be rebated by one quarter.

[45] A significant issue in the present case is Mr Burgess Jnr's claim for lost wages consequent upon the dismissal. The usual rule is that an employee who has successfully demonstrated they have a personal grievance for unjustified dismissal can claim wages that are lost "*as a result of the personal grievance*": s.128 of the Act.

[46] In the present case, Concrete4U maintains that Mr Burgess Jnr lost wages not as a consequence of the unjustified dismissal but as a consequence of removing himself from the buoyant Christchurch labour market. It is contended that since the devastating 2011 Christchurch earthquakes, the Christchurch labour market has been a boom town for building trades and especially for the concrete industry which is of course fundamental to the rebuild and particularly a requirement where new building code requirements make greater demands on builders to improve structural integrity. Those improvements in structural integrity frequently require concrete applications.

[47] The allegation that Mr Burgess Jnr removed himself from the Christchurch labour market is made because shortly after the dismissal, Mr Burgess Jnr repaired to

Duvauchelle, a small community near Akaroa on Banks Peninsula. He says that he moved there because his father ran a hotel there and could offer him free accommodation in return for some assistance in the hotel. In effect, Mr Burgess Jnr got free board and lodgings in return for a little bit of bar work and other work associated with his father's business activities.

[48] He was also able to get some farm work which generated income which he has disclosed and there was another short period of work in his trade as well.

[49] But the contention made by the employer is that by virtue of his location at Duvauchelle together with his loss of licence, it was impossible for Mr Burgess Jnr to aspire to any of the roles in the building industry in Christchurch in the midst of the rebuilding of the city.

[50] Conversely, Mr Burgess Jnr says that he accepted the offer from his father to live at Duvauchelle because he effectively had no choice. He had lost his job, had no regular income and was accordingly unable to pay his rent.

[51] When I put it to Mr Burgess Jnr that he had received final pay from Concrete4U amounting to over \$2,000 and I asked him why he could not have continued his rent obligations using some of that money at least to see if he could get work quickly, he did not provide me with a satisfactory answer. In essence, it seemed that he made the decision to move to Duvauchelle quickly and soon after the dismissal and he failed to see that the consequence of him being so far away from potential employment and without transport, made it almost inevitable that he would struggle to get gainful employment.

[52] The employer made the point in its evidence to the Authority that although Mr Burgess Jnr had no driving licence over the three month period in question, he could have worked in any number of labouring jobs in the building industry without a driving licence even if such employment was not particularly in the concrete industry per se. In the alternative, the employer argued that Mr Burgess Jnr could have worked in the pre-cast concrete businesses that were operating in Christchurch (apparently there are six such businesses in the city) and this would have enabled him to continue working with concrete but to be doing it in effect in a factory environment rather than on a building site. Mr Burgess Jnr expressed no knowledge or understanding of those pre-cast concrete businesses and also appeared not to appreciate that he could have

aspired to labouring roles in the wider building industry even if the absence of a driving licence made him less marketable as a concrete placer.

[53] The short point is that in order for Mr Burgess Jnr to satisfy me that he is entitled to look to his former employer to reimburse lost wages, he must prove that he has done enough to mitigate his loss. In that regard, I am satisfied that Mr Burgess Jnr has proved that he has attempted to get work but that those attempts have been within a relatively narrow range of businesses similar to the one that he worked in with his uncle and of course, like Concrete4U, competitor businesses needed a potential employee to have an operative driver's licence.

[54] Having reflected on the matter carefully, I am persuaded that Mr Burgess Jnr has not adequately satisfied me that he has mitigated his loss and therefore I am not persuaded that he can look to his former employer for the reimbursement of the wages that he would otherwise have earned during the period he was without a driver's licence.

[55] I reach this conclusion for two fundamental reasons. The first is that I think the decision that Mr Daniel Burgess made to depart to Duvauchelle was a precipitate move and not a rational decision in all the circumstances. I think he should have at the very least used some of his final pay from Concrete4U to remain in the city and see if he could obtain alternative employment. I reach this conclusion because I accept the evidence for the employer that Christchurch was effectively a boom town during the relevant period for construction work and that labour was in short supply and that Mr Burgess Jnr would have been able to obtain new employment virtually straightaway. I heard evidence from Mr Andrew McCormick who is the Southern Operations Manager for Tradestaff Group Limited. That business:

... helps employees find temporary and/or permanent work; and businesses find permanent and/or temporary employees. We are primarily a labour supply company that deals with trades and labouring workers across a broad range of industries.

[56] Mr McCormick was as clear as can be that Mr Daniel Burgess':

... profile closely fits the profile of people our business clients are looking for in the construction industry. Of particular interest to me is his experience in concrete placement. There was a good demand in Christchurch for people with his experience.

[57] Mr McCormick goes on to say that even if Mr Burgess could not get employment in concrete placement because of his lack of an operative driving licence, Mr McCormick is satisfied that he could have worked in concrete pre-cast.

[58] That brings me to the second reason I conclude Mr Burgess did not do enough to mitigate his loss, namely his failure to register with a work broker. I have already noted that Mr Burgess Jnr appeared to have no idea about pre-cast and certainly had made no effort to get employment in one of those six businesses trading in the city. Nor had Mr Burgess Jnr sought to register with a business like Tradestaff which would have put him in the position where even if he was unsure about where his skills might give him work, a business broker with experience would be able to assist him find alternative employment.

[59] I think Mr McCormick's evidence is persuasive that there was significant opportunity for people with Mr Burgess Jnr's skills and it is clear to me from that evidence that if Mr Burgess Jnr had taken appropriate steps like remaining in Christchurch, like registering with one of the businesses specialising placing tradesmen and construction workers, he would have immediately or virtually immediately got alternative employment, perhaps at a similar rate or a slightly reduced rate to the one he was being paid in his uncle's business, and accordingly I am not persuaded that Mr Burgess has adequately mitigated his losses.

[60] It follows from that conclusion that the wages that I think Mr Burgess is entitled to get a contribution to from Concrete4U are nothing like the quantum that Mr Burgess Jnr is seeking (around \$15,000 gross).

Should a penalty be imposed?

[61] It is common ground that there was no employment agreement provided. Mr Burgess Jnr claims to have asked for an employment agreement on a number of occasions. Mr Burgess Snr does not deny that those requests were made.

[62] What Mr Burgess Snr does say in his evidence is that none of his staff had an employment agreement and that was principally because he had only recently changed the staffing arrangements of the business from subcontracting to employment.

[63] Prior to Mr Daniel Burgess' employment, Concrete4U had got its workforce on a contractual basis where those persons were self-employed contractors and paid

tax on a withholding tax basis. Latterly, and around the time that Mr Daniel Burgess was employed, Concrete4U got advice from its accountant to change the position to one of employment. Mr Burgess Snr had not got onto getting those employment agreements in place because he has not enjoyed good health and had been hospitalised with a heart attack.

[64] That said, the evidence before the Authority is that the employment agreements are now in place for the continuing staff and Mr Burgess Snr acknowledges that he was in error in failing to address that matter sooner.

[65] I have a discretion as to whether to impose a penalty or not. I decline to impose a penalty. This is not a case where, in my judgment, the absence of an employment agreement affected the outcome of the employment. This is because my conclusion is that Mr Burgess Jnr knew or ought to have known that a driver's licence was a requirement of his continuing employment, not because of its documentation in an employment agreement but because he was provided with a vehicle and the tools to do the job required of him in that vehicle that it is difficult to see how he could have imagined that he would do his job if he could not drive that vehicle.

[66] In those circumstances, and given the fact that the employment agreements are now all in place, I do not consider that imposing a penalty on this business is going to achieve any useful purpose.

Determination

[67] Mr Daniel Burgess has a personal grievance for unjustified dismissal. I have already determined that Mr Daniel Burgess has contributed to the circumstances giving rise to that dismissal to the extent of 25%. Mr Daniel Burgess' claim for compensation is frankly extravagant and not in accordance with principle or practice in the Authority.

[68] I direct that Concrete4U is to pay to Mr Daniel Burgess the sum of \$3,000 as compensation under s.123(1)(c)(i) of the Act, that figure taking account of the 25% contribution.

[69] Concrete4U is also to pay to Mr Daniel Burgess the Authority filing fee of \$71.56.

[70] I have not been persuaded that Mr Daniel Burgess has taken appropriate steps to mitigate his loss and indeed I am satisfied on the evidence I heard that first by effectively removing himself from the labour market and second by failing to register with job placement agencies, he did not adequately mitigate his loss and in consequence, is not entitled to the reimbursement of all the wages that he lost during the period immediately post-dismissal.

[71] However, I accept that because the likely roles that he would have been able to aspire to might be outside of his particular trade I have tried to estimate what difference there may have been between what he would have earned had the dismissal not taken place and what he should have earned by way of replacement income if he had made proper efforts to obtain such alternative employment.

[72] Accordingly, I direct that Concrete4U is to make a contribution to Mr Daniel Burgess' lost wages in the sum of \$1,000 gross.

[73] Evidence for Concrete4U is that it presently has cashflow problems and may not be in a position to make immediate capital payments to Mr Daniel Burgess and may need to arrange time payment. I think the proper way of addressing that issue should that be necessary is to deal with it as between the representatives who will need to engage with each other on the question of costs.

[74] If the parties' two very able representatives are not in a position to agree on a basis for the payment of the sums ordered, leave is reserved for either party to come back to the Authority for orders.

Costs

[75] Costs are reserved but I observe that both parties have been partially successful and the representatives are encouraged to engage with each other to see if the costs matter can be dealt with by agreement.

[76] If not, again leave is reserved to revert to me for orders.

James Crichton
Member of the Employment Relations Authority