New Zealand Employment Relations Authority Decisions

Hebert v Avalon Industrial Services Limited [2011] NZERA 21; [2011] NZERA Auckland 19 (17 January 2011)

Last Updated: 4 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 19 5307649

BETWEEN

AND

DOUGLAS HEBERT Applicant

AVALON INDUSTRIAL SERVICES LIMITED
Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

Vicki Campbell

David Vinnicomb for Applicant John Brosnan for Respondent

19 November 2010

26 November 2010 from Applicant 25 November 2010 from Respondent

Determination:

17 January 2011

DETERMINATION OF THE AUTHORITY

A Douglas Hebert has a personal grievance arising from his unjustifiable dismissal from his employment with Avalon Industrial Services Limited (AISL)

B AISL is ordered to pay the following remedies to Mr Hebert: i) the sum of $2,304.00 gross pursuant to s 123(1)(b); and

(ii) $2,000.00 pursuant to s 123(1)(c)(i).

[1] Mr Douglas Hebert commenced employment as a Rope Access Worker with Avalon Industrial Services Limited (AISL) on 8 March 2010. His employment was subject to a written fixed term employment agreement which had an end date of 1 July 2010.

[2] On 30 April Mr Hebert's employment ended on the basis that his employment had been frustrated by a client of AISL banning Mr Hebert from all its work sites. Mr Hebert challenges the way his employment ended which he says was an unjustified dismissal. AISL denies the claims.

Relevant terms of employment

[3] Mr Hebert's employment was subject to a written employment agreement which he signed before commencing work.

[4] Clause 5 of the written agreement specifies that the nature of the relationship is fixed term with variable hours. The term

is stated as being 8 March 2010 to 1 July

2010 or:

".. .until Avalon's temporarily increased workload (primarily due to Vector Foiltec Limited contracts) (Vector) decreases to the point where the employees services are no longer required."

[5] The reason for the fixed term agreement is stated as being due to AISL having a temporarily increased workload. There is no challenge to the nature of the employment relationship being of a temporary nature.

[6] Clause 6 of the employment agreement sets out an agreement that Mr Hebert's employment would be subject to a 90 day trial period during which his employment could be terminated on notice if he does not perform the role up to standard, and with an acknowledgement that in those circumstances Mr Hebert could not take a personal grievance.

[7] Clause 18 of the agreement allows for termination of employment on the giving of one week's notice where Mr Hebert's performance is unsatisfactory or if he breaches any terms of the agreement or neglect's his duties.

The dismissal

[8] Mr Hebert is a specialist rigger. He specializes in rigging work at a significant height above ground and specializes in abseil work.

[9] Mr Hebert undertook his work for AISL at two work sites. Initially in March he worked at Waitomo and was then moved to Eden Park, Auckland. Mr Hebert's move to Eden Park site came about because AISL needed additional help in Auckland.

[10] AISL was a sub-contracting firm to Vector. Vector was the lead contractor on the work site and as such had control over the work and the performance of those on site.

[11] On 30 April 2010 at about 8.30am Mr Steve Thomas, the Operations Manager, says he received a phone call from Mr Lee West, Construction Manager for Vector, advising AISL that Mr Hebert was to be removed from its work-sites due to Mr Hebert's disruptive behaviour.

[12] Mr Thomas says he rang Mr Hebert and asked him to come straight to the office for a meeting. Mr Hebert agrees that he was asked to go to the office but not until about midday. I am satisfied from the evidence that Mr Hebert's evidence in this regard is correct. Mr Neil McHugh, a director of AISL told the Authority that Mr Thomas came to him soon after 8.30am to discuss the call from Mr West. Mr McHugh contacted the HR adviser in his accountant's office and forwarded a copy of Mr Hebert's employment agreement.

[13] Mr McHugh discussed the situation with his adviser and was informed about the doctrine of frustration and was advised that the circumstances facing AISL was such a situation. After discussing the appropriate course of action Mr McHugh and Mr Thomas agreed that Mr Thomas would contact Mr Hebert and request him to come into the office.

[14] Mr Hebert attended AISL's offices as required and was immediately informed of the decision that his employment had been frustrated as a result of him being banned from the Vector sites and because of that AISL no longer had any work it could offer him.

Frustration

[15] AISL claims Mr Hebert was not dismissed but rather his contract was frustrated by the actions of Vector on 30 April 2010. The doctrine of frustration has been heldby the Court of Appeal to apply to employment agreements[1]. The effect of frustration is to kill the contract and discharge the parties from further liability under it and is not to be lightly invoked.[2] In *Karelrybflot* the Court stated:

Whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree, but it seems to us that, in view of the nature of the contract of employment, the doctrine will not easily be able to be invoked by an employer because of the drastic effects which it would have on the rights of vulnerable employees.

[16] In the most recent Court of Appeal decision on the application of the doctrine of frustration, the Court was asked to consider whether allegations of a sexual nature, made by the son of the employer against a worker who lived and worked in close proximity to the employer altered the employment of the worker and made it so radically different from the original undertaking as to frustrate the contract.[3]

[17] The Court found that it was possible to envisage a range of situations where some form of serious wrongdoing is alleged which will leave one or both of the parties in distress and/or create a rift between the parties.[4]

[18] The Court also held:

.it is only if the employment contract did not make sufficient provision for what occurred that the doctrine of frustration will

apply.[4]

[19] The Court found the decision that the contract could not be continued was made prematurely and in the absence of any statutory processes for dismissal.[5]

[20] AISL's reliance on the doctrine of frustration was hasty and ill-advised. The parties had a written employment agreement which made sufficient provision for the circumstances that arose on 30 April 2010.

[21] The Employment Agreement contained at least two provisions which enabled AISL to consider Mr Hebert's performance and/or conduct and take steps to terminate it. Firstly there is the 90 day trial clause and secondly the termination clause. Had AISL chosen to rely on the 90 day trial clause, it is possible Mr Hebert may have been prevented from taking a personal grievance.

[22] At the investigation meeting AISL was unable to tell me what the misconduct was that got Mr Hebert banned from the Vector sites. At the time AISL dismissed Mr Hebert all AISL knew was that Mr Hebert had been "disruptive". AISL did not enquire of Vector, as to what specifically Mr Hebert had done, and neither did Vector disclose this information. The Authority has received no satisfactory answer as to why this enquiry was not undertaken before AISL decided to terminate Mr Hebert's employment.

[23] Because of the reliance on frustration, there was a complete absence of any notion of procedural fairness with respect to the termination of Mr Hebert's employment. He was not informed, before the meeting, what the meeting was to discuss, or what the possible consequences could be. While the parties did discuss the reason for the termination of Mr Hebert's employment as being frustration that was not enough. What was required was an investigation by AISL into the reasons why Vector did not want Mr Hebert on its site and a full opportunity for Mr Hebert to provide an explanation to the information gained through that investigation.

[24] Standing back and considering the actions of AISL and how it acted, I find AISL has failed to act as a fair and reasonable employer would have acted in all the circumstances of this case.

[25] Mr Hebert has been unjustifiably dismissed.

[26] For the sake of completeness I have considered whether the 90 day trial clause should be invoked to prevent Mr Hebert from receiving any remedies. However, AISL did not rely on the 90 day provision of the employment agreement when ending Mr Hebert's employment, and there has been no argument from AISL that Mr Hebert was prohibited from raising a personal grievance. I have, therefore, concluded that Mr Hebert is not restricted in being awarded remedies and I have set these out below.

Remedies

Lost wages
[27] Mr Hebert found alternative employment which he commenced on 5 May 2010 and after a short period was promoted to Foreman. Mr Hebert says he was paid less in his new job than he was when employed by AISL. Mr Hebert seeks lost wages from 30 April 2010 until the end of the fixed-term contract based on his actual loss.

[28] Despite requesting it, I have received no supporting evidence from Mr Hebert as to the difference in his pay from AISL and that which he received from his new employer starting on 5 May 2010. On that basis, I am inclined to award Mr Hebert the one week's wages he lost following the termination of his employment plus one weeks wages in lieu of notice.

Avalon Industrial Services Limited is ordered to pay to Mr Hebert the sum of $2304.00 gross pursuant to section 123(1)(b) of the Employment Relations Act within 28 days of the date of this determination.

Compensation
[29] In his statement of problem Mr Hebert sought the sum of $10,000 under this heading. However, in his witness statement, which he confirmed under oath at the investigation meeting, Mr Hebert asks the Authority to award him $6,000 by way of compensation.

[30] Mr Hebert's evidence to support his claim for a monetary award is remarkable for its paucity. The Authority accepts that the manner of his dismissal would have left Mr Hebert in some distress, however, with a lack of evidence on the point I am inclined to award an amount at the lower end of the scale. Further, Mr Hebert was gainfully employed in a new position within a week of his dismissal and in which he appears to be successful, given his rapid promotion to the role of Foreman.

Avalon Industrial Services Limited is ordered to pay to Mr Hebert the sum of $2,000.00 gross pursuant to section 123(1)(c)(i) of the Employment Relations Act within 28 days of the date of this determination.

Contribtuion
[31] I have considered the matter of contribution as I am required to do under s 124 of the Act. Given the lack of evidence as

to any wrong doing by Mr Hebert, it is difficult for the Authority to reasonably establish any conduct on the part of Mr Hebert which contributed to his dismissal. In that case, no reduction to the remedies will be made.

Costs

[32] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Mr Hebert may lodge and serve a memorandum as to costs within 28 days of the date of this determination. AISL will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[33] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around $3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case, which my file notes record, took less than half a day.

Vicki Campbell

Member of Employment Relations Authority

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[1] *Karelrybflot AO v Udovenko* [1999] NZCA 331; [2000] 2 NZLR 24.
[2] *JLauritzen AS v Wijsmuller BV* [1990] 1 as cited in *Karelrybflot* at [33].
[3] *A Worker v A Farmer* [2010] NZCA 547.
5[4] At [23].
[4] At [21] and also cited *Turner v Goldsmith* [1891] UKLawRpKQB 12; [1891] 1 QB 544 at 550 per Lindley LJ.
[5] At [24] and [25].
