

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 38
3013155

BETWEEN ROSS DEED
 Applicant

A N D BUSHNELL NOMINEES
 LIMITED and MATTHEW
 BUSHNELL
 Respondents

Member of Authority: David Appleton

Representatives: Anna Oberndorfer, Advocate for Applicant
 Jonathan Smith, Counsel for Respondents

Investigation Meeting: 22 February 2018 at Christchurch

Submissions Received: 5 and 19 March 2018 from Applicant
 12 March 2018 from Respondent

Date of Determination: 22 March 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Bushnell Nominees Limited was Mr Deed’s employer throughout his employment.**
- B. Mr Deed was a permanent employee employed with variable hours, and not a casual employee, throughout his employment.**
- C. Mr Deed was unjustifiably dismissed from his employment and is entitled to the remedy set out in this determination, subject to a reduction for contribution.**
- D. Mr Deed was not entitled to be paid at \$21 an hour gross.**
- E. Mr Deed is entitled to be paid for four public holidays, and holiday pay pursuant to s 28(4) of the Holidays Act 2003.**

- F. Mr Deed did not suffer an unjustified disadvantage in his employment arising from an alleged change in his duties or by not having been issued with an employment agreement.**
- G. The counterclaim against Mr Deed fails.**
- H. Costs are reserved.**

Prohibition from publication order

[1] Evidence was presented to the Authority regarding Mr Deed's medical history. As this information contains sensitive and personal information which Mr Deed wishes to keep confidential, I prohibit from publication any information in respect of Mr Deed's medical history which has been put before the Authority save as otherwise set out in this determination.

Employment relationship problem

[2] Mr Deed brings claims before the Authority of unjustified dismissal and unjustified disadvantage. He also claimed in his statement of problem that Mr Bushnell was his employer (although his evidence at the Authority's investigation meeting seemed to contradict this) and that the respondents breached their duty of good faith towards him.

[3] Mr Bushnell denies that he was at any time Mr Deed's employer and asserts that Bushnell Nominees Limited was at all material times the employer of Mr Deed, and that Mr Deed was at all times a casual employee.

[4] The respondents otherwise deny that they dismissed Mr Deed and deny that Mr Deed suffered any unjustified disadvantage in his employment. They also deny that they have breached their duty of good faith towards Mr Deed.

[5] Finally, the respondents have asserted a counterclaim against Mr Deed in respect of monies paid to Mr Deed which they say were given to assist him in paying child support payments.

Brief account of events leading to the termination of employment

[6] Mr Bushnell formerly owned and operated a substantial building company in Christchurch and is now the sole director of Bushnell Nominees Limited (the

company). The company owns and farms a property at Ashley Gorge Road and two at Glentui Bush Road; number 78, which includes a dwelling of about a third of an acre of lawns and landscaped area, and number 103, which is Mr Bushnell's main residence.

[7] In early 2016 Mr Deed was engaged to carry out mowing and grass cutting duties at number 78 Glentui Bush Road. The work started in January 2016 and Mr Deed was paid \$20 an hour, cash in hand. According to Mr Bushnell, he told Mr Deed at the beginning that his employer would be the company.

[8] In the last week of March 2016 Mr Bushnell says he spoke to Mr Deed and told him that cash payments from the company would no longer be possible after the end of the month. From that point on Mr Deed was paid through the company's payroll, including PAYE deductions. Mr Bushnell says that he advised Mr Deed that the pay rate would be \$19 an hour, plus 8% for all holiday pay, less PAYE. This equates to \$20.52 gross an hour.

[9] Mr Bushnell says that he also made it clear to Mr Deed that there were to be no sick pay or paid holidays and that if he did not work (for example if it was raining) he would not be paid. Mr Deed raised no objections, according to Mr Bushnell, who says that Mr Deed was happy to proceed at the new rate.

[10] According to Mr Deed, he was offered full-time permanent work in March or April 2016 and offered \$21 an hour and not \$19. He also says that he was given an employment agreement by Mrs Bushnell which he took home, signed and gave back the following day. Mrs Bushnell denies this, saying that no employment agreement was given to Mr Deed.

[11] According to Mr Bushnell, Mr Deed also did occasional labouring work, for example helping with the construction of an outdoor kitchen at number 78 and the placement of concrete troughs.

[12] At some point during 2016 Mr Deed spoke about having to pay child support arrears which required \$25 per week to be deducted from his weekly earnings. Mr Bushnell says that Mr Deed appeared to be quite depressed by having to pay child support and so "to try to help him move past this [in] good faith" Mr Bushnell and his

wife (Sandra Bushnell) made at least three payments of \$100 each to help Mr Deed cover the cost. These payments were not taxed.

[13] Mr Bushnell says that, in July 2016, one of the farm hands (Zach Miln) and his partner left the farm in order to travel to the UK to visit his partner's family for a few months. The intention was for the Milns to continue to pay rent on their rented house and for Mr Miln to return to his position when they had returned from the UK. Mr Bushnell says Mr Deed helped feed the animals after Mr Miln's departure to the UK.

[14] According to Mr Deed the feeding of the animals was a highlight of his job but this changed when another employee, AJ, was taken on and AJ was given the feeding duties. Mr Deed said he queried this with the farm manager, saying that AJ did not have a driver's licence and so could not legally drive around the three farms, but was told that he (Mr Deed) could 'go to shovel some dirt'. Mr Deed says that the farm manager then said that Mr Deed was only hired as a gardener anyway, which was not true as he had been feeding the animals for months. He says that Mr Bushnell said that he would "deal with it" but never spoke to Mr Deed about it again.

[15] Mr Bushnell says that, whilst Mr Deed did help feed out the animals during Mr Miln's absence, Mr Deed was never promised that feeding duties would be solely assigned to him. Mr Bushnell says that he knew that these duties would be reassigned to Mr Miln when he returned in November.

[16] There was at some point a disagreement between the parties about an incident involving a dog (called Bev) belonging to Mr Miln which Mr Deed looked after during Mr Miln's absence. Mr Deed says he looked after Bev during Mr Miln's absence because it was being neglected but that he returned Bev when Mr Miln came back on the farm.

[17] According to Mr Bushnell, however, Bev was essentially "kidnapped" by Mr Deed who refused to return Bev to Mr Miln upon his return. Mr Bushnell says that an ugly scene took place in which Mr Deed behaved irrationally and physically threatened Mr Miln. Mr Bushnell says he paid Mr Deed \$300 to cover his expenses of looking after Bev (although Mr Deed says that he spent \$800 doing so). It does not appear that any claims arise out of this incident involving Bev. However, I

understand that Mr Bushnell gives evidence about the incident in order to support his assertion of the way that the employment ended.

[18] In late January 2017, according to Mr Deed, he hurt his shoulder and was signed off work. Although Mr Bushnell and Mr Deed had a conversation about whether or not Mr Deed had hurt his shoulder at work, according to Mr Bushnell, despite his reservations, the company paid for Mr Deed's first week off work, and then Mr Deed received ACC compensation.

[19] On 8 February 2017 Mr Deed went to Mr Bushnell's residence and presented him with a medical certificate. Mr Bushnell was not sure which one (out of the two that Mr Deed provided) he saw, but it was likely to have been one that signed Mr Deed off sick until 12 March 2017. Mr Bushnell says that he questioned Mr Deed as to whether he really had hurt his shoulder at work, as he had not reported a work injury. Mr Bushnell says that he and Mr Deed had some heated words about this.

[20] Mr Bushnell says that he then advised Mr Deed that he would not be required for the upkeep of the grounds at number 78 and that his hours would therefore be likely to reduce. This was because Mr Miln and his partner were going to move back into the house at number 78 in March 2017, and were going to be responsible for the upkeep of the grounds themselves. Mr Bushnell did not explain this reason to Mr Deed however, he says, because Mr Deed had by then become very angry and agitated and "stormed off part way through the conversation". This is confirmed by Mr Alex Bushnell, Mr Bushnell's son, who was present in the house during the conversation (unbeknownst to Mr Deed).

[21] Mr Deed, on the other hand, says in his written evidence that he went to see Mr Bushnell with the second medical certificate on 8 February 2017 and, upon Mr Bushnell reading the certificate, told him that they did not have any more work for him, and that they would give him a call if they needed some gardening done. Mr Deed took this as a dismissal. He says that he never heard from the respondents again.

[22] Mr Deed's oral evidence was slightly different in that he said that Mr Bushnell said there would be no more work for him but that they would call him if they needed any lawns mowed. He also said that he later saw Mr Bushnell a few days later to return some wet weather gear.

[23] Mr Bushnell agrees that Mr Deed visited the farm a few days later to return equipment owned by the company. He says that Mr Deed said that he was still not fit for work. Mr Bushnell says that, contrary to dismissing him, he actually asked Mr Deed to contact him when he was fit for work.

[24] Mr Deed took legal advice and a personal grievance was raised by Miss Oberndorfer on behalf of Mr Deed by way of a letter to the respondents' lawyers on 14 March 2017. It appears that Ms Oberndorfer had also called Mr Bushnell prior to that date, on 24 February.

The issues

[25] The Authority must determine the following issues:

- (i) The identity of Mr Deed's employer;
- (ii) whether Mr Deed was a permanent or casual employee;
- (iii) what Mr Deed's rate of pay was from March 2016;
- (iv) Whether Mr Deed should be paid for the four public holidays over Christmas/New Year of 2016/17;
- (v) whether Mr Deed was unjustifiably dismissed from his employment or abandoned his employment;
- (vi) whether Mr Deed suffered unjustified disadvantage in his employment through a unilateral change in his duties;
- (vii) whether Mr Deed suffered an unjustified disadvantage in his employment by not having been provided with an employment agreement;
- (viii) if Mr Deed has a valid personal grievance, what remedies should be awarded to him;
- (ix) whether Mr Deed is entitled to an award of holiday pay pursuant to s28(4) of the Holidays Act 2003; and
- (x) whether the respondents have a valid counterclaim against Mr Deed.

The identity of Mr Deed's employer

[26] The principles which apply to determining the identity of the employer were considered in the Employment Court judgment of *Vince Roberts Electrical Limited v Scott Phillip Carroll & Vincent Forsman Roberts (t/a Vince Roberts Electrical)*¹. In that case His Honour Judge Perkins examined the authorities which set out the main principles for determining the identity of an employer. These principles can be summarised as follows:

- (i) Section 6 of the Employment Relations Act 2000 (“the Act”) provides some assistance with the question as it covers the meaning of an employee, and the Authority has the jurisdiction under s.6 to determine the identity of the employer. The relevant provisions of s 6 provide as follows:
 - (1) In the Act, unless the context otherwise requires, **employee-**
 - a. Means any person of any age employed by an employer to do work for hire or reward under a contract of service;
 -
 - (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
 - (3) For the purposes of subsection (2), the court or the Authority—
 - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.
 - (ii) Of particular relevance are subsections (2) and (3).
 - (iii) The onus is on the employee to prove the identity of the employer. This assessment is generally to be made by reference to the outset of the employment relationship. It is for the Authority to make an objective assessment of the evidence and to determine the identity of the employer.
 - (iv) The standard of proof is on the balance of probabilities.
 - (v) In making an objective assessment each case must be determined on its own individual circumstances.

¹ [2015] NZEmpC 112, [17] et seq.

[27] In his oral evidence Mr Deed says that the employment agreement he was given stated that the company, Bushnell Nominees Limited, was the employer. Mr Bushnell also said that the company was the employer. In addition, the payslips that recorded Mr Deed's pay each week bear the company's name. Even though Mr Bushnell gave Mr Deed orders, he is the sole director of the company, and so that would not be unexpected. Mr Bushnell also said in his oral evidence that he does not have a bank account in his own name, so all monies paid to Mr Deed (including, by inference, the cash paid prior to April 2016) came from the company. Mr Deed did not try to contest that evidence.

[28] I therefore see no cogent evidence to persuade me that Mr Bushnell personally was the employer. I find that Bushnell Nominees Limited was Mr Deed's employer.

Was Mr Deed a permanent or casual employee?

[29] As Mr Smith states in his submissions, there is no statutory definition of a casual employee. The principles involved in determining whether someone is employed as a casual employee or as a permanent employee were examined by the Employment Court in the case of *Jinkinson v Oceana Gold (NZ) Limited*². The starting point of determining this question is, again, s.6 of the Act, the relevant provisions of which I have set out above.

[30] The principles that may be extracted from *Jinkinson* are as follows:

- a. The substance of the employment relationship should prevail over the form of any agreement;
- b. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work;
- c. If those obligations only exist during periods of work, the employment will be regarded as casual;
- d. If there are mutual obligations that continue between periods of work, there will be an ongoing employment relationship;

² [2009] ERNZ 225.

- e. Regularity of work and continuity of the employment relationship are indicative of ongoing employment as opposed to casual employment;
- f. Where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.

[31] It is also instructive to cite some passages from former Chief Judge Colgan from the judgement in *Bay of Plenty District Health Board v Wendy Leeanne Rahiri*³

[9] Speaking generally, however, the law is not simply that casual employees cannot bring grievances including allegations of unjustified dismissal. That may be the consequence of that status in some cases, although, case by case, it is a fundamental matter of contractual terms and conditions, of pleading, and of proof, to determine whether, in any particular case, an employee is or was a casual employee, and the consequences of that status. An examination of the various cases decided by this Court in this field indicates that they are very fact-specific and only very general guidance can be drawn from the leading cases. This case is no exception.

[10] It is also pertinent to note that the relevant legislation, that is the Act and appropriate parts of the so-called minimum code of legislative protection of employees, does not differentiate between classes of employees or, indeed, define employees for gate-keeping purposes, as 'permanent', 'part-time' or 'casual'. All that the Act requires is that there was an employment relationship between an employer and an employee at the relevant time. In the case of a dismissal by an employer, that relevant time is the date of dismissal. In the case of a constructive dismissal, that relevant time includes both when the fundamental breaches by the employer are alleged to have occurred and when the employee either resigned or abandoned his or her employment in response to those fundamental breaches.

[11] In some cases, it can be argued for an employer that each separate work engagement by the employer of an employee is a distinct and fixed-term period of employment at the conclusion of which there is no longer in existence a relationship of employer and employee. If, however, the parties agree to a further working engagement, then, as the argument goes, a new employment agreement is constituted, again for a fixed term, at the conclusion of which there is again no longer an employment relationship. In many cases the unreality or at least the artificiality of such a categorisation of some employment relationships, is patent. It would, in law, require such employers and employees to enter into fresh written fixed-term employment agreements before each casual engagement, which engagements may be as short as several hours.

³ [2016] NZEmpC 67

[12] There are numerous examples of employments categorised as 'casual'. Often in such cases, the employer's refusal to offer further work engagements is taken by the employee to be a "dismissal". In many such cases, if the Authority or the Court finds that there was no extant employment relationship, then the parties were not, at the relevant times, employer and employee. It follows in such cases that there can be no access by the employee to the personal grievance procedures in respect of a claim of unjustified dismissal.

[32] It is well established that subjective evidence about what the parties believed their employment arrangements to comprise, and how they referred to the arrangements between themselves, are not as persuasive as the day to day reality of the arrangements. In other words, merely calling an arrangement a casual employment does not make it so.

[33] The evidence of Mr Bushnell was that Mr Deed was employed to work what hours he wanted or, as Mr Bushnell put it, Mr Deed 'could come and go as he pleased'. Mr Deed denied this, saying that he was required to work certain hours because of the work that needed to be carried out. He gave as an example the feeding out, which was done in the winter. Because of what was needed to be done, he had to start as soon as it became light, and had to work up to 8 hours per day. This was not contested by Mr Bushnell, although he said that feeding out represented only a small percentage of the overall work done by Mr Deed during his employment.

[34] When he was not feeding out, Mr Deed says there was plenty of other work to do, especially clearing the scrub around fencing. Mr Bushnell emphasised in his reply that Mr Deed chose his hours.

[35] I believe that Mr Deed was not required by Mr Bushnell or the foreman to be present at work at a certain time each day. I believe that Mr Deed did choose the hours he worked, but that they were dictated largely by the work that was available for him to do each day, and each week. It was agreed by Mr Bushnell that Mr Deed had a good work ethic, and no doubt that work ethic drove Mr Deed to work every week and almost every day, for many hours of each day in order to get the tasks done.

[36] Does that arrangement make Mr Deed a casual employee? I believe not, as this arrangement does not fit the fundamental characteristic of a casual employment arrangement, which is an absence of mutual obligations. Whilst there was no obligation upon Mr Deed to carry out the work he did at any particular time, there was

an obligation on him to carry out the tasks making up the work I believe. Mr Bushnell says Ms Deed was primarily hired as a gardener, who was to assist with labouring duties around the properties and farms. The evidence shows that there was an expectation on Mr Deed to carry out those gardening and labouring duties and that there was always work to be done.

[37] In other words, I believe that this was a situation where the conduct of the parties gave rise to legitimate expectations that further work would be provided and accepted. I say this because Mr Deed had work available to him at all times for most of his employment.

[38] Amongst the documents disclosed by Mr Deed were copies of all his payslips. These payslips showed the number of hours worked each week. An analysis of these payslips shows that from 20 April 2016 through to the end of November 2016 Mr Deed worked every single week and averaged 39.63 hours a week. When averaged across the entire employment, Mr Deed's hours averaged 37.27 hours per week. It is clear from the payslips that Mr Deed worked full time, or close to full time hours every week, save occasionally when, according to him, inclement weather meant that fewer hours were worked.

[39] Mr Deed's hours dipped below 35 hours a week on only eleven occasions between April 2016 and January 2017, most of those occasions being from mid-November onwards. The regularity and continuity of the employment relationship are strongly indicative of ongoing employment as opposed to casual employment. Mr Deed's work pattern was very largely predictable. There is no evidence that, between the days he worked, there was no obligation on Mr Deed to turn up to work the following day.

[40] In addition, Mr Deed felt obligated to provide Mr Bushnell with a medical certificate, which Mr Bushnell did not say he did not need to see. Such an action is inconsistent with a relationship which both parties believe is a casual one. Also, as Ms Oberndorfer pointed out, Mr Bushnell would not have felt the need to raise the fact that Mr Deed's hours were going to reduce once his injury recovered had the relationship been one of a casual employment.

[41] Finally, the Authority saw ACC documents completed by the respondent which declared Mr Deed to be a full time employee (Monday to Friday) and which

answered in the affirmative to the questions “if it were not for the incapacity would this employee have continued to receive earnings from you each week for the next 12 months?” and “if it were not for the incapacity would this employee have been working at least 30 hours per week?”. These answers are inconsistent with casual employment.

[42] For all of these reasons, but principally those explored in paragraphs [33] to [39], my firm conclusion is that Mr Deed was not a casual employee but a permanent employee with variable, but largely predictable hours.

What was Mr Deed’s rate of pay from March 2016?

[43] Mr Deed says that he had agreed with Mr Bushnell that his pay rate would be \$21 an hour, which is denied by Mr Bushnell. I find that Mr Deed was mistaken about this, as I note from evidence produced at the investigation meeting by the respondent that the pay of another employee (AJ) was \$20.52 an hour, which equates to \$19 an hour plus 8%. I believe it is unlikely that Mr Bushnell would have agreed to pay Mr Deed more than another employee doing the same or similar work.

Should Mr Deed have been paid for the four public holidays over Christmas/New Year of 2016/17?

[44] Having found that Mr Deed was a permanent employee and not a casual employee, he was entitled to be paid for public holidays if he did not work on them, if the day would otherwise have been a working day for the employee⁴. Christmas Day and Boxing Day 2016 and New Year’s Day and New Year’s Day holiday all fell on weekdays. Mr Deed worked largely from Monday to Friday, so these public holidays would otherwise have been working days for him. Therefore, Mr Deed is entitled to be paid for these four days at the average daily pay for each day.

[45] Mr Deed’s average daily pay was \$141.63 gross (\$19.00 x 7.454 hours). That entitles him to \$566.50 for the four public holidays. On top of this sum there needs to be added 8% holiday pay. This amounts to the gross sum of \$45.32.

⁴ Section 49 of the Holidays Act 2003.

Was Mr Deed unjustifiably dismissed from his employment or did he abandon his employment?

[46] There is a fundamental difference between the parties in relation to how the employment ended. Mr Deed says he was effectively sent away (being told there would be no more work until he was called for gardening work) whereas Mr Bushnell says Mr Deed stormed off when he was told his hours were to reduce.

[47] I believe both men were sincere in their versions of events. Of course, I need only decide what happened on a balance of probabilities. I believe that what is likely to have happened is that Mr Bushnell said that there would be no more work at number 78 and Mr Deed misunderstood this to mean that there would be no more work at all. My reason for concluding this is that Mr Deed says that Mr Bushnell did say that he would call him if they had any gardening or mowing. It is not likely that Mr Bushnell would have dismissed Mr Deed and then offered him gardening work at a later date.

[48] This offer of gardening work at a later date is consistent with Mr Bushnell just having seen on the medical certificate that Mr Deed was unable to work until 12 March. Mr Bushnell's decision to reduce Mr Deed's hours unilaterally is also consistent with Mr Bushnell's belief that Mr Deed was a casual employee.

[49] A dismissal is the termination of employment at the initiative of the employer, so that the act of the employer results directly or consequentially in the termination of employment, and so that the employee does not voluntarily leave the employment relationship⁵.

[50] What occurred on the doorstep on 8 February 2017 was not a 'sending away' of Mr Deed by Mr Bushnell. Nor was it an abandonment of his employment by Mr Deed, as he did not just walk away from his employment without cause and, in any event, abandonment is a contractual concept, the conditions of which must be stipulated in an agreement between the parties. And yet Mr Deed's employment was treated as having ended by both parties by the time that Mr Smith replied to Ms Oberndorfer's personal grievance letter on 16 March 2017.

⁵ *Iritana Horowai Ngawharau v The Porirua Whanau Centre Trust* [2015] NZEmpC 89, paragraphs [67] et seq., approved by the Court of Appeal in *Porirua Whanau Centre Trust v Ngawharau* [2015] NZCA 585, [2015] ERNZ 93 at paragraphs [7] –[8].

[51] When Mr Smith replied to Ms Oberndorfer, he stated on behalf of the respondent that “by your client’s own actions, he appears to have abandoned his employment.” This was in denial of Ms Oberndorfer’s assertion that Mr Bushnell had told Mr Deed that there was no more work for him and that he had been “summarily dismissed without any meaningful discussion.”

[52] In the Employment Court case of *Boobyer v Good Health Wanganui Limited*⁶ the then Chief Judge Goddard discussed different scenarios where an employee is treated by an employer as having resigned against his or her will. Goddard CJ referred to one category as follows:

Another type is illustrated by NZ PSA v Land Corporation Ltd [1991] 1 ERNZ 741. That is where an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so or takes advantage of words of resignation known to be unwitting or unintended and the employee promptly makes it plain that the employee's communication was not meant to be a resignation and should not be treated as if it were. In that kind of case, the employer cannot safely insist on its interpretation of what the employee said or wrote. This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once "the heat of the moment" had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning faculties": Chicken and Food Distributors (1990) Ltd v Central Clerical Workers Union [1991] 1 ERNZ 502,507.

[53] The Chief Judge also referred to cases of abandonment and stated that each case turns on its own facts.

[54] An important feature in this case is that Mr Deed was signed off sick until 12 March 2017, as Mr Bushnell will have seen. I accept Mr Bushnell’s evidence that, when he spoke to Mr Deed again, when the latter returned the wet weather gear, Mr Bushnell asked Mr Deed to contact him when he was well. Therefore, it appears that Mr Bushnell, at that point, did not believe that Mr Deed had abandoned his employment. Mr Bushnell was prepared to continue to employ Mr Deed, albeit on reduced hours. It was only when Mr Smith wrote to Ms Oberndorfer on behalf of Mr Bushnell on 16 March that there is evidence that Mr Bushnell’s position had changed. No doubt, this was in response to Ms Oberndorfer’s assertion of unjustified dismissal.

⁶ 24 February 1994 WEC 3/94, W 17/94

[55] In my analysis, Mr Bushnell was entitled to believe that Mr Deed was off sick, and willing to return to work when he was better, until he received a call from Ms Oberndorfer on 24 February when, I understand, she told him that Mr Deed regarded himself as dismissed. Any doubt by Mr Bushnell of that belief of Mr Deed will have been removed by 14 March when the personal grievance letter was sent. At that point, on 24 February or 14 March, Mr Bushnell will have understood that Mr Deed had misunderstood what he had said to him on 8 February.

[56] However, instead of striving to correct Mr Deed's misunderstanding, and reassuring Mr Deed that he had not dismissed Mr Deed, and that Mr Deed was welcome to return to work after he was well, it appears that Mr Bushnell became annoyed at having been challenged by Ms Oberndorfer (this annoyance showed during his answers to cross examination questions by Ms Oberndorfer about the call she had made to him) and he instructed his lawyer to defend his position.

[57] In my analysis, the termination of employment did not occur on 8 February 2017, but on 16 March 2017 when Mr Smith stated on behalf of Mr Bushnell that Mr Deed had abandoned his employment. It was not too late at that point for Mr Bushnell to have attempted to reassure Mr Deed (via Ms Oberndorfer and Mr Smith) that his job was still open, as he was still off sick (Mr Deed's injury still preventing him from working). Indeed, Mr Bushnell said in evidence that he would have been willing to have had him return to work, given his good work ethic.

[58] In *Taylor v Milburn Lime Ltd*⁷ His Honour Judge Couch stated the following principle where an employer had reason to doubt that an employee wished genuinely to end the employment relationship.

Where such doubt exists the good faith obligation to be "active and constructive in ... maintaining a productive employment relationship" requires an employer to investigate the situation further before responding to the supposed resignation. Put another way, where there is doubt, a fair and reasonable employer will ensure that its response is based on the employee's actual intentions rather than on what might be inferred from equivocal words and conduct.

[59] In conclusion, following *Boobyer*, and later cases⁸, I find that Bushnell Nominees Limited, Mr Deed's employer, was not active and constructive in

⁷ [2011] NZEmpC 164, at paragraph [32]

maintaining a productive employment relationship (as is expressly required by s 4 of the Act) when Mr Bushnell found out that Mr Deed had erroneously believed himself to have been dismissed by Mr Bushnell. As a result, Mr Deed's employment came to an end against his will.

[60] I will briefly address Mr Bushnell's evidence that he was unable to contact Mr Deed because Ms Oberndorfer had expressly forbidden direct contact with him in her letter of 24 February 2017. First, if he had believed that he had not dismissed Mr Deed, and that Mr Deed was still an employee of Bushnell Nominees Limited, in my view Mr Bushnell would have been entitled to have contacted the employee directly, although he would have needed to have communicated that intention to Ms Oberndorfer first.

[61] Second, even if Mr Bushnell believed he could not contact Mr Deed personally to reassure him he had not been dismissed, he could very easily have instructed Mr Smith to communicate this message via Ms Oberndorfer.

[62] In conclusion, I find that Mr Deed was unjustifiably dismissed by Bushnell Nominees Limited as, in all the circumstances, no fair and reasonable employer could have failed to have corrected Mr Deed's misunderstanding about his employment having ended.

Did Mr Deed suffer unjustified disadvantage in his employment through a unilateral change in his duties?

[63] Ms Oberndorfer in her submissions argues that the removal of the animal feeding duties was an unjustified disadvantage in Mr Deed's employment. From the evidence it appears that the new employee AJ simply took it upon himself to take over this work, and Mr Bushnell and the manager did nothing to change that. It appears that Mr Deed did make an initial complaint but did not follow it up when no action was taken.

[64] It is my conclusion that Mr Deed had no contractual right to do the animal feeding duties. He started to do the work when Mr Miln went overseas. It is my finding that Mr Deed was employed to carry out a range of labouring tasks, some of a

⁸ Such as *Taylor v Milburn Lime Ltd* [2011] NZEmpC 164 and *Kostic v Graham Dodd and Grant Milligan* [2007] CC 14/07, 11 July 2007

skilled nature, and that the tasks could vary from week to week and day to day. Therefore, no disadvantage can flow from AJ taking over the duties, or from any reduction in hours as a result (although it is not clear that there was any such reduction).

[65] A possible grievance is that the respondent did not investigate Mr Deed's complaint that the work had been taken from him, and effectively belittled him when it was said that he had 'only been hired as a gardener'. Whilst it appears that the respondent did not follow up with AJ why he had unilaterally taken over the feeding duties, it is not clear that the respondent was aware that Mr Deed harboured a grievance about this to the extent that he did. Furthermore, Ms Oberndorfer's letter raising the personal grievance which referred to the issue was dated 14 March 2017, more than 90 days after AJ took over the animal feeding work and Mr Deed complained about it.

[66] All in all, I cannot find that a valid personal grievance was raised about the issue and so cannot take the matter further, as no application has been made for Mr Deed to raise the grievance outside of the statutory 90 day limit.

Did Mr Deed suffer an unjustified disadvantage in his employment by not having been provided with an employment agreement?

[67] Mr Deed was entitled in law to have been given a written employment agreement. Unusually, though, he is adamant that he was given an employment agreement. The respondent says he was not. I accept the respondent's evidence.

[68] In such a case, however, I cannot find that Mr Deed suffered a disadvantage in his employment because of his belief that he was given an agreement. Even though there was a future unilateral reduction in his hours signalled by Mr Bushnell it is likely that this would have happened in any event because Mr Bushnell believed that he was entitled to take that action; I do not believe that an employment agreement would have made any difference. In any event, there is no evidence that the failure to give Mr Deed an employment agreement would have had any effect on Mr Deed for which an award of compensation would have been appropriate.

[69] It is theoretically arguable that Mr Deed suffered a disadvantage because, if he had been given an agreement, it would have stated that he was a casual employee, and

he would not have accepted that, given his evidence that he had been seeking permanent employment full time. However, his oral evidence was that he read only part of the agreement which he says he was given and that he “did not get to that part” when asked whether the agreement had stated whether he was to be a permanent or casual employee. Therefore, according to his evidence, he did not read the agreement he says he was given anyway.

[70] Mr Deed did not seek the imposition of a penalty for the failure to provide him with an employment agreement.

Are remedies due to Mr Deed?

[71] The relevant parts of s 123 of the Act provide as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:

[72] It is accepted by Ms Oberndorfer that, as Mr Deed has been unable to work since he injured his shoulder in January 2017, and has been in receipt of ACC compensation ever since, he is not entitled to any award of lost wages arising from the dismissal, as he would not have been able to have worked in any event. Any loss of earnings arises from the injury, not the dismissal. Mr Deed is therefore only entitled to be considered for an award of compensation pursuant to s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to his feelings.

[73] Mr Deed said in his oral evidence that he had loved his job and being sent away shattered him. Of course, he was not actually sent away by Mr Bushnell; my finding is that Mr Deed misunderstood what Mr Bushnell had said. However, even though the effects on Mr Deed of being “sent away” were based on a misunderstanding, they were affirmed when the employer did not correct the misunderstanding, once it came to the employer’s attention.

[74] Put another way, Mr Deed’s feelings about being “sent away” could have been assuaged by Mr Bushnell instructing Mr Smith to state unambiguously that Mr Deed had misunderstood him, that he had not been dismissed and that he could continue to work once he was better. However, Mr Smith’s letter, on Mr Bushnell’s instructions, did nothing to correct Mr Deed’s overall understanding that his employment was at an end, even though it disagreed with the way in which Mr Deed says it ended.

[75] Mr Deed also said that he was upset when he read in Mr Smith’s letter to Ms Oberndorfer that he had been paid \$18 an hour, not \$20. He said that that was Mr Bushnell trying to discredit him. Mr Smith said in the investigation meeting that that had been an error in the letter. However, no grievance was raised about that matter and so I cannot find that this justifies any award of compensation.

[76] What award should I make? Ms Oberndorfer asks for \$19,000 in compensation. I understand that this is based on an estimation that Mr Deed suffered effects that were close to the middle of ‘band 2’ (involving mid-range loss/damage) as referred to in *Waikato District Health Board v Kathleen Ann Archibald*⁹.

[77] Mr Deed put in a letter from a medical practitioner which summarised Mr Deed’s health since his employment ended. It refers to a number of consultations, and medication that was prescribed over the months.

[78] I cannot be certain from this evidence how much of the effects Mr Deed reports having suffered were due to his employment ending, and how much to being incapacitated by his shoulder injury. I must therefore be cautious about not taking the medical evidence at face value when the author of the letter setting it out was not present to be questioned. It is clear that Mr Deed did suffer not insignificant degrees of humiliation, loss of dignity and injury to his feelings in the way his employment ended. However, I am not satisfied that an award of \$19,000 is justified.

⁹ [2017] NZEmpC 132, at paragraph [62]

[79] I believe that an award of \$10,000 is more likely to be appropriate given the evidence that is before me.

[80] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[81] I have found that Mr Deed misunderstood Mr Bushnell, which led to him walking away. Whilst misunderstanding someone cannot be seen as particularly blameworthy, walking away angrily can be seen as blameworthy. Mr Deed reacted too hastily. If he had sought further information, it would have become quickly clear to him that he was not being dismissed but was being told he would not be required to tend to the grounds of number 78 once he returned to work. In his oral evidence, he believed that change would not have had much of an impact on his overall hours.

[82] Mr Deed walking away angrily did contribute to the situation that gave rise to the personal grievance. Whilst anger may be a predictable reaction, it was not a constructive one. The Employment Court in *Xtreme Dining Limited trading as Think Steel v Leighton Dewar*¹⁰ held that a finding of contributory fault of 50% is a significant one. I do not believe that Mr Deed should share equal responsibility with the respondent for what occurred, as he did not have the power of employment and dismissal that the respondent had. Mr Deed's contribution was not negligible but was not significant either.

[83] I believe that it would be appropriate to reduce Mr Deed's award by 25%.

Is Mr Deed entitled to an award of holiday pay pursuant to s28(4) of the Holidays Act 2003?

[84] In her submissions Ms Oberndorfer argues that Mr Deed is also entitled to be paid annual holiday pay as, not being a casual worker and not being employed on a fixed term agreement of less than 12 months, he was unlawfully paid holiday pay on a 'pay as you go' basis under s 28 of the Holidays Act 2003.

¹⁰ [2016] NZEmpC 136

[85] Does it matter that Mr Deed did not claim this in his statement of problem? Normally, a matter must be expressly brought before the Authority (or ‘pleaded’ to use more judicial language) before the Authority can investigate it. However, first, s160(3) of the Act provides that the Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.

[86] Second, the payment of holiday pay is a minimum employment standard¹¹. By dint of having found that Mr Deed was not a casual employee, but a permanent employee, it follows without the need for any further analysis that the respondent was not entitled to pay him holiday pay under s 28 of the Holidays Act. Therefore, the Authority cannot ignore the fact that there has been a breach of a minimum employment standard, and must rectify it.

[87] Section 28(4) of the Holidays Act provides as follows:

If an employer has incorrectly paid annual holiday pay with an employee’s pay in circumstances where subsection (1) does not apply and the employee’s employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with section 16 and paid in accordance with this subpart.

[88] Section 16 of the Holidays Act provides as follows:

16 Entitlement to annual holidays

(1) After the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks’ paid annual holidays.

(2) For the purposes of subsection (1), the 12 months of continuous employment—

(a) includes any period during which the employee was—

(i) on paid holidays or leave under this Act; or

(ii) on parental leave under the Parental Leave and Employment Protection Act 1987; or

(iii) on volunteers leave within the meaning of the Volunteers Employment Protection Act 1973; or

(iv) receiving weekly compensation under the Injury Prevention, Rehabilitation, and Compensation Act 2001 or former Act as well as, or instead of, payment from the employer; or

(v) on unpaid sick leave or unpaid bereavement leave; or

(vi) on unpaid leave for any other reason for a period of no more than 1 week; but

(b) unless otherwise agreed, does not include any other unpaid leave, being leave other than that referred to in paragraph (a)(v) and (vi).

¹¹ I refer to the definition of ‘employment standards’ in s 5 of the Act.

(3) If, for the purposes of subsection (2)(b), an employer and employee agree that any period of unpaid leave of more than 1 week is to be included in the employee's 12 months of continuous employment, the divisor of 52 to be used for the purposes of calculating the employee's average weekly earnings must be reduced by the number of whole or part weeks greater than 1 week that the employee was on the unpaid leave.

(4) An employee's entitlement to annual holidays remains in force until the employee has—

(a) taken all of the entitlement as paid holidays; or

(b) been paid out under section 28B for the entitlement in the entitlement year.

[89] I agree with Ms Oberndorfer that Mr Deed's average weekly hours were 37.27 per week. I disagree that Mr Deed was entitled to be paid \$21 an hour plus holiday pay. His pay entitlement was \$19 an hour plus holiday pay. Therefore, four weeks' pay equates to \$2,832.52 gross.

[90] For the remainder of the period after completion of 12 months' employment Mr Deed was employed from 22 January 2017 until 16 March 2017, the date when Mr Bushnell instructed Mr Smith to state that Mr Deed had abandoned his employment. That is seven weeks and five days. During that period Mr Deed would have earned \$5,462.72. Calculating 8% of that sum produces holiday pay for that period at \$437.02 gross. Therefore, the respondent owes Mr Deed a total of \$3,269.54 gross in respect of holiday pay pursuant to s 28(4) of the Holidays Act.

Do the respondents have a valid counterclaim against Mr Deed?

[91] It appears that the payments made to Mr Deed were voluntary payments by Bushnell Nominees Limited and were not conditional upon any act or action being performed by Mr Deed. Therefore, Mr Deed had the expectation that he would be able to keep these payments. Indeed, his evidence is that he understood them to be bonus payments and not in any way connected to his child support payments.

[92] In any event, even if Mr Deed had understood them to be payments to help him with his child support, that would not change the position. No matter what the purpose of the payments were, if they were given on an ex gratia basis, as I find they were, there is no legal basis upon which the respondents can now seek to have those payments returned.

[93] Indeed, the raising of this counterclaim seems either to be a litigation tactic for which there is no justification other than to put pressure on Mr Deed, or an act of

vengeance to punish Mr Deed for bringing a claim against Mr Bushnell and his company.

[94] I therefore decline to order Mr Deed to repay these payments.

Recommendation

[95] Section 123(1)(ca) of the Act provides that, if the Authority finds that any workplace conduct or practices are a significant factor in the personal grievance, it may make recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring. I believe there are two practices that I have identified that have been a significant factor in the personal grievance.

[96] The first is the belief, not uncommonly held, by the respondents that an employer can characterise an employment relationship as casual, and that it will evermore be a casual employment relationship no matter how regular and predictable the work patterns become. This erroneous belief probably led to the belief that there had been no dismissal.

[97] I recommend that the respondents review any employment arrangements they have which they believe are casual to ascertain whether they are in fact casual in practice. If any such relationships do not accord with the legal tests for casual employment, as explained in this determination, I further recommend that they be re-characterised as permanent, with appropriate changes to employment agreements, the way holiday pay is paid, and so forth.

[98] The second recommendation is to treat any personal grievances received, initially at least, as a notification of an employment relationship problem which is to be investigated with an open mind, and in accordance with the principles of good faith set out in s 4 of the Act, rather than a legal letter before action which requires a robust defensive response.

Orders

[99] I order Bushnell Nominees Limited to make to Mr Deed within 14 days of the date of this determination the following payments:

- a. The gross sum of \$566.50 in respect of four public holidays;
- b. the gross sum of \$45.32 in respect of holiday pay on the above sum;
- c. the gross sum of \$3,269.54 payable pursuant to s 28(4) of the Holidays Act; and
- d. the sum of \$7,500 pursuant to s 123(1)(c)(i) of the Act.

Costs

[100] I reserve costs. The parties are to seek to agree how costs are to be dealt with, but if they are unable to do so within 14 days of the date of this determination, any party seeking a contribution to their costs must serve and lodge a memorandum setting out what contribution they seek, and the basis of it, within a further 14 days, and any response must be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority