IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 120
3012953

	BETWEEN	GLEN COLLINS Applicant
	AND	TAMMY ACTON-ADAMS First Respondent
		ANDREW MCKENZIE Second Respondent

Member of Authority:	Andrew Dallas
Representatives:	Peter Moore, advocate for the Applicant Tammy Acton-Adams for the Respondents
Investigation Meeting	26 April 2018 and 6 September 2018 at Christchurch
Submissions and further information received from the parties up to and including:	4 December 2018
Date of the Determination	4 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Glen Collins commenced employment with Tammy Acton-Adams and Andrew McKenzie in March 2015. Mr Collins' main responsibility was to drive a stock truck but he performed other duties for Ms Acton-Adams and Mr McKenzie as required. Mr Collins said he was either dismissed on 20 September 2016 during an altercation with Mr McKenzie or, in the alternative, he resigned "in the heat of the moment" and this could not be replied upon as ending the employment relationship.

[2] Mr Collins also claimed he was owed underpaid wages and holiday pay. He also said he was not provided with an employment agreement and for this he had raised a personal grievance and also sought the imposition of a penalty. As remedies for his personal grievances, Mr Collins sought an award of lost wages and compensation for hurt, humiliation and injury to feelings.

[3] Ms Acton-Adams and Mr McKenzie denied Mr Collins' claims and said he resigned of his own volition. They also said, in any event, he did not raise his personal grievance for unjustified dismissal within 90 days of his dismissal as prescribed by the Employment Relations Act 2000 (the Act). However, they did accept Mr Collins was not provided with an employment agreement.

The Authority's investigation

[4] During the Authority's investigation meeting, I heard evidence from several witnesses including Mr Collins, Ms Acton-Adams and Andrew McKenzie. I also heard evidence from Mr Collins' partner and a witness who had assisted Ms Acton-Adams with payroll issues.

[5] Having regard to s 174E of the Employment Relations Act 2000 while I have not referred to all the evidence received from witnesses or the submissions advanced by the representatives in this determination, I record that I have fully considered this material.

[6] Issues for investigation and determination are:

i. Who was Mr Collins' employer?
ii. Was Mr Collins' dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?
iii. Was Mr Collins unjustifiably disadvantaged in his employment?
iv. If the employer's actions were not justified, what remedies should be awarded, considering
    a. Lost wages;
    b. Compensation under s 123(1)(c)(i) of the Act;
v. Is Mr Collin's owed wages, holiday pay, meal breaks and KiwiSaver contributions;

vi. Should penalties for breaches of the Act or Holidays Act be imposed on the employer? If so, in what amount and should be these be wholly or partially paid to Mr Collins?
vii. If Mr Collins is successful in his claim for lost remuneration, should interest be made payable?
viii. Should either party contribute to the costs of representation of the other?

What happened?

[7] Mr Collins worked relatively long hours for Ms Acton-Adams and Mr McKenzie for which he received a reasonable hourly wage. The employment relationship was not without its challenges but generally the evidence supported positive dynamics and Mr Collins was regarded as a good worker.

[8] One issue between the parties, and one which continued to reverberate in the Authority, related to Mr Collins use of a small dwelling known as "the hut" on the farm, from which Ms Acton-Adams and Mr McKenzie undertook their commercial activities. As will be seen in due course, Mr Collins said the use of the hut was part of his remuneration, whereas his employer described its use as a "favour" to help Mr Collins deal with a personal issue. In any event, friction did emerge over large power bills for the hut. Another issue related to, in particular, Mr McKenzie's view Mr Collins spent too much time using his mobile telephone. It was the latter of these that contributed to the events giving rise to Mr Collins' resignation or dismissal.

Events of 20 September 2016

[9] 20 September 2016 was a typical spring day in the Canterbury countryside but for an altercation between Mr Collins and Mr McKenzie.

[10] On Mr Collins' account, on or about 4.15pm, he was watering calves when he got a phone call from his partner. On his account, once he completed this job he made his way towards the farmhouse during which time he received a "missed" call on his phone from Ms Acton-Adams and another call from her which he received and where she asked him in a "stern tone" where he had been. Mr Collins said he told her he had been going to the toilet. Evidently, Ms Acton-Adams then entered the farmyard and

proceeded to “have a go at him” about being on his phone. After a further terse exchange, Ms Acton-Adams got into her car and drove away.

[11] Mr Collins said he then approached Mr McKenzie elsewhere in the farmyard. Mr Collins said Mr McKenzie then said: “the fuckin’ phone thing has got to stop”. On Mr McKenzie’s account he said “all this yapping on the phone at work has to stop”.

[12] Mr Collins responded by saying: “Andrew, I was not on the phone, I was having a piss”. Whereas, Mr McKenzie recalled Mr Collins said “no one fucking tells me what to do”. The conversation then became very heated and Mr Collins said, by his own account, “fuck you, I don’t need to put up with this shit”.

[13] Mr McKenzie then said: “Good. Fuck off then. Go on. Fuck off” to which Mr Collins’ responded with “you can get fucked, I am outa here”. Mr McKenzie claimed he said “look – just go, just go” (as in, he meant “cool off, go for the day”).

[14] Mr Collins then headed towards the hut. While on route he encountered Ms Acton-Adams with whom he engaged in a short, relatively conciliatory conversation. Ms Acton-Adams told him she believed he was on the telephone. A while later he had a brief text message exchange with Ms Acton-Adams, which including him thanking her for employing him and observing “I’m sad that it ended”. Ms Acton-Adams would take this to be Mr Collins’ resignation. Mr Collins said he only sent this text message because Mr McKenzie told him to fuck off and this caused him to believe he was dismissed.

[15] Ms Acton-Adams then came to the hut to see Mr Collins. However, before she did so she sought “advice” which included making a “transcript” of the discussion. Mr Collins’ told her that maybe he should move on because he had enough of her and Mr McKenzie’s abuse towards him. Ms Acton-Adams then mentioned there was stock to move the next day. Mr Collins said he needed “a couple of days off to clear [his] head”. Having packed some personal items, he then left the farm.

[16] While Ms Acton-Adams and Mr McKenzie contested some of Mr Collins version of events, the fact that some sort of altercation occurred between Mr Collins and Mr McKenzie is accepted. While Mr McKenzie denied telling Mr Collins to “fuck off” by his own account he did say to him “look – just go, just go”. To the

extent, there is a difference in the language used during the altercation I prefer Mr Collins' evidence as being the most likely occurrence.

22 September 2016

[17] On 22 September 2016, Mr Collins contacted Ms Acton-Adams and asked her if she wanted him to do his normal Friday stock run the next day. Ms Acton-Adams said she would get back to him. Mr Collins said about two hours later, Ms Acton-Adams confirmed she wanted him to do the Friday run.

23 September 2016

[18] On 23 February 2016, Mr Collins met Ms Acton-Adams and she drove him to the stock truck, which was being serviced in Amberley. Both Mr Collins and Ms Acton-Adams described the conversation they had on the journey as cordial. Mr Collins undertook the run. Mr Collins also sent Ms Acton-Adams an email on 23 September 2016 that, among things, outlined his enjoyment of his job and his desire to move forward. Ms Acton-Adams agreed the email confirmed that Mr Collins wanted to continue to drive trucks for her and Mr McKenzie. A meeting was arranged for 25 September 2016 to discuss Mr Collins' email.

Meeting on 25 September 2016

[19] The meeting did not go the way Mr Collins thought it would. There were people in the farmhouse and he said this made him feel uncomfortable. He asked to meet Ms Acton-Adams at the hut. However, Ms Acton-Adams asked him to come to the farmhouse house and he went there with his partner.

[20] When they got there, Ms Acton-Adams advised Mr Collins his resignation had been accepted and that two weeks notice was required. Mr Collins disputed that he had resigned and she had a text message to that effect. He said she also said words to the effect of "hold your head high and just walk way. We have a whole lot of things – pages of it – that we could bring up". Mr Collins said he had no idea what she was talking about. Mr Collins' partner was also concerned about the way the meeting progressed in terms of bringing up collateral issues about the employment.

[21] Ms Acton-Adams said Mr Collins asked her during the meeting for a letter confirming he had been "fired". She said she refused to do so because he had resigned.

[22] Mr Collins performed no further work for Ms Acton-Adams or Mr McKenzie after 23 September 2016.

The Authority's view

Who was Mr Collins' employer?

[23] As best can be explained by the evidence, Ms Acton-Adams and Mr McKenzie separately, through registered companies, and personally own parts of a common enterprise between them which carries on business as a farm, an agricultural contractor and as a livestock trucking operator.

[24] Indeed, given the legal web surrounding the common enterprise, the absence of an individual employment agreement identifying Mr Collins' employer and the wrong legal entity being identified as paying PAYE taxation on his behalf to the Inland Revenue, there was, understandably, a dispute between the parties as to who actually employed Mr Collins. However, there is no dispute Mr Collins was actually employed to perform work for Ms Acton-Adams and Mr McKenzie's common enterprise. Having reviewed the evidence, I find Ms Acton-Adams and Mr McKenzie jointly employed Mr Collins. Under powers set out in s 221(a) of the Employment Relations Act 2000, I join Mr McKenzie to these proceedings.

Did Mr Collins raise a personal grievance for unjustified dismissal within 90 days?

[25] Having reviewed the correspondence Mr Collins caused to be sent to his employer in the 90 day period after his employment ended about his employment relationship problem, I find they contain, cumulatively, enough specificity to put his employer on notice that he believed he had been unjustifiably dismissed. To find otherwise would be to subject these communications to pedantic scrutiny and allow artifice to prevail over common sense. Even if I were wrong about that, having heard from Mr Collins and Ms Acton-Adams and Mr McKenzie, I would exercise my discretion under s 114(4) of the Act to allow him to raise his grievance out of time on

the basis that he was not provided with an employment agreement containing an explanation concerning the resolution of employment relationship problems.[1]

Was Mr Collins dismissed by Ms Acton-Adams and Mr McKenzie?

[26] I find that Mr Collins was unjustifiably dismissed from his employment on 20 September 2016 following a heated discussion where he believed he had been dismissed by being told to "fuck off" by Mr McKenzie. Relying on and enforcing a "resignation" in such circumstances founded as it was on ambiguous, heated, statements by Mr Collins are not the actions of a fair and reasonable employer[2] and do not shield from a finding he was unjustifably dismissed.[3]

[27] *In Boobyer v Good Health Wanganui*[4]the Court identified several factual scenarios where an employer can be said to be seeking to hold an employee to a disputed resignation. In the present case, based on the facts, this is one such scenario where Ms Acton-Adams and Mr McKenzie seized on the unintended words of Mr Collins uttered as part of altercation with Mr McKenzie and second as a response to being told to "fuck off" by Mr McKenzie during it.[5]

[28] At no stage during the altercation with Mr McKenzie, or afterwards, on any account of the facts, did Mr Collins either verbally or in writing unequivocally advise his employer: "I resign". In the absence of either an employment agreement containing an objectively verifiable termination provision or some other form of confirmatory verbal or, more soundly, written communication, Ms Acton-Adams and Mr McKenzie could not sit back, as they did, and allow the resignation to take effect through effluxion of time.

[29] It is clear what an employer finding themselves in such circumstances must do to comply with their good faith obligations and the requirements of s 103A of the Act.[6] A fair and reasonable employer complying with these obligations would have taken active steps to ascertain what Mr Collins' words really meant rather than

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[1] Employment Relations Act 2000, s 115 (c)
[2] Employment Relations Act, s 103A.
[3] See, *Wellington Clerical Workers Union v Barraud* [1970] BA 347
[4] [1994] NZEmpC 15.
[5] *NZPSA v Land Corporation of New Zealand* [1991] 1 ERNZ 741
[6] *Taylor v Milburn Lime Ltd* [2011] NZEmpC 164; *Kostic v Dodd* [2007] NZEmpC 86 and by analogy *New Zealand Cards Limited v Ramsay* [2012] NZEmpC 51

jumping to conclusions or simply relying on its own interpretation as to what he said and what this actually meant.

[30] Further, and in any event, the presenting facts in this case also warranted such an inquiry because Mr Collins offered himself for work on 23 September 2016 (which was accepted and, indeed, the work was performed) and he protested Ms Acton-Adam's belief he had resigned in circumstances where Mr Collins believed he had been dismissed.

[31] Even if, accepting Ms Acton-Adams and Mr McKenzie's position that Mr Collins' uttered words that were capable of being construed as a resignation – or the text message he sent to Ms Acton-Adams thanking her for the employment could be said to be further evidence of his desire to resign or his actual resignation – they failed to adequately or appropriately communicate with him about this. When Ms Acton-Adams visited the hut after the text exchange on 20 September 2016 would have been the most logical time. However, on her own account she sought "advice" in advance of this visitation which included making a transcript of the discussions rather than openly and constructively engaging with Mr Collins about the future of their employment relationship.

[32] Further, it was incumbent upon Ms Acton-Adams and Mr McKenzie when becoming aware that Mr Collins believed he was dismissed (and he believed this as late as 25 September 2016) to confirm their understanding he had actually resigned. To do otherwise was to not comply with their good faith obligations under the Act. There was ample opportunity for a fair and reasonable employer in Ms Acton-Adams positon to clarify and confirm Mr Collins' position regarding his resignation. Indeed, the evidence discloses Ms Acton-Adams could have easily done so:

(a) during the discussion with Mr Collins in the hut on 20 September 2016;
(b) during the telephone discussions on 22 September 2016;
(c) before or during the drive to Amberley on 23 September 2016;
(d) by responding to Mr Collins' email of 23 September 2016; and
(e) during the meeting at the farmhouse on 25 September 2016.

[33] It was also open to Mr McKenzie to do the same. However, neither did so and as a result they could not fairly and reasonably rely on his putative resignation as

bringing the employment relationship to an end. In such circumstances, neither can it be said that Ms Acton-Adams and Mr McKenzie can now justify his dismissal when applying the test in s 103A of the Act.

[34] Ultimately, the consequences of the non-provision of an employment agreement to Mr Collins, the mistaken belief he had resigned and inactions in failing to properly ascertain his position about the employment belong to Ms Acton-Adams and Mr McKenzie.

What remedies should Mr Collins' receive?

Lost wages

[35] Having found Mr Collins was subject to an unjustifiable dismissal by Ms Acton-Adams and Mr McKenzie, the Authority must, under s 123(2) of the Act, even if it awards no other remedies, order payment of the lesser of a sum equal to lost wages or three months ordinary time wages.

[36] I am satisfied that Mr Collins made a reasonable attempt to mitigate the loss of his fulltime employment. He was able to obtain further employment within four months of his dismissal. I award Mr Collins three months gross lost wages together with any applicable holiday pay on that amount. Given their common enterprise in employing Mr Collins, Ms Acton-Adams and Mr McKenzie are jointly and severally liable for payment of these lost wages and are directed to calculate and pay these wages with Mr Collins within 28 days of the date of this determination.

Compensation for humiliation, loss of dignity and injury to feelings

[37] Mr Collins sought $10,000 as compensation for humiliation, loss of dignity and injury to feelings. Given the general upswing in compensatory awards of this nature in the employment jurisdiction in recent years, it was a relatively modest sum.

[38] I accept Mr Collins' evidence, supported by that of his partner, about the impact the end of his employment had on him. He said he felt angry, humilated and depressed. Mr Collins said his ex-partner called him a "bludger" after Ms Acton-Adams told her that he had "quit" his job. He said he worried about how he would support his children and became very stressed at the prospect of looking for and finding new employment.

[39] Subject to any consideration of contribution under s 124 of the Act, I award Mr Collins $10,000 as compensation for that humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act. Ms Acton-Adams and Mr McKenzie are jointly and severally liable for payment of this compensatory award and are directed to pay this amount to Mr Collins within 28 days of the date of this determination.

Contributory conduct by Mr Collins?

[40] Having found that Mr Collins is entitled to remedies for his personal grievances, I am required by s 124 of the Act to consider whether his actions were causative and blameworthy of the situation he found himself in.

[41] Mr Collins said there should be no deduction for contribution. Ms Acton-Adams and Mr McKenzie did not directly address the issue of contribution in their submissons, however their evidence suggested very strongly Mr Collins contributed significantly to the situation giving rise to the end of his employment.

[42] However, having considered all the evidence, I find, on the balance of probabilities, there was no blameworthy contribution on the part of Mr Collins. His initial reaction to the altercation with Mr McKenzie, while on one approach to the facts was intemperate, was misinterpreted by his employer and his subsequent reaction, within the context of being told to "fuck off" by Mr McKenzie, was explicable. Consequently, there should be no deduction to the remedies awarded.

Failure to pay notice

[43] There is a dispute between the parties about the required notice to be given and paid. At various times, Ms Acton-Adams and Mr McKenzie discussed a requirement for a two week notice period with Mr Collins. However, it would seem that, even on their account, Mr Collins was only paid one weeks' notice, for which they said he worked.

[44] There is no employment agreement to assist in the resolution of this dispute. Mr Collins said his weekly pay period was not determinative of how much notice should be worked (or paid out in lieu). I accept this submission. Mr Collins worked for Ms Acton-Adams and Mr McKenzie for a period of 19 months and a period of two weeks' notice, which, on the evidence, had already been discussed between the parties, would not be an unreasonable in such circumstances.

[45] Ms Acton-Adams and Mr McKenzie being jointly and severally liable are directed to calculate and pay Mr Collins an additional one weeks' notice including any applicable holiday pay. While claimed by Mr Collins, I have decided no interest is payable on this sum.

Failure to provide an employment agreement

[46] Mr Collins sought a penalty under the Act for failure to provide an employment agreement. The maximum penalty that can be imposed on Ms Acton-Adams and Mr McKenzie as individuals engaged in the common enterprise employing Mr Collins is $10,000.

[47] The Court in *Nicholson v Ford*[7] set out useful guidance about the relevant factors to be taken into account when considering the imposition of penalties. Taking these factors into account after considering the parties' submissions, the admitted conduct by Ms Acton-Adams and Mr McKenzie and the difficulties posed by the absence of an agreement to the employment relationship as detailed in this determination, I find that $2000 is an appropriate penalty to impose in all the circumstances of the case. As Ms Acton-Adams and Mr McKenzie do not oppose the payment of this penalty to Mr Collins, and having regard to all the other relevant circumstances of the case, I have decided to exercise my discretion under s 136(2) of the Act to award the whole of the penalty to him. Ms Acton-Adams and Mr McKenzie are jointly and severally liable for payment of the penalty.

[7] [2018] NZEmpC 132

[48] For completeness, Mr Collins also raised a personal grievance for the failure to provide an employment agreement. However, as there is a specific penalty regime under the Act for dealing with such matters, it is not necessary to consider separately his grievance or otherwise separately award remedies arising out of the same facts.

Issues relating to payment of holiday pay, Kiwisaver contributions and meal breaks

[49] Mr Collins, through his representative, had an elaborate and extremely complicated approach – including a labyrinth of spreadsheets – for the calculations of other entitlements, including holiday pay, said to be owing to him. Indeed, the Authority had to convene a second investigation meeting to fully understand what was being advanced.

[50] As to the claim relating to Kiwisaver contributions and meal breaks, I find, at best, there were some very minor discrepancies in Ms Acton-Adams' approach to calculation, but these had been corrected.

[51] As to the claims related to payment of holiday pay, this was centred around the alleged value of lodging Mr Collins said were provided by Ms Acton-Adams and Mr McKenzie on their farm, which he said were part of his remuneration. Ms Acton-Adams and Mr McKenzie vigorously disputed this claim. They said Mr Collins was allowed to use the hut as "a favour" because he was not able to have access to his children at his primary residence. Ultimately, after considering the evidence about this matter, I prefer that of Ms Acton-Adams and Mr McKenzie. I find the provision of the accommodation was not part of his remuneration and therefore did not affect the payment of Mr Collins' holiday pay.

[52] As I have found Ms Acton-Adams and Mr McKenzie did not breach the Holidays Act, the issue of penalty for breach of the same does not arise.

Summary of Mr Collins' remedies

[53] The remedial orders made for Ms Acton-Adams and Mr McKenzie to resolve Mr Collins' employment relationship problem by paying him the following amounts within 28 days of the date of this determination:

(i) Three months gross pay as reimbursement for lost wages and any applicable holiday pay on that amount;

(ii) $10,000 as compensation for humiliation, loss of dignity and injury to feelings;

(iii) One week's pay as additional notice including any applicable holiday pay; and

(iv) $2000 as a penalty for failure to provide him with an employment agreement.

Costs

[54] As Mr Collins has had a measure of success, costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Mr Collins has 28 days from the date of this determination in which to file and serve a memorandum on costs. Ms Acton-Adams and Mr McKenzie have a further 14 days in which to file and serve a memorandum in reply.

[55] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis of $4500 for the first day of an investigation meeting and $3500 for each day thereafter unless particular circumstances or factors require an adjustment upwards or downwards. As with all other payments, Ms Acton-Adams and Mr McKenzie will be jointly and severally liable for payment of any costs award made to Mr Collins.

Andrew Dallas
Member of the Employment Relations Authority