

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 217
3059013

BETWEEN CHARLES ERIHE
 Applicant

AND ALUMINIUM REPAIRS
 LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Nicola Perry for the applicant
 No appearance for the respondent

Investigation Meeting: 11 May 2021

Submissions (and further At the investigation meeting and 11 and 17 May 2021
information) received: from the applicant
 Nothing received from the respondent

Date of determination: 21 May 2021

DETERMINATION OF THE AUTHORITY

- A. Charles Erihe was a permanent employee of Aluminium Repairs Limited and was unjustifiably dismissed by it.**
- B. Within 21 days of the date of this determination Aluminium Repairs Ltd is to pay Mr Erihe:**
- (a) \$6,525.00 gross as lost wages for his personal grievance;**
 - and**
 - (b) \$71.56 for the Authority's filing fee.**

Employment relationship problem

[1] Charles Erihe is an experienced aluminium fabricator. In December 2018 he worked for a brief period for Aluminium Repairs Limited (ARL or the company).

[2] Mr Erihe complained that he was unjustifiably dismissed. ARL replied that he was a casual employee and did not inform the company of his family commitments on appointment.

[3] An investigation meeting was held on 11 May 2021. There was no appearance for ARL. An Authority staff member attempted to contact ARL's director Troy Dobbs, who had been representing the company. A message was sent but no response received.

[4] The Notice of Investigation Meeting specifies that if the respondent does not attend the meeting, the Authority may, without hearing evidence from the respondent, issue a determination in favour of the applicant. I was satisfied that ARL was properly notified of the investigation meeting and so proceeded with that meeting.

[5] At the investigation meeting I heard evidence by Zoom link from Mr Erihe under affirmation. I sought additional documents from him. Documents were lodged on Mr Erihe's behalf after the investigation meeting. I then permitted both parties to provide any additional comment but nothing was received from either party.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[7] The issues for investigation and determination are:

- (a) Was Mr Erihe a casual or permanent employee?
- (b) Was Mr Erihe unjustifiably dismissed by ARL?
- (c) If so, what lost wages (if any) should he receive?
- (d) Should either party have to make a contribution to the other's costs?

[8] At the investigation meeting Mr Erihe advised that he did not wish to pursue any claim for compensation for humiliation, loss of dignity and injury to feelings, as regards his dismissal claim. He also did not wish to pursue any wage arrears issues.

How did Mr Erihe come to work for ARL?

[9] Mr Erihe saw a job advertisement on Seek for a full time aluminium services technician. He had a phone interview with Mr Dobbs during which time Mr Dobbs said

he was looking for permanent staff as he had so much work on. He specified the hours of work as 9am to 6.30pm daily.

[10] The two men then met in person with Mr Dobbs taking Mr Erihe to his living space near ARL's factory. Mr Dobbs said that once he was satisfied with Mr Erihe's performance he would give him access to a work phone, vehicle and a job sheet and Mr Erihe could head out and do jobs on his own. The plan was that Mr Dobbs would give Mr Erihe the factory keys and each day Mr Erihe would open up in the morning.

[11] Mr Erihe recalls Mr Dobbs mentioning that he was hoping to get a bigger shop, to have Mr Erihe as a foreman, with Mr Dobbs then being able to take a passive role in the business.

What did the agreement say?

[12] ARL lodged a letter of offer and an employment agreement. The letter of offer does not suggest that a casual agreement is being offered. However, the agreement is headed "CASUAL EMPLOYMENT AGREEMENT - Intermittent or Irregular Work". It begins:

EMPLOYMENT AS A CASUAL EMPLOYEE

This is a casual employment agreement. You are employed on an intermittent or irregular basis and will not be placed on a roster for regular work.

There is no obligation on either party to provide any amount of work. The employer does not guarantee any amount of work and subject to the Termination of Employment clause below, your employment may be terminated at any time when the employer determines, in its discretion, that it no longer requires your services.

[13] The hours of work provision on the first page states that the employee will be given reasonable notice of the dates and hours when required.

[14] Mr Erihe told me that he did not believe the first two pages of the agreement sent in by ARL were part of the agreement he signed. He says the handwriting of his name on the first page as the employee party, is not in his writing. However, the signature on the last page is his. He also hand-wrote in an acknowledgement about the house rules and company policies, signing that as well.

[15] Mr Erihe's recollection was that the agreement provided for a permanent role. ARL did not give him a copy of the agreement to keep. After the investigation meeting

Mr Erihe provided three unsigned agreements from ARL; a casual one and two permanent agreements. None of these agreements have Mr Erihe's name on them, nor are they signed. One of the permanent agreements refers to another person in the parties section at the head.

[16] Mr Erihe's evidence of wanting permanent work is supported by a note in the ARL application form in response to a question about why he was attracted to the position. He recorded that he needed a permanent job.

[17] The first pages of the agreement are not initialled. However, the final signed page matches the signature page on the unsigned casual agreement. It appears Mr Erihe did sign a casual employment agreement.

What happened with Mr Erihe's work?

[18] On Wednesday 19 December 2018 Mr Erihe began working. He completed a few jobs over the next few days, usually starting and finishing at the specified time. One day he had to work very late into the night to complete a job, well past 6.30pm.

[19] Once Mr Dobbs was satisfied with Mr Erihe's work, Mr Erihe worked unsupervised. He was given a set of keys to open the factory each morning. He was also allowed to drive a company SUV.

[20] Mr Erihe had the public holidays off work and returned to ARL. As well as undertaking client jobs he was working his way through what he describes as some virtual reality training about undertaking window work at height.

[21] At some stage Mr Dobbs informed Mr Erihe that having spoken to his business partner/s, reportedly called Julie and Chris, Mr Dobbs was told he should not have made Mr Erihe an employment offer as they wanted cheaper Filipino workers and had used the Seek advertisement to demonstrate that they could not get New Zealand based workers. Mr Erihe did not meet any ARL staff other than Mr Dobbs. I note that according to the Companies Register Mr Dobbs has been the sole ARL director and shareholder during the last 13 years.

[22] Following the reported comments no steps were taken immediately regarding Mr Erihe's employment.

How was Mr Erihe dismissed?

[23] On 27 December 2018 Mr Erihe's girlfriend called ARL at his mother's request, advising of an emergency at his mother's home. Mr Erihe was picked up from ARL at about 4.30pm to assist his mother with his disabled brother who had had an accident needed to go to hospital.

[24] Just before 8pm that evening Mr Erihe received an email from Mr Dobbs' ARL email address although it was signed "Admin/Julie". The message asked when Mr Erihe was going to be back onsite. He was asked to return to complete the training days booked for the next four non-statutory days. "An urgent response" to the email was said to be needed.

[25] Mr Erihe replied that he had been unable to return as he had been waiting in hospital for his brother's clearance to leave. He indicated that he would be back at work tomorrow as usual.

[26] A little later Mr Dobbs phoned. Mr Erihe estimates the call to have lasted five minutes, if that.

[27] Mr Dobbs said that Mr Erihe had not been back to the factory (that evening) and had not been in contact with the administrator. Mr Erihe explained that he was at the hospital with his mother and brother who had had an accident. Mr Dobbs told Mr Erihe he was dismissed.

[28] Mr Erihe did not return to ARL. Someone using the same email address, referring to themselves as "TJ" sent Mr Erihe an email on 7 January 2019, primarily about why his pay was late. The email included the following:

Regarding the day you left and the reason for us not continuing with casual work. (we have no obligation to do so)

Well I would of expected you to inform us of any reasons why you wouldn't be able to be at work on the pre-employment form you filled out. (you did not put anything on that form.

I feel that having a dependent that relies on you alone is worth mentioning.

...We have a schedule of times and this affects others and causes downtime when its not followed, that I know was made very clear to you on the first day. As was attendance during any employment with Aluminium Repairs Ltd.

Also the fact you left after telling me of your circumstances to which I replied, returning this evening to complete the VR training or making arrangements for that time to be completed asap is what we will need. You agreed. ...

Was Mr Erihe a casual or permanent employee?

[29] Mr Erihe was looking for permanent work and noted this on ARL's application form. His understanding was that he was a permanent ARL employee. This was based partly on his conversation with Mr Dobbs about the role and Mr Dobbs saying Mr Erihe's daily hours would be 9am to 6.30pm.

[30] The employment agreement ARL lodged specifies that Mr Erihe was a casual employee without guaranteed hours. However, the agreement does not reflect the advertisement, job descriptions, the parties' discussions, training or work practice.

[31] The advertisement referred to the role being "Full time". It also stated that:

Working for ARL you can further your skill set and achieve competency in a very specialised field of the aluminium industry.

[32] The description of full time work is not in keeping with the casual description in the agreement. Mr Dobbs also said the role was permanent and discussed future plans for Mr Erihe in the business. The letter of offer does not indicate a casual role was involved.

[33] Mr Erihe lodged two ARL job descriptions; one for a labourer and the other for an aluminium technician with the title "Technician in Training". The latter is more in keeping with the job advertisement and with Mr Erihe's previous experience. The reference to 'in training' suggests on-going employment.

[34] Both job descriptions include the following statement which is more in keeping with a permanent role:

[S]pecific goals will be set for the individual and performance will be measured against those goals...Further performance measures and achievement goals will be progressively set.

[35] Mr Erihe was told that he was working regular hours and did have the regular start times during the days he worked for ARL. Other aspects of the employment also indicate a permanent role including that:

- Mr Erihe was given keys to open up each morning

- He used a company SUV and was to be given a company phone
- A training package was provided which required some hours and days of time
- ARL's pay slip shows Mr Erihe being paid for 37.5 hours which does not appear to reflect his actual work but rather a standard 7.5 hour day.

[36] Casual employment is referred to in the post-dismissal 7 January 2019 email but other aspects of the email suggest a more permanent arrangement.

[37] I conclude on balance that Mr Erihe was a permanent ARL employee.

Was Mr Erihe unjustifiably dismissed?

[38] I look at whether ARL acted as a fair and reasonable employer could have done in all the circumstances.¹ This includes examining whether the company:

- (a) Sufficiently investigated, having regard to its resources;
- (b) Raised its concerns with Mr Erihe before dismissing him;
- (c) Gave him a reasonable opportunity to respond; and
- (d) Genuinely considered his explanation.²

[39] It appears that ARL dismissed Mr Erihe because he had taken a few hours off work to attend to his brother who had to be hospitalised. The statement in reply refers to Mr Erihe failing to inform ARL of his commitments to a family member.

[40] Mr Erihe acknowledged that he answered 'no' to a question in the job application about whether there was anything that may affect his ability to do the work. An example given on the form is 'family commitments'. Mr Erihe's brother was not his dependent in the sense most people would usually use that term. They did not live together. Mr Erihe had no specific commitments to his brother's care anymore than anyone could be called upon to assist with a partner, child, parent or other whanau if they have a serious accident. It would not be usual to have to answer a questioning identifying those usual family responsibilities in an employment application. I do not see his answering this question in the negative as improper.

¹ The Act, s 103A(2).

² The Act, s 103A(3).

[41] The statement in reply also identifies the non-completion of the induction framework within a satisfactory time and to a satisfactory level. Mr Erihe responds that he was not told of any timeframe within which the training had to be completed. He could not see why it could not have been done the following morning when he returned to work. I have no information about what level the training was completed to and so cannot conclude that this provides a basis for dismissal.

[42] In terms of the process used, there were serious deficiencies in ARL's approach. Mr Dobbs decided to deal with concerns about Mr Erihe over the phone. There was no evident need to do so when Mr Erihe indicated he would be back at work the next day. The call was brief.

[43] Although there was some attempt to raise ARL's concerns and give Mr Erihe a chance to respond, the circumstances were far from ideal. The lack of investigation is indicated by the identification of Mr Erihe's brother as his dependent. It is hard to see that ARL can have genuinely considered the explanation when Mr Dobbs proceeded straight away to dismiss Mr Erihe over the phone.

[44] In addition, the employment agreement required a day's notice to be given in writing.³ Mr Erihe did not receive written notice. The employment agreement was breached.

[45] I conclude that ARL did not act as a fair and reasonable employer could have done. Mr Erihe was unjustifiably dismissed.

Remedies

[46] Mr Erihe seeks lost wages. He regards 29 working days as a reasonable sum. That amounts to 5.8 weeks. The claim is based on his specified normal hours at \$25 an hour making a daily rate of \$225. Twenty nine days at \$225 a day equates to \$6,525.

[47] Under s 128(2) of the Act I must order ARL to pay Mr Erihe the lesser of a sum equal to the remuneration which he lost or to three months' ordinary time remuneration.

[48] It took Mr Erihe some time to get another job. As he points out, it was a difficult time of the year to contact employers, being very shortly after Christmas.

³ Employment agreement, third page (no pages or clause numbers). This is the page Mr Erihe acknowledges he signed.

[49] I have considered whether Mr Erihe could be seen to have contributed to the situation giving rise to his dismissal.

[50] It is hard to criticise Mr Erihe for assisting his family. I do not see his completion of the application question as blameworthy. No reduction is made for contribution.

[51] ARL is ordered to pay Mr Erihe within 21 days of the date of this determination, the sum of \$6,525.00 gross as lost wages.

Costs

[52] Mr Erihe's representative was a family member and not a paid advocate so I make no order for the costs of representation. Mr Erihe did however have to pay the Authority's filing fee. As he has been successful in his claim I order ARL to pay Mr Erihe \$71.56 for the filing fee within 21 days of the date of this determination.

Nicola Craig
Member of the Employment Relations Authority