

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 349
5372823

BETWEEN VICTORIA MAREE CHANT
 Applicant

A N D ANGLESEA CONSULTING
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: DM Grindle/E Smith, Counsel for Applicant
 D Watson/ LN Crawford, Counsel for Respondent

Investigation Meeting: 19 and 20 March 2013

Submissions Received: 13 and 22 March 2013 from Applicant
 13 and 22 March 2013 from Respondent

Date of Determination: 8 August 2013

DETERMINATION OF THE AUTHORITY

- A. Victoria Maree Chant was unjustifiably dismissed from her employment by Anglesea Consulting Limited;**
- B. Anglesea Consulting Limited shall pay to Victoria Maree Chant the sum of \$2,500 (reduced from \$5,000 due to conduct which was causative and blameworthy) as compensation for hurt and humiliation s123(1)(c)(i).**
- C. Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.**

Employment relationship problem

[1] Victoria Maree Chant was employed by a contract milker to Anglesea Consulting Limited (ACL), Mr Frank Oud, on or about 1 June 2011. Due to Mr Oud's unexpected death, Ms Chant was asked and continued working on ACL's farm

between 2 and 16 February 2012. An offer of employment was made during this period and subsequently withdrawn by ACL on 16 February 2012 due to disobedience and performance issues. Ms Chant was paid two weeks wages and asked to vacate the premises.

[2] Ms Chant alleges she was unjustifiably dismissed because she had been offered and accepted employment with ACL on 2 February 2012. The employer's action in withdrawing her employment was an unjustified dismissal and/or disadvantage. She submits her employment was terminable at the end of the milking season in accordance with the offer of employment and industry practice.

[3] ACL denies there was an employment relationship between the parties at all. Alternatively it submits Ms Chant was a casual employee which ended when negotiations for permanent employment broke down. Alternatively it submits her employment ended when she was given reasonable notice of one week or a replacement was found.

Issues

[4] The following issues arise:

- (a) What was the real nature of the relationship between the parties?
- (b) If Ms Chant was an employee, was she a casual employee? When was her term of employment to end?
- (c) What remedies (if any) should be awarded to Ms Chant?

What was the real nature of the relationship between the parties?

[5] Ms Chant submits an employment contract arose from the 'offer' made by Mr Graeme Edwards on 3 February 2012 when he instructed her to continue working at the farm. Ms Chant continued working on the farm until 16 February 2012 when she was dismissed. The nature of her work was known to the parties – milking and taking care of the farms daily requirements. The parties intended to formalise the terms and conditions at a later stage.

[6] ACL disagrees. It states there was no contractual relationship at all between the parties because there was no offer and acceptance and agreement on essential terms, and no degree of trust and confidence between employer and employee.

[7] An employee is defined as *any person of any age employed by an employer to do any work for hire or reward under a contract of service* (s.6(1)(a)). In deciding whether a person is employed by another person under a contract of service, the Authority *must determine the real nature of the relationship between them* (s.6(2)). The Authority must consider all relevant matters, including any matters that indicate the intention of the persons (s.6(3)(a)) and is not to treat as a determining matter any statement by the persons that describes the nature of their relationship (s.6(3)(b)).

[8] To create an employment contract there must be a common intention of the parties to enter into legal obligations. Whether a *common intention* can be read into an arrangement between the parties is to be determined in the evidence of their respective statements and/or actions at the time of, or before, or after that arrangement is made.¹

[9] The Authority must examine the terms and conditions of the contract and the way in which it actually operated in practice.² When the intention of the parties has to be gathered partly from documents, oral exchanges and conduct, the terms of the contract are questions of fact.³ Intention can also be derived from parties statements at the time the employment contract was allegedly made and if not clear, from their subsequent conduct and dealings.⁴

[10] It is accepted Ms Chant's employment with Mr Oud terminated upon his death. It is accepted there was no employment contract signed between these parties. Whether any employment contract was intended between ACL and Ms Chant would be questions of fact to be determined by the parties' correspondence and conduct between 2 and 16 February 2012.

[11] Mr Edwards conceded at hearing he may have agreed to the casual employment of Ms Chant. Other evidence corroborates the existence of an

¹ *Inspector of Awards and Agreements v. Religious Society of Friends (Quakers) Wellington Monthly meeting* [1984] ACJ 409

² *Bryson v. Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at [32]

³ *Bryson v. Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at [20]

⁴ *Page v. Waipu Citizens and Services Club Inc*, unreported, AEC1/98

employment relationship. Mr Edwards asked Ms Chant to continue working on the farm. He is an experienced farmer. It can be inferred from his conduct and experience he was aware this was an offer of paid work. Ms Chant continued to work between 2 and 16 February 2012. ACL paid her for this work. During this period the parties were discussing fixed term employment through email exchanges. The evidence supports an inference and finding Ms Chant was an employee of ACL.

If Ms Chant was an employee, was she a casual employee? When was her term of employment to end?

[12] Ms Chant denies she was a casual employee because she had regular certain work, no evidence she could refuse work and no direct evidence this employment was to be casual. She submits her employment was to end with the milking season of 31 May 2012 as specified in a letter from Mr Edwards dated 14 February 2012⁵. ACL submits her duties were akin to a casual relief milker, there was a lack of certainty about essential terms such as duties and pay and it was implicit she was asked to work until negotiations broke down or a replacement was found.

[13] There is no statutory definition of a casual employee. The Authority can assess whether employment is casual against the following characteristics:⁶

- (a) engagement for short periods of time for specific purposes;
- (b) a lack of regular work pattern or expectation of ongoing employment;
- (c) employment is dependent on the availability of work demands;
- (d) no guarantee of work from one week to the next;
- (e) employment as and when needed;
- (f) the lack of an obligation on the employer to offer employment, or on the employee to accept any other engagement; and
- (g) employees are only engaged for the specific term of each period of employment.

⁵ Applicants Bundle of Documents (ABD) pp 6-7

⁶ *Lee v Minor Developments Ltd t/a Before Six Childcare Centre* EmpC Auckland AC52/08, 23 December 2008 at [43]

[14] The question of whether or not a person has been employed as a casual employee depends on the mutuality of the intention at the outset of the employment and the nature of the work including its regularity, its hours and the obligations imposed on the employee.⁷

[15] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work.⁸

[16] Ms Chant was not a casual employee. The two weeks she worked were continuous, there were certain hours for milking and an expectation Ms Chant would undertake the work. It was not employment 'as and when needed'.

[17] However the evidence does not support a reasonable expectation of ongoing employment. This was a stopgap measure until Mr Oud's replacement was sorted. It arose due to his unexpected death. It would be unreasonable for a party to expect this to be ongoing permanent or fixed term employment as a consequence. It was temporary employment until the finding of a replacement for Mr Oud.

[18] The subsequent conduct of the parties indicates Ms Chant was being considered as a replacement for Mr Oud. Terms and conditions of her employment were being negotiated between 2 and 16 February. At 16 February 2012 the parties still disagreed about essential terms such as remuneration and duties. Ms Chant was unhappy with rent for the house she occupied on the farm being deducted from her wages and sought time to seek advice.⁹

[19] Ms Chant did not possess the same skill set as Mr Oud. At hearing she conceded she did not undertake stock management (other than milking and administering minor health care); pasture management (other than rotating stock to prevent overgrazing); general farm work involving machinery such as tractors; and business management. She had no formal qualifications in running a farm and limited experience beyond milking. It was clear at hearing she could not have been a replacement for Mr Oud.

⁷ *Lee v Minor Developments Ltd t/a Before Six Childcare Centre* EmpC Auckland AC52/08, 23 December 2008 at [44]

⁸ *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [40] and [41].

⁹ Applicants Bundle of Documents (ABD) tab 5 Email V Chant to G Edwards 16/02/12.

[20] However the negotiations about her employment broke down on 16 February 2012 because the offer of employment was withdrawn due to alleged disobedience and performance issues. Ms Chant disobeyed a direct instruction not to use an unwarranted motor vehicle. Stock were not mustered properly. Cows were not milked at regular times. Little farm work was being done.¹⁰ There had been correspondence regarding high cell counts in milk.¹¹ There were allegations she took drugs and/or cultivated cannabis¹² and left the farm in an unacceptable state.

[21] ACL's withdrawal of the offer of employment and requiring Ms Chant to vacate the premises was a dismissal. It was based upon poor performance allegations, not the finding of a replacement for Mr Oud.

[22] The process leading to dismissal was defective. There is no evidence ACL met any of the mandatory considerations set out in s.103A(3). There was no investigation of the allegations before dismissal. There was no raising of concerns before dismissal. There was no opportunity to respond to the concerns before dismissal. There was no genuine consideration of any explanation before dismissal. In effect the dismissal was immediate and abrupt. These defects were not minor and resulted in Ms Chant being treated unfairly (s103A(5)). Accordingly the dismissal was unjustified.

What remedies (if any) should be awarded to Ms Chant?

[23] Ms Chant seeks payment of lost remuneration. This is capped at "... *the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration*" (s128(2)). It was inferred ACL found a replacement for Mr Oud within one week of Ms Chant's dismissal. Given the determination the employment was temporary until a replacement was found, her lost remuneration is confined to one week's wages being \$586.55 excluding tax.¹³

[24] Ms Chant must act reasonably to mitigate loss of wages. Otherwise she has not lost remuneration as a result of the grievance under s123(1)(b). If the remuneration has been lost because of a failure to mitigate, there is no statutory

¹⁰ ABD p12 Email G Edwards to V Chant 16/02/12

¹¹ ABD p3 Email G Edwards to V Chant 11/02/12

¹² ABD p12; Brief of Evidence (BoE) G Edwards para 35; Oral evidence L Smith

¹³ Document B to Statement of Problem Bank Account V Chant \$1,173.10 paid on 16/02/12 for 14 days work.

requirement to order reimbursement.¹⁴ Ms Chant deposed to minimal effort to find work. She rang some local farmers and applied for “a couple of jobs”. Given the minimal effort, it cannot with certainty to the standard of proof required be found she has lost remuneration under s128. The Authority declines to make any orders under s123(1)(b) as a consequence.

[25] Ms Chant seeks compensation for hurt and humiliation of \$20,000 (s123(c)(i)). An award of \$5,000 would have been appropriate. Ms Chant’s temporary employment was ending within one week. She had only been employed for two weeks.

[26] The Authority must consider the extent to which Ms Chant’s actions contributed towards the situation that gave rise to the personal grievance and if required, reduce the remedies that would otherwise have been awarded (s.124).

[27] Ms Chant did drive the motor vehicle after being directed not to do so. It was unsafe and unwarranted. She had told ACL she had an alternative vehicle. She was seen by Mr Edwards driving this vehicle on 16 February despite being injured on 15 February badly enough to warrant two weeks sick leave.¹⁵

[28] Ms Chant accepted her defacto partners were drug users. She denied her drug use. However another witness gave compelling evidence she told them about her methamphetamine or ‘P’ use and he had seen symptoms she was using methamphetamine.

[29] ACL gave evidence which was not contested it had received ‘demerit points’ and a charge of \$91.00 for poor milk quality on 10 February 2012.

[30] All of these performance issues were blameworthy and causative of the dismissal. A reduction in remedies of 50% is warranted in the circumstances.

Determination

[31] Accordingly the following determination shall issue:

- a) Victoria Maree Chant was unjustifiably dismissed from her employment by Anglesea Consulting Limited;

¹⁴ *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

¹⁵ ABD pp 9 to 12

- b) Anglesea Consulting Limited shall pay to Victoria Maree Chant the sum of \$2,500 (reduced from \$5,000 due to conduct which was causative and blameworthy) as compensation for hurt and humiliation s123(1)(c)(i).

- c) Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.

T G Tetitaha
Member of the Employment Relations Authority