New Zealand Employment Relations Authority Decisions

Hughes v Primogrow Ltd (Auckland) [2017] NZERA 343; [2017] NZERA Auckland 343 (7 November 2017)

Last Updated: 20 November 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY Auckland

[2017] NZERA AUCKLAND 343
3011374

BETWEEN TREVOR HUGHES Applicant

AND PRIMOGROW LTD Respondent

Member of Authority: Tania Tetitaha

Representatives: M Harrison, for Applicant

S McBeath Rudkin, for Respondent

Investigation Meeting: 3 November 2017

Oral Determination 3 November 2017 delivered:

Written Determination 7 November 2017

issued:

ORAL DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

This determination is a written record of an oral determination delivered on 3

November 2017.

A. **Trevor Hughes was a casual employee offered continuous work between October to November 2016.**

B. Trevor Hughes was unjustifiably dismissed by Primogrow Limited on

24 October 2016.

C. Primogrow Limited is ordered to pay $2,145 gross less PAYE in lost remuneration to Trevor Hughes, pursuant to s.s.123B, 124 and 128 of the Employment Relations Act 2000;

D. **Primogrow Limited is ordered to pay $1,000 in hurt and humiliation to Trevor Hughes pursuant to s.s.123C(i) and 124 of the Employment Relations Act 2000.**

E. **Primogrow Limited is ordered to pay Trevor Hughes $2,250 contribution towards his legal costs.**

Employment Relationship Problem

[1] Trevor Hughes was employed by Primogrow Limited until October 2016. He alleges he was unjustifiably dismissed by a text message. Primogrow Limited alleges that he was not. It states he was a casual employee whose period of work had ended and they had no obligation to offer him any further work.

Relevant Facts

[2] Trevor Hughes was employed by Primogrow Limited as an orchard worker in or about October 2015. Primogrow Limited is a contracting business. It offers mowing, spraying and fertilising services to horticultural businesses throughout the Bay of Plenty from Welcome Bay to Te Puke and as far as Opotiki. It also contracted out labourers to various orchards during the fruit picking season.

[3] Mr Hughes was initially employed to provide mowing services. This allowed the owner of Primogrow Limited, Matthew John Wilding-Spratt, to undertake spraying services. Later he was also assigned to picking fruit. In July/August 2016 Mr Hughes was also given the task of spraying.

[4] From the evidence the busiest season for this business is October to November. During this time Mr Hughes was in full time employment of 40 hours or more. At other times he was engaged on a weekly then daily basis.

[5] Mr Hughes received 8% holiday pay as part of his fortnightly wages as his holiday pay on a pay-as-you-go basis. There was no written agreement to pay his holiday pay in this way.

[6] It is accepted there is no written employment agreement between these parties. From both Mr Hughes and Mr Wilding Spratt's evidence there was very little (if any) discussion at the beginning of the employment relationship about the type of employment relationship between the parties. As Mr Wilding- Spratt stated in evidence, October was a busy time of year; he needed immediate backup to meet the demand from his clientele and he was too busy at that stage to properly discuss with Mr Hughes whether he was employed on a permanent or casual basis. It appears Mr Wilding-Spratt was unable to remedy that at any later stage prior to Mr Hughes termination of employment.

Termination of employment

[7] Mr Hughes worked without incident for just over a year. On Saturday 22 October

2016 he went to work as usual. Whilst there he had a conversation with the Operations Manager, John Henry Brunston. During this conversation Mr Hughes advised he needed to take the weekend off. Mr Brunston's evidence was the conversation was short and rather vague. Mr Hughes stated in his evidence he told Mr Brunston out of courtesy more than anything else.

[8] By 24 October Mr Brunston remained of the belief that Mr Hughes was coming into work. He texted Mr Hughes asking "*You coming in or what*". Mr Hughes replied that same day with "*Na m8 fat out on drag car with a m8 txt me 2 moro if I still have a job?*"

[9] On Tuesday 25 October Mr Brunston replied "*Hey sorry bro we won't be needing you back again. Unfortunately we needed more commitment especially now the pressure has increased dramatically. Thanks for all the help you've given us though.*"

[10] Mr Hughes alleges that text message unjustifiably dismissed him and filed these proceedings.

Hearing

[11] This hearing has proceeded on the basis that neither party was required to file any briefs of evidence. All evidence has been led orally or produced at hearing. This enabled the parties to accept an early date for hearing in Tauranga.

Issues

[12] The following issues were agreed for hearing t an earlier teleconference 1:

a) Was Trevor Hughes a casual employee? and

b) Was he unjustifiably dismissed on or about 25 October 2016?

Agreed Facts

[13] Both parties helpfully came to an agreement at the above telephone conference about facts that were not at issue between the parties. These agreed facts were:

(a) That Trevor Hughes was employed by Primogrow Limited;

(b) That Trevor Hughes received a payment of 8% of his gross wage as holiday pay as part of his wages on a pay-as-you-go basis;

(c) There is no written employment agreement between the parties;

(d) The text messaging between the parties leading to termination contained in Appendices C, D and E to the Statement in Reply are accepted as having been exchanged between the named persons, although there is a contest as to what they may

mean.

The Law

[14] There is no definition in the Employment Relations Act 2000 of a "casual employee" although it has long been recognised as a type of employment. The Employment Court has described casual employment in the following way:2

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. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship. ...

The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice.

[15] The Court then listed a number of indicators of permanent employment, including numbers of hours worked each week, work being allocated on a roster basis, whether there was a regular pattern of work, whether there was mutual expectation of continuity of employment, whether the employer required notice before an employee is absent or on leave, and whether the employee worked to consistent starting and finishing times. By inference the absence of those factors must imply a casual employment arrangement.

[16] Although courts have attended to endorse those principles, more recently it has been noted that cases on casual employment are of limited assistance. This is because "c*ases turn on their infinitely variable facts*3"

Casual Employment?

[17] This has been factually a perplexing case. It has aspects that both support and detract from casual employment.

[18] Facts that indicate this was not a casual employment relationship include the fluctuating number of hours worked each week, the lack of any rostered work in advance, and inconsistent starting and finishing times.

[19] Facts that indicate this could be a permanent employment relationship included the lack of a written employment agreement, the lack of discussion between the parties about Mr Hughes' status during the time he was employed, the regular pattern of work from October to November and the statements between the parties at its termination about commitment.

[20] Considering all of the evidence I have determined this was a casual employment relationship with no mutual obligations between periods of employment. However Mr Hughes had not completed the period of work he had accepted for the months of October and November.

[21] After November any subsequent employment periods and offers of work made to Mr Hughes varied. There was certain work of at least 40 hours per week between October to November. Thereafter the work was offered on a week to week basis shown by the fluctuating hours in his pay summary. From mid-January his work reduced to daily offers of work. From March to April there was no work.

[22] Both parties accepted this was a seasonal business. It is reliant upon the needs of orchardists for its services. However, Mr Hughes was offered and accepted a period of continuous employment between October until November 2016. Within that period Mr Hughes turned up regularly to work at 8.00 am unless directed to start earlier. There is no evidence the parties engaged in daily or weekly offers of work during this period. He worked

3 *Bay of Plenty District Health Board v Rahiri* [2016] NZEmpC 67 at [46].

at least 8 hours per day 5 or more days per week. He made himself available to work exclusively for PrimoGrow Limited during this period. PrimoGrow also expected him to turn up to work throughout this period of time.

[23] This was underlined by the text message Mr Hughes received on 25 October 2016 berating his lack of commitment. This showed PrimoGrow expected Mr Hughes would turn up each day, including a public holiday (Labour Day) for work.

[24] Trevor Hughes was a casual employee offered continuous work between October to

November 2016.

Was there a dismissal?

[25] The text message on 25 October 2016 terminated Mr Hughes work at PrimoGrow. Mr Hughes was partway through a period of employment. He had an expectation of ongoing work to the end of November. The text message was effectively a dismissal during the period of his employment.

Was it unjustified?

[26] Before the dismissal occurred, there was no raising of concerns, investigation or any opportunity given to Mr Hughes to be heard about concerns regarding his commitment. This is required by s.103A of the Employment Relations Act 2000 ("the Act") irrespective of whether he was a casual or permanent employee.

[27] Therefore Trevor Hughes was unjustifiably dismissed by Primogrow Limited on 25

October 2016.

Remedies

[28] The Statement of Problem seeks remedies of lost remuneration of three months, totalling $12,870 and compensation for hurt and humiliation of $10,000. It does not seek any other remedies, although Mr Hughes' representative attempted to seek a penalty. As indicated

during submissions, it was not put into the Statement of Problem, therefore it is not before me for determination.

Lost remuneration

[29] Lost remuneration must be confined to the end of his expected period of employment. The expected end, in my view, was 30 November 2017. He could have expected employment similar to the number of hours he worked the previous year. He is required to give evidence of mitigation of losses. I accept, as the respondents representative submits, the evidence was minimal. He did, however, give examples of looking for jobs. There is also evidence he opted to do cash jobs from his home as well to meet his lost income.

[30] Mr Hughes acknowledged that the months when he was looking for work was a very slow season for orchard work. That is also consistent with my view he could not have had an ongoing expectation of work with Primogrow after November 2016.

[31] I am prepared to award lost remuneration of a similar amount as he earned in the previous year for November. This encapsulates the work he should have had up and until the end of his period of employment. In the previous year, his pay summary indicates he worked for 195 hours @ $22 per hour equates to $4,290 lost remuneration. This will be subject to any reduction for contributory behaviour.

Compensation for hurt and humiliation

[32] Whilst I accept the applicant's representative's submission that some personal grievances can cause people significant hurt and humiliation, that is not the evidence I heard today. Mr Hughes strikes me as a stoic man whom gets on with his life and does not dwell on the past. He had no evidence of significant (if any) hurt or humiliation from this.

[33] His evidence primarily highlighted his financial losses which were not quantified. He used his savings to meet his mortgage repayments. An award of $2,000 is sufficient to meet those losses subject to any reduction for contributory behaviour.

Contributory behaviour

[34] Where an employee has a personal grievance the Authority must, in deciding both the nature and extent of remedies consider the extent to which the actions of the employee contributed towards the situation that gave rise to that personal grievance. If the employee has contributed to the grievance the Authority is required to reduce the remedies accordingly.4

[35] The test for determining whether there has been contributory behaviour is whether the behaviour was causative and blameworthy. 5 In my view the grievance was caused by Mr Hughes refusal to work. He knew this was upsetting to Mr Brunston. He knew his job may be at risk as a result. This was shown in his reply text message the previous day on 24

October.

[36] The behaviour was also blameworthy. Mr Hughes knew this was a busy part of the year for his employer. There was no emergency or other reason to take the time off other than working on a car with a friend. In my view refusing to attend work in these circumstances was both causative and blameworthy conduct and a reduction is required. I have determined a reduction of 50% is appropriate.

[37] Therefore the following orders are now made:

A. Primogrow Limited is ordered to pay $2,145 gross less PAYE in lost remuneration to Trevor Hughes, pursuant to s.s.123(b), 124 and 128 of the Employment Relations Act 2000;

B. Primogrow Limited is ordered to pay $1,000 in hurt and humiliation to Trevor Hughes pursuant to s.s.123(c)(i) and 124 of the Employment Relations Act 2000.

4 Section 124 Employment Relations Act 2000.

5 *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

Costs

[38] Having heard from both parties about costs, there is no reason to depart from the usual costs basis applied in the Authority. The Authority uses a daily notional tariff of $4,500 for one full hearing day. This matter took a half day. An award of $2,250 costs will be made in favour of Mr Hughes.

[39] Primogrow Limited is ordered to pay Trevor Hughes $2,250 contribution towards his legal costs.

TG Tetitaha

Member of the Employment Relations Authority

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