



**Employment relationship problem**

[2] Mr Fulton was party to an individual employment agreement with Canstaff dated 23 January 2009. Canstaff is a personnel company that provides employees on a temporary basis to work on assignments for clients. Mr Fulton was interviewed for the position with Canstaff by Andrew McDonald who is a recruitment consultant with Canstaff. Mr McDonald specialises in seasonal work and temporary placements.

[3] Mr Fulton accepted an assignment from Canstaff with Heinz Seed Cleaning from mid January 2009 until on or about 3 April 2009. He says that during that time he was given short notice of less than hour that he should not attend work one day during the week ending 5 April 2009. Mr Fulton did not receive pay for that day but he requested, and was paid, a portion of his holiday pay. Clause 12 of the employment agreement provided that holiday pay entitlement could be paid either at the end of each assignment with the final pay relating to that assignment less any holidays taken in advance, or, as an 8% component of each payment of wages.

[4] At the conclusion of the Heinz Seed Cleaning assignment Mr Fulton then accepted another assignment that commenced on 6 April 2009 with Talleys Ashburton (Talleys) as a potato grader.

[5] Mr Fulton says that he was stood down at short notice from that role during the week ending 12 April 2009. As with the day that he was stood down during the assignment with Heinz Seed Cleaning he also seeks payment for that day. A claim of a third day was withdrawn in final submissions because it was clear that the day in question was a public holiday and payment had been made.

[6] Mr Fulton says that he was told that the assignment with Talleys would last 8-10 weeks but instead says he was unjustifiably dismissed from his position by Canstaff on or about 20 April 2009. Mr Fulton says that the issue started when a supervisor at Talleys spoke inappropriately to him and as required under his employment agreement he advised Canstaff of this. He says that after he did this there was no proper investigation and when he inquired as to whether he was returning to Talleys he was advised by Mr McDonald that he had been replaced by someone else and was not given any further assignments.

[7] Mr Fulton has assessed on the basis that his assignment with Talleys would have lasted for a further eight weeks that he has lost wages of \$1,821.01 gross. He

has reached this figure after deducting what he received from new employment and an unemployment benefit for two weeks. Mr Fulton also says that he should receive two days pay for the days he was stood down at short notice.

[8] Mr Fulton also seeks compensation of \$15,000 and costs and \$1,000 damage because he says he was required to sell a van quickly because of his financial situation and received \$1,000 less than he would have had he sold it within the usual time.

[9] Canstaff do not accept that there was an unjustifiable dismissal or that there was any money owing to Mr Fulton for the two days he was stood down from each assignment. It says that Mr Fulton indicated that because of the way he had been treated at Talleys he would never return to Talleys and that by doing so he effectively resigned from his position and should receive no remedies.

### **The issues**

[10] The issues for the Authority are as follows:

- How did Mr Fulton come to cease working on an assignment with Talleys?
- Was there a dismissal or did Mr Fulton resign from his employment?
- If there was a dismissal then was it unjustified in terms of the test in s.103A of the Employment Relations Act 2000?
- What remedies is Mr Fulton entitled to and are there issues of contribution;
- Is Mr Fulton owed any money in terms of the two days that he was stood down when working on his assignments.

### ***How did Mr Fulton come to cease working on the assignment with Talleys?***

[11] Before the assignment commenced at Talleys Mr MacDonald said that he advised Mr Fulton that the assignment would last between 6-8 weeks. Mr Fulton says that he was told 8-10 weeks on the basis that there was a possibility of two more sheds being erected.

[12] The evidence was that the temporary workers placed by Canstaff at Talleys were there until early June. For present purposes therefore I accept that had Mr Fulton continued to work at Talleys then it would have been for a period in total of 8 weeks of which he worked two weeks.

[13] Mr Fulton said in his evidence that he was not advised that the work at Talleys was on a day-to-day basis and would be weather dependent. Mr Fulton said that he expected to work during the period of the assignment on a full time basis from Monday to Friday for 10 hours each day.

[14] Mr McDonald was familiar with Talleys' requirements and the effect bad weather had on digging potatoes that in turn impacted on grading work. In those circumstances I consider it less likely there was no discussion about weather as an issue in terms of potato grading. I find it less likely that the assignment was discussed as being day-to-day and more likely in terms of a duration of about 8 weeks.

[15] Mr Fulton was to commence the assignment with Talleys on 6 April 2009. One of his children was unwell during the night with a stomach upset and he was unable to telephone Canstaff before he was due to commence work with Talleys at 6am. Mr Fulton's employment agreement required him to let Canstaff know if he was unable to attend work on any particular day to enable arrangements to be made for a replacement. As it transpired Canstaff was advised by Talleys that they were a person short (Mr Fulton) and Canstaff then contacted Mr Fulton to establish whether he was to attend that day. Mr Fulton's recollection was that Canstaff had no particular difficulty at that stage and it was arranged that he would commence work on 7 April 2009.

[16] Mr Fulton started his assignment at Talleys on 7 April 2009. He was late because he said he had difficulty finding his way around and he said that he apologised. Canstaff produced a witness who said that Mr Fulton did not apologise but I do not consider resolving that dispute is necessary for the purposes of what I am asked to determine.

[17] Mr Fulton was not impressed with the work at Talleys and on his first day at work he telephoned Canstaff to see if there was anything else available. Nothing else was available and Mr Fulton continued on with his work at Talleys until Friday 17 April 2009 which was his last day.

[18] On 17 April 2009 Mr Fulton was sorting potatoes when one of Talleys supervisors, Simon Binnie came up to him and commented in what Mr Fulton said was a negative way on what he was doing. Mr Fulton said that he advised Mr Binnie he was doing the best he could and then Mr Binnie then said words to the effect *are you fucking blind? If you don't want to work here you can fuck off.*

[19] Mr Binnie was telephoned during the Authority's investigation meeting and whilst he denied saying words about *are you fucking blind* he accepted he said *if you don't want to fucking work here then you can go home.*

[20] There were other staff close by during the exchange. The evidence was that they ranged from 3 to 6 or even 7. I conclude from the evidence that it is possible that about 4 staff could possibly have heard the exchange. Mr Fulton was upset by it although he carried on working until the end of the day.

[21] There was a dispute as to whether Mr Fulton checked with Helen Kirdy, who had been responsible for allocating the area he was to work in to remind her that he would not be working Saturday because he needed to look after his children. Ms Kirdy said that he did not talk to her about not working on the Saturday and that had such a discussion taken place she would have asked Mr Fulton to talk to Mr McDonald.

[22] Canstaff were unaware it appears of the Saturday arrangement as outlined by Mr Fulton because it is common ground that Mr Fulton was questioned by Mr Jones about his absence from work on the Saturday. I conclude therefore that it was less likely Mr Fulton had such a discussion with Helen Kirdy.

[23] After concluding work on 17 April Mr Fulton telephoned Mr McDonald and advised him about the exchange with Mr Binnie and that he had found it upsetting and unacceptable.

[24] Mr Fulton's employment agreement provides in clause 5 with respect to difficulty in assignments:

5.1 *I will contact the company immediately for assistance if I have difficulty in an assignment.*

[25] Mr McDonald I find was appropriately concerned about the situation and undertook to talk to the Managing Director of Canstaff, Matthew Jones about it.

[26] Mr Fulton did not hear anything over the weekend. Mr McDonald said that it was reported back to him from Talleys that Mr Fulton had not been at work on Saturday although he was rostered to attend. He decided to leave that matter for Mr Jones to talk to Mr Fulton about.

[27] I was provided with a certified transcript of text messages from Mr Fulton's cell phone that I accept as true and accurate.

[28] The first communication after 17 April 2009 occurred about 5.30pm on Sunday 19 April 2009 when Mr Fulton sent a text advising Mr MacDonald that he would not be at work on Monday 20 April 2009 as he was going to the Labour Department and laying a complaint. The text message said that it was not good enough being abused at work. Mr McDonald sent a text by return to Mr Fulton acknowledging his text and advising that he would be in touch the following day.

[29] There was a conflict in the evidence about the telephone calls that took place on Monday 20 April 2009. The first conflict is whether or not Mr Fulton telephoned Mr MacDonald early on in the morning of 20 April 2009.

[30] Mr McDonald said that Mr Fulton did and asked if he had spoken to Mr Jones yet. At that stage Mr McDonald had not done so. Mr McDonald said he recalled Mr Fulton saying *he did not think he wanted to return to Talleys anyway*. Given that Mr Fulton accepted, at least the possibility, that he may have telephoned Mr McDonald in the morning of 20 April then I conclude that it is more likely than not there was such a call. Mr Fulton said that if there was such a call in the morning that *he did not think he said that he did not want to return to the Talleys assignment*. I accept that there could have been some confusion on the part of Mr McDonald at that stage about Mr Fulton's intentions in terms of the Talleys assignment.

[31] Mr McDonald and Mr Jones then had a discussion. Mr Jones said that this involved Mr McDonald running through the work history of Mr Fulton and I find on the basis of Mr McDonald's evidence that he advised Mr Jones that Mr Fulton *had indicated/wanted to look for alternative work*.

[32] Mr Jones advised Mr McDonald that he would telephone Mr Binnie at Talleys and then talk to Mr Fulton.

[33] I find it likely that between that discussion and when Mr Jones telephoned Mr Fulton, Mr McDonald attempted to and did find a replacement for Mr Fulton at Talleys.

[34] Mr Binnie advised over the telephone the nature of his discussion with Mr Jones. There was discussion about the incident involving Mr Fulton. Mr Binnie raised concerns that he had about Mr Fulton's attitude to work. Mr Jones went over how he felt Mr Binnie should have dealt with the matter and I accept that Mr Binnie was then asked by Mr Jones whether he was prepared to have Mr Fulton back. Mr Binnie responded that he could have him back provided Mr Fulton wanted to be there and do the work.

[35] Interestingly Mr Jones could not recall asking Mr Binnie whether he was prepared to have Mr Fulton back. I have accepted however that this was likely.

[36] The significant dispute in this case was about what occurred from this point. It is common ground that later in the day of 20 April 2009 about 5pm or possibly a little earlier, Mr Jones telephoned Mr Fulton. In attempting to resolve some of the disputes I have also placed reliance on subsequent text exchanges between Mr Fulton and Mr McDonald later that same day. The reason for doing so will be apparent.

[37] In relation to the telephone call to Mr Fulton, Mr Jones produced some notes that he said were expanded from an original note of the telephone call that was bullet pointed and made at the time. The original note was never produced because it was apparently unavailable and the expanded note was not provided until the investigation meeting. I have placed little weight on the note preferring the text messages.

[38] Mr Jones says that he called Mr Fulton between 4.30pm and 5pm. He advised him that he had spoken to Mr Binnie and that Mr Binnie had complained about Mr Fulton's work. Mr Jones said that Mr Fulton clearly advised him that he did not want to return to Talleys and that when he talked about Mr Binnie's view of the exchange Mr Fulton got angry and the call was ended. There was some suggestion that it may have been terminated at the initiative of Mr Jones, although that is not really a matter that I consider I am required to resolve.

[39] Mr Fulton on the other hand puts the call more at 5pm and says that Mr Jones advised him he had spoken to Mr Binnie and had heard a different story. Mr Jones accepted that Mr Fulton had been abused, but said that from what he heard he had

deserved *all you had got and that Canstaff would not be doing anything about it*. Mr Fulton also recalled Mr Jones saying something like *my heart goes out to you*. Mr Fulton said that he was quite shocked at Mr Jones' response and after confirming that was all Mr Jones wanted to say Mr Jones then hung up on him.

[40] The main dispute I am required to resolve is whether Mr Fulton advised Mr Jones clearly about his intention with respect to returning to work at Talleys. After the discussion between Mr Jones and Mr Fulton, Mr Fulton sent a further text to Mr McDonald and asked the following: *So, am I still working at Talleys? Or have I been fired?* This text I note was sent at 5.12pm and Mr MacDonald sent a text to Mr Fulton advising *haven't fired you less you and Matt discussed it. I didn't think you wanted to work there was trying to get you something else*.

[41] In response to this Mr Fulton sent a further text asking *so what is the story then am I at Talleys or somewhere else*. Mr Fulton said that Mr McDonald then telephoned him and advised that he could not go back to Talleys as he had been replaced by someone else but that he would try to find him something else.

[42] It was at this stage that Mr Fulton says he understood he would not be returning and considered the replacement of him in terms of his position amounted to his dismissal.

[43] It would have been most unlikely in my view the text exchanges to Mr McDonald would have been worded the way they were had Mr Fulton advised Mr Jones that he did not intend to return to Talleys. The text messages in my view support that Mr Fulton was unclear as to whether he was able to return to Talleys or not. On the basis of the text messages sent I prefer Mr Fulton's evidence as being inherently more likely than Mr Jones as to the nature of the telephone exchange between them.

[44] On 22 April 2009 Mr Fulton instructed his solicitor to raise a personal grievance with Canstaff which was duly done by letter of the same date. It does not appear that that letter was responded to until 18 May when Canstaff advised that Mr Fulton had never been dismissed and remained on its records and that they would continue to look for a new assignment that was suitable.

***Was there a dismissal or did Mr Fulton resign from his employment?***

[45] I find that after Mr Fulton's discussion with Mr Jones he remained unclear as to the assignment with Talleys. That is apparent from the text exchanges between Mr Fulton and Mr McDonald. I accept that Mr McDonald may well have replaced Mr Fulton based on a misunderstanding, but then having received the text messages and the letter from Mr Martin dated 22 April 2009 there should have been further discussions about Mr Fulton returning to Talleys at a later date. I find that Mr Fulton had not clearly indicated that he did not want to work at Talleys and that the advice that he was replaced in the absence of any suggestion that he could return, even at a later date, was a dismissal. For completeness there was no other assignment offered to Mr Fulton to replace the Talleys assignment.

***If there was a dismissal, then was it unjustified?***

[46] I am not satisfied that there were grounds to justify the dismissal of Mr Fulton. Talleys were prepared to have him back and even if there was confusion on the part of Mr McDonald about Mr Fulton's intentions, he should have sought clarification from Mr Fulton. This may have meant that Mr Fulton would have had to wait a day or so before he could return to Talleys. A fair and reasonable employer would have met and talked to Mr Fulton about whether he wanted to return to Talleys

[47] I find that Mr Fulton was unjustifiably dismissed by Canstaff from his assignment with Talleys Ashburton because of the actions of Canstaff were not what a fair and reasonable employer would have done in all the circumstances..

**Remedies*****Contribution***

[48] Mr McDonald or Mr Jones could have met with Mr Fulton after 20 April 2009 and clarified whether he wished to return to Talleys or not. This employment problem could then have been resolved and this claim avoided altogether. After the text exchanges on 20 April 2009 and Mr Martin's letter of 22 April 2009 raising a personal grievance there was an opportunity for Canstaff to resolve the situation and to give Mr Fulton the opportunity to return to Talleys.

[49] On that basis therefore I am not satisfied that Mr Fulton contributed to the personal grievance that I have found in a blameworthy way.

*Lost wages*

[50] The lost wages claimed were calculated on an assumption that the Talleys assignment would have lasted from 6 April until 12 June 2009, being a period of 10 weeks and on the basis that the benefit received was deductible. I have already referred in this determination to evidence that in fact the assignment ended in late May/early June at eight weeks, therefore any loss is limited to that timeframe of which Mr Fulton had worked two weeks.

[51] Mr Fulton has also calculated his lost wages on the basis of 50 hours per week but Canstaff say that because of poor weather during that period the working weeks only averaged about three days per week. There was no independent evidence to verify that. In light of the above in any event some recalculation is called for.

[52] I want to start with the deduction of the benefit received by Mr Fulton. I am not satisfied that it is appropriate to deduct the benefit from the assessment of lost wages. Any repayment of the benefit is a matter between Mr Fulton and Work and Income New Zealand – *James & Co Ltd v Hughes* [1995] 2 ERNZ 432. There will also need to be a recalculation of Mr Fulton's earnings to reflect the six week period rather than the eight weeks. .

[53] Mr Jones says that the weather was such that Mr Fulton, if indeed he had stayed at Talleys, would not have worked for 50 hours per week for the full six week period.

[54] Mr Jones is to provide to Mr Martin within 10 days of the date of this determination some independent evidence to support the hours that Mr Fulton could have worked for the weeks during that period. The parties are to attempt to reach agreement on lost wages for a six week period deducting earnings but not the benefit received. It is appropriate that the 8% be added to the final figure. If agreement is not reached, leave is reserved for either party to return to the Authority.

### ***Compensation***

[55] Mr Fulton has claimed the sum of \$15,000 under this head. The evidence in support of that was in the main about his financial situation which he described as very difficult, being the main earner for his family of five children. Matters were further exacerbated because Canstaff put on the necessary WINZ documentation that Mr Fulton had told them that the work was unsuitable and had decided not to go to work.

[56] In all the circumstances however I am not satisfied that an award of the size claimed is justified. Mr Fulton was able to obtain other employment within a reasonably quick time. In all the circumstances I am of the view that a suitable award for compensation is \$3,000.

[57] I order Canstaff Limited and/or Canstaff Ashburton Limited to pay to Gregory Fulton the sum of \$3,000 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

### ***Damages***

[58] I am not minded to make any order in terms of the van. I consider any loss too remote. Under questioning it appeared that the van was sold after Mr Fulton obtained another position.

### ***Is Mr Fulton owed any money in terms of the two days that he was stood down?***

[59] The argument on behalf of Mr Fulton in terms of these two days was that both assignments continued for a period of weeks and there was no term in the agreement that gave Canstaff the right to not pay Mr Fulton for the days worked. Mr Martin also relied on the Holidays Act 2003 and the closedown period referred to in the Holidays Act 2003 in terms of the absence of any notice.

[60] I find that although it no doubt disadvantaged Mr Fulton to be deprived of two days work at short notice, the situation was governed by clause 11.1 of his employment agreement in terms of payment:

*Clause 11.1 I agree that my wages shall be based solely on the hours worked on each Assignment. I am not entitled to remuneration when not working on an Assignment provided by the Company.*

[61] Mr Fulton wages were solely based therefore on hours worked. If he was not working on an assignment then he was not entitled to payment. I am not satisfied that the provisions in the Holidays Act 2003 assist him in this matter. I make no award of payment therefore in terms of the two days claimed.

### *Costs*

[62] I reserve the issue of costs. Mr Martin has until 15 July 2010 to lodge and serve submissions as to costs and Mr Jones and Mr Marchant until 29 July 2010.

### *Summary of findings and awards made*

- I have found that Mr Fulton was unjustifiably dismissed from his employment.
- I have found that lost wages are to be assessed on the basis of six weeks. The parties are to attempt to reach agreement on the loss if any on the basis that the benefit is not to be deducted and that within ten days of this determination Mr Jones is to provide independent verification of days/hours available to Mr Fulton had he continued to work at Talleys over the six week period. I have reserved leave for either party to return to the Authority if agreement is not reached.
- I have ordered Canstaff to pay \$3000 compensation under s.123 (1) (c)( i) of the Employment Relations Act 2000.
- I have not made any award in terms of damages for the sale of the van.
- I have not made any award in terms of the two days Mr Fulton was stood down.
- I have reserved the issue of costs and timetabled for an exchange of submissions.

Helen Doyle  
Member of the Employment Relations Authority