

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 193
3133019

BETWEEN STEVE HOEBERGEN
Applicant

AND AMLINE FREIGHTERS
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Mike Harrison, advocate for the Applicant
Mark Beech, counsel for the Respondent

Investigation Meeting: 3 November 2022

Further information and 21 December 2022 from Applicant
submissions received: 14 November 2022 and 18 January 2023 from the
Respondent

Determination: 19 April 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Hoebergen was employed by Amline Freighters Limited (AFL) as a truck driver from November 2017 until 15 April 2020 when he says he was dismissed. He says his dismissal was unjustified for which he seeks remedies of reimbursement of lost wages and compensatory damages and a contribution to the costs of representation he has incurred. He also says a penalty for breach of good faith is warranted.

[2] AFL says Mr Hoebergen was not dismissed. It says he was a casual relief driver employed on an 'as required' basis and that it did not require his services after 15 April 2020.

The Authority's investigation

[3] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Hoebergen and Miles Roberson, a director of AFL who was involved with Mr Hoebergen's employment. A witness statement filed for a former co-worker of Mr Hoebergen's was withdrawn at the investigation meeting.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and their submissions.

Issues

[5] The issues identified for investigation and determination are:

- i. Was Mr Hoebergen a casual or permanent employee?
- ii. Was Mr Hoebergen unjustifiably dismissed by AFL on or about 15 April 2022?
- iii. If so, is Mr Hoebergen entitled to a consideration of remedies sought including:
 - a. Lost wages (13 weeks totalling \$12,220 (gross)) under s 123(1)(b) of the Act;
 - b. Compensation of \$10,000 under s 123(1)(c)(i) of the Act;
- iv. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Hoebergen which contributed to the circumstances which gave rise to his grievance?
- v. Has AFL breached s 4 duty of good faith?
- vi. If so, should a penalty be awarded any portion of which to Mr Hoebergen?
and
- vii. Is either party entitled to an award of costs?

Discussion

Was Mr Hoebergen a casual or permanent employee?

[6] In assessing whether Mr Hoebergen was a casual or permanent employee the real nature of the relationship between the parties needs to be examined. In *Jinkinson v Oceana Gold (NZ) Ltd*, the Court held “if the result of the inquiry is that the nature of the relationship is at odds with the label given to it by the parties, substance should prevail over form”.¹ The law also recognises the true nature of an employment relationship can change over time.²

[7] There is no statutory classification that distinguishes a casual employee from a permanent employer. A key element of casual employment is that each period of work is a separate and distinct employment.

[8] In assessing whether a period of work is a separate engagement or part of an ongoing relationship, the law looks at the conduct of the parties. Relevant to this application, the following factors are to be examined:

- the nature of the work performed by Mr Hoebergen and whether or not the work was integral to the business;³
- whether Mr Hoebergen’s work pattern was intermittent and unpredictable or consistent and regular;⁴
- whether the parties’ conduct gave rise to legitimate mutual expectations that further work will be provided and accepted;⁵

[9] AFL operates a truck driving business. The work Mr Hoebergen performed for AFL was truck driving and is fundamental to the operation of the business. This work was foreseeable and this is a factor that lends itself to a conclusion that his employment was permanent.

[10] It is accepted that when Mr Hoebergen started employment with AFL he was a casual employee working on an intermittent basis. This is what the first written

¹ *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [37].

² *Barnes v Whangarei RSA (Inc)* [1998] ERNZ 626, pp 636-637.

³ n1 at [66].

⁴ n2 at pp 636-637.

⁵ n1 at [52].

employment agreement stated and that this was the true nature of the relationship at that time is supported by the several pay records provided for the first few months of his employment which show he did not have set days or hours of work.

[11] However, during the course of his employment the nature of the relationship appears to have changed from casual to permanent as suggested by the following:

- Mr Hoebergen's holiday pay changed from being paid as an 8% loading to accrual of that entitlement;
- he took periods of annual and sick leave for which he was paid;
- he was paid for public holidays when he did not work those days;
- pay slips show that from at least 26 November 2018 until his employment ended he worked hours ranging 35 to 60 per week and usually worked in blocks of at least five successive days;
- the timesheet hours assessment record (the timesheet record) shows Mr Hoebergen worked consistently and regularly;
- he attended external training at AFL's direction and cost;
- he was notified of and allocated work tasks by the same method used for all other drivers; and
- his work pattern appears to have seamlessly accommodated periods of leave including to go whitebating.

[12] AFL says too much should not be made of these matters including the leave payment method shifted to assist Mr Hoebergen, it wishes to assist all its staff with training, he took leave when he wished which was accommodated by AFL and, significantly, it tried to enter a permanent employment agreement with Mr Hoebergen which he rejected. The Authority understands AFL's core concern to be that Mr Hoebergen has knowingly sought and enjoyed flexibility in his employment, this has been accommodated by AFL and it is not fair or reasonable or a true reflection of the parties' relationship for him to now assert permanent employment status.

[13] The evidence before the Authority suggests it is difficult to recruit experienced truck drivers and in this context AFL has sought to accommodate driver preferences, including those of Mr Hoebergen. This is demonstrated by the succession of employment agreements AFL provided to Mr Hoebergen. He was first employed under

a casual employment agreement. He was then offered a permanent employment agreement which he did not accept. Then, in April 2019 the parties executed another casual employment agreement which included features of permanent employment such as holiday pay accrual, sick and bereavement leave, payment of and lieu time for public holidays and a requirement to provide two weeks' notice of resignation. Mr Hoebergen's reliance on the permanent written employment agreement is not accepted. He did not accept it and he executed the next written employment agreement AFL offered him.

[14] AFL's ability to accommodate a more flexible approach to Mr Hoebergen's wish to take time off appears to have ended with the challenges presented by the COVID-19 situation, when, in Mr Roberson's words AFL required its drivers to "step up". This apparent change in approach does not vitiate how the relationship had developed between the parties which, I am satisfied was one characterised by a consistent and regular work pattern and mutuality of obligation, discussed as follows.

[15] AFL suggests there was no obligation on Mr Hoebergen to accept offers of employment. This is not consistent with the methodology of scheduling which confirmed which drivers were doing what and did not require confirmation. There is no dispute work was distributed the day before the work became available by way of group text message from the operations manager to the drivers. This message often followed an earlier discussion with the operations manager. Mr Hoebergen was included in these messages and discussions and there is no indication on the face of the messages of a distinction on the basis of relief work or otherwise. Similarly, the whitebaiting arrangement indicates the parties' mutual obligations concerning ongoing employment. AFL knew Mr Hoebergen would take time off for whitebaiting and the timesheet record shows he seamlessly resumed work following these periods of leave. There were mutual obligations amongst the parties.

[16] For these reasons when Mr Hoebergen's employment ended he was a permanent nature. He was not a casual employee.

Was Mr Hoebergen's dismissal justified?

[17] The events leading up to Mr Hoebergen's employment with AFL ending occurred at the start of the COVID-19 response period. Unfortunately, neither Mr Hoebergen nor Mr Roberson have retained a copy of the text messages they exchanged or been able to produce a log of their calls to each other over this period. Given the time that has passed since these events their respective recollections are not precise. In making findings as to what occurred particular weight has been placed on the aspects of the evidence not in dispute and the pay slips which record the last wages and final holiday pay.

[18] On 19 March 2020 while at work Mr Hoebergen experienced cold like symptoms. He told the operations manager he was not feeling well and she sent him home. When he got home, he called a COVID-19 helpline and was told to isolate at home and not attend work or a doctor. He called the operations manager that day and advised he was isolating. Over the weekend Mr Roberson who was in Australia sent Mr Hoebergen a text message to the effect that if he was not at work on Monday 23 March he would be dismissed. Mr Hoebergen did not attend work on the Monday because he was isolating as directed. On Tuesday he did not receive his pay as expected and sought to follow this up with AFL. He exchanged text messages with Mr Roberson and this exchange became tense. He was paid later that week, and received a final holiday pay on 31 March.

[19] In respect of these communications Mr Roberson in his evidence to the Authority said he knew Mr Hoebergen wanted to meet with the operations manager to sort out his pay and he (Mr Roberson) probably would have met with him (Mr Hoebergen) but felt it was fairer to tell him they did not need him anymore so he would not have to wait to be offered work by AFL and could get another job. He also said he was concerned about Mr Hoebergen's reliability and, as stated above, he needed his staff to 'step up' to face the challenges of the COVID-19 environment. In addition, Mr Roberson had concerns about business decline and how that might effect his ability to employ staff.

[20] There was no further communication between the parties until 15 April when AFL, through counsel wrote to Mr Hoebergen confirming no further work would be

offered to him under the terms of his casual employment agreement because there was no casual work available.

[21] Mr Hoebergen said he could “sense” he had been dismissed on 21 March by Mr Roberson’s text, that the 15 April letter was “the formal part” but he had expected to meet with Mr Roberson to talk matters through. The 15 April letter was confirmation of his apprehension. The employment ended on this date. While the date of final holiday pay may indicate the end of the employment relationship, because the parties have not been able to recall in detail all their communications around this time, it is possible there are reasons the payment was made which do not indicate the employment relationship ended then.

[22] Whether a dismissal is justifiable is determined by the Authority inquiring into the employer’s actions, both as to whether there were reasonable grounds for the dismissal and whether the process taken to reach that decision was fair (including whether minimum standards of procedural fairness as set out at s 103A(3) of the Act were met). The Authority is required to objectively assess whether those actions were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.⁶ The Authority must also assess whether the employer’s actions were those of a fair and reasonable employer acting in compliance with the good faith obligations set out in s 4 of the Act.⁷

[23] Mr Hoebergen was a permanent employee and his employment was ongoing. He was entitled to have his employer put its concerns to him and to be provided a fair opportunity to respond and have any response fairly considered. In addition, the concerns had to be well founded. Because AFL did not put its concerns fairly to Mr Hoebergen, it is unable to discharge its obligations under s 103A and s 4 of the Act. Mr Hoebergen’s dismissal was unjustified.

Remedies

[24] Mr Hoebergen has established a personal grievance for unjustified dismissal. He is entitled to a consideration of the remedies sought.

⁶ Employment Relations Act 2000, section 103A.

⁷ Employment Relations Act 2000, section 4.

Reimbursement

[25] Mr Hoebergen seeks reimbursement of 13 weeks earnings lost as a result of his dismissal pursuant to section 123(1)(b) and 128 of the Act. He has not made a claim for wage arrears.

[26] Mr Hoebergen does not appear to have looked for a new job within the reimbursement claim period. He suggests he was unable to do so because of the negative impact of his dismissal but the evidence of this and his steps taken to find alternative employment was not strong. While I accept this was the COVID-19 lockdown period which would have created some challenge to securing new employment it did not prevent Mr Hoebergen attempting to do so. On balance I find Mr Hoebergen has not made himself available for work. No remedy of lost wages is made.

Compensation for humiliation, loss of dignity and injury to feelings

[27] Mr Hoebergen said he was upset by his dismissal, that it made him feel as if he was a bad worker and came at a difficult time when the COVID-19 lockdown had been implemented.

[28] The circumstances of his personal grievance have had a negative impact on Mr Hoebergen. He is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$8,000.

If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Hoebergen that contributed to the situation giving rise to his grievance?

[29] No deduction from the remedies awarded is to be made under s 124 of the Act. The unjustifiability of Mr Hoebergen's dismissal has been established in AFL's failure to follow statutory requirements. These obligations were not Mr Hoebergen's and there is to be no deduction from the monetary remedy for reasons of contribution.

Penalty

[30] Mr Hoebergen seeks a penalty for breach of the duty of good faith. This is not a matter for which a finding of breach of good faith could be made or a penalty awarded. Mr Hoebergen has been compensated for established losses arising from his personal grievance. While communications between the parties may have been tense towards the

end of the employment relationship and AFL appears to have held concerns as to the genuineness of Mr Hoebergen's absence for sickness these matters are not of such a nature as to warrant a finding of breach of good faith. The Authority has found Mr Hoebergen's employment was not as AFL had characterised it however, it genuinely held that view. A finding of breach of good faith is not warranted.

Summary

[31] Steve Hoebergen was a permanent employee of Amline Freighters Limited.

[32] Amline Freighters Limited must pay Steve Hoebergen within 21 days of the date of determination \$8,000 under 123(1)(c)(i).

Costs

[33] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[34] If parties are unable to resolve costs between them and an Authority determination on costs is needed Mr Hoebergen may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Amline Freighters Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Marija Urlich
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.