

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 105/10  
5149859

BETWEEN                      **NATASHA JAMES, ALLY  
JAYE-McVEA,                JANITA  
GALBRAITH and SHELLEY  
PAPWORTH**  
Applicants

A N D                              **NEW                      ZEALAND  
VINEYARD                ESTATES  
LIMITED**  
Respondent

Member of Authority:      Helen Doyle

Representatives:            David Beck, Counsel for Applicants  
Stephen Langton, Counsel for Respondent

Investigation Meeting:    10 November 2009 at Christchurch  
Submissions:                On the day and 16 and 23 April 2010

Determination:              30 April 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Natasha James, Ally Jaye-McVea, Janita Galbraith, and Shelley Papworth were employees of New Zealand Vineyard Estates Limited from 20 November 2008 to 3 December 2008. The four applicants say they were summarily dismissed from their employment on 3 December 2008 and seek compensation and lost wages. There is an issue as to whether they were employed as genuine casual employees or whether their employment was of an ongoing continuous nature.

[2]     When the Authority considered the employment relationship problem for the purposes of determination, it concluded that there was a possibility that in resolving

the problem between the parties the Authority may see it under section 160 of the Employment Relations Act 2000 as a different problem on the same facts. That is, an unjustified action(s) causing disadvantage.

[3] A minute was sent to the representatives, Mr Beck and Mr Langton advising of this possibility and inviting submissions. Submissions were duly received from both Mr Beck and Mr Langton and have been considered along with the evidence and original submissions in determining the matter.

[4] New Zealand Vineyard Estates Ltd (New Zealand Vineyards) say the applicants were not dismissed, that they were employed as genuine casual employees and when it identified that it had no further work available the four applicants were advised there would be no further engagements offered to them after 5 December 2008.

[5] No objection was made to the applicants' personal grievances being heard together. If I get to the point of awarding remedies, separate consideration will have to be given to each of the applicants' evidence and circumstances about the facts as they relate to the employment relationship are essentially the same, or where there are differences I have identified them.

### **Issues**

[6] The issues for the Authority to determine are:

- Were the four applicants employed as genuine casual employees?
- Were the four applicants unjustifiably dismissed or unjustifiably disadvantaged in their employment?
- If the four applicants were unjustifiably dismissed from their employment, then what remedies are they entitled to, and are there issues of contribution and/or mitigation?

### **Background to the employment**

[7] Ms Papworth saw an advertisement in the newspaper from New Zealand Vineyard Estate Ltd for workers. She talked to Ms James, Ms Jaye-McVea and Ms Galbraith. All four applicants were interested in the prospect of vineyard work and

the outdoor nature of the work. Ms Papworth spoke by telephone to the Assistant Vineyard Manager, Clinton Cunliffe about working for the vineyard. Mr Cunliffe suggested that all four applicants come out to the vineyard the following day.

[8] The applicants duly attended at the vineyard on 20 November 2008 and met with Mr Cunliffe. Employment agreements were signed on that day. The roles were described as that of a casual vineyard worker. Having heard the evidence it is unlikely the applicants paid much attention to the nature of the agreements before they were signed.

[9] I find that Mr Cunliffe in all probability made some comments about the nature of the work and indicated that there could be work until March or April. Ms James recalled in her evidence a statement he made: *Pretty much until March*. I accept Mr Cunliffe's evidence that he did not advise that there would definitely be work to that time in the vineyard although he accepted that the work, the availability of which can depend on weather and other factors in the vineyard, was of an ongoing nature.

[10] There are about 80 casual employees engaged per year in the vineyard and this is between three main separate periods. Between January and March for second setting/green thinning, wire lifting and crop thinning; then again between June and August casual workers carry out pruning work; and between November and December when casual workers carry out bud rubbing, wire lifting and leaf plucking.

[11] Ms James advised Mr Cunliffe that as she had children she would not be able to work as long as the other three for the first three weeks of work. Mr Cunliffe had no issue with that.

[12] The four applicants were not advised they could take their agreements and get advice about them although there was a clause to that effect in each agreement. I accept that it is unlikely the applicants noticed that clause.

[13] After signing the agreements the applicants were introduced to the supervisor, Lauren File. Ms File showed the applicants what to do and they started work that day.

[14] There was some evidence that Mr Cunliffe was laughing whilst the applicants were upstairs signing their employment agreements. I cannot be satisfied from the

evidence of the reasons for his laughter and I do not conclude therefore that it was about the four applicants.

[15] The arrangement with workers at the vineyard is that they turn up in the morning and Ms File then directs the workers to undertake particular tasks. The hours worked by the four applicants were provided by Mr Cunliffe in his statement of evidence and referred to by Ms File in hers. No particular issue was taken with the hours and I accept that the applicants did not work all the hours that were on offer and sometimes they started later and/or left earlier.

[16] There is one issue though in relation to the hours and that is an issue as to whether Ms James worked on 2 December 2008. The hours set out in Mr Cunliffe's statement of evidence do not show her working that day. Her evidence is that she did. I accept Ms James' evidence it is more probable than not that she worked on 2 December although nothing particularly turns on that. There was a day or two of bad weather during the short period that the applicants worked when they did not attend at work.

[17] For the week ending 21 November 2008 Ms James and Ms Papworth worked 16 hours and Ms Jaye -McVea and Ms Galbraith 14 hours. For the week ending 28 November 2008 Ms James worked 7.5 hours on 25 November, and 7.5 hours on 28 November. The other three worked 3.5 hours on 24 November, 7.5 hours on 25 November and 7.5 hours on Friday 28 November. For the week ending 5 December 2008 Ms James worked 6.5 hours on the Monday and I have found probably on the Tuesday as well and the other three worked 6.5 hours on 1 December, 6 hours on 2 December and 4.5 hours on 3 December.

[18] If the applicants were not intending to work the following day they would advise Ms File of this normally before leaving for work and the evidence supports that they had a degree of flexibility in their work in terms of finishing earlier and starting later as they wished.

[19] On 28 November 2008 Ms James said in her evidence that four applicants were asked to repair some rows after a nor-westerly. The applicants felt Mr Cunliffe was angry with them because there had been some windy conditions and the wire had come loose. Mr Cunliffe did not accept that he was angry, but he had concluded they had not completed the wire lifting properly. Ms James talked briefly, I accept, with

Mr Cunliffe about the situation and concluded at the end of the day that everything was alright.

[20] On 1 December 2008 the work assigned to the four applicants changed to bud rubbing. On 2 December 2008 the four applicants said they started to feel ignored and ostracised from the group of new employees who had started and were being shown what to do. I accept Mr Cunliffe's statement that from memory the reason he would not have showed the four applicants the bud rubbing was because they already knew how to do the role. I do accept however, the evidence of both Ms James and Ms Galbraith that one of the new people questioned them as to whether they were *all right* and questioning how they were being treated by the *bosses*.

[21] The applicants also felt hurt because they were not told that the caravan and toilet facility that was generally parked up close to where they were working had been removed for cleaning. This meant that they were required to use the office facility some way away. I accept the applicants in all probability felt they were singled out, but I concluded that this was simply an unfortunate oversight and the caravan and toilet had been removed for cleaning. Given the applicants' view that week of how they were being treated, it is not surprising though that they considered the omission deliberate.

[22] On Wednesday, 3 December 2008 Mr Cunliffe attended a meeting with Lauren File and Nigel George, the Manager of Mound & Dunstaffnage Vineyard. He said there was a discussion that they were running short of wire lifting work and that from the pool of approximately 37 casual workers they no longer required four employees after Friday 5 December 2008. They decided, given as Mr Cunliffe described it, the applicants' slightly haphazard work, that it would be the four applicants.

[23] It was Ms File's responsibility to advise the applicants that there would no longer be work for them as it was running short. Ms James did not attend work on 3 December 2008 and Ms File said she intended to talk to Ms James the following day. At lunchtime Ms File went to talk to Ms Galbraith and Ms McVea. Ms Papworth was elsewhere down another row of vines.

[24] There was a dispute as to whether Ms File advised Ms Galbraith and Ms McVea that the reason they were required to finish up on Friday 5 December was

because Mr Cunliffe was not happy with them, or that, as Ms File said, she advised them that there was no work. Ms File did not accept that she mentioned Mr Cunliffe not being happy with the applicants. Ms McVea's evidence was that Ms File had simply said there was no work and that she did not really get a reason why that was so.

[25] It was common ground that Ms Galbraith did ask whether it was the four applicants or everyone who was no longer required. Ms File responded that it was just the four applicants who were no longer required. Ms File asked that they advise Ms Papworth who was on another row that there would be no work after 5 December 2008.

[26] After Ms Papworth was advised the three applicants decided to leave immediately because they felt they had been treated badly. I prefer the evidence of Ms File that in all likelihood she did not advise that they were selected out of the pool of workers because Mr Cunliffe was not happy with them. Ms Galbraith may well have formed that view. Ms File accepted however the four applicants were chosen because their work was not as good as that of the other casuals. When questioned, Ms File said she was able to gain an impression from the casuals who had started work only recently that their work was of a higher standard.

[27] Later that day the three applicants advised Ms James that there was to be no further work. Ms James said, and I accept her evidence, that she could not understand the reason why and decided to telephone Mr Cunliffe and put him on the speaker phone so that the other applicants could also hear the conversation. Mr Cunliffe said that he found the conversation became heated on the part of Ms James and I accept that he was somewhat put on the spot by the call.

[28] There was a dispute about what was said. For example Ms James said she asked Mr Cunliffe if the applicants were fired and that he responded they were. Mr Cunliffe denied that he had made that comment and further, he denied, as Ms James put in her evidence – *if you can't get it right the first time, don't bother*.

[29] I think it more likely that Ms James was the person who made a reference to being *fired*. Mr Cunliffe in all likelihood made it clear that there was no work for the applicants and I find it likely he accepted towards the end of the call that their work skills were not *great*. There was evidence that Mr Cunliffe laughed during the

conversation. I accept that this was in all likelihood the result of him feeling rather nervous rather than because of the applicants' situation.

[30] I do conclude that at a point in the conversation, and this was also recalled by Ms McVea, Mr Cunliffe did refer to the applicants *not getting it right the first time*. Ms James then made a further call and nothing really turns on whether it was that same day or the next. I accept it was made clear during that call that there was no further work for the applicants.

[31] I find that the four applicants were selected from the group of workers because of their performance. I do not find that they knew that their performance was of an issue to either Ms File or Mr Cunliffe except in terms of their feeling as a group that they were somewhat ostracised and treated differently from the other workers during the last week they worked.

### **Were the four applicants employed as genuine casual employees**

[32] All four individual employment agreements signed by the applicants were of an identical form. They were headed "Casual Vineyard Worker" and the terms of the agreement were expressed in clause 1.1 as employment on an irregular as-required basis to assist in the vineyard for a variety of tasks, e.g. pruning, harvest etc., and there is no expectation of ongoing work. The agreements provided that the employment is neither permanent nor continuous.

[33] In clause 1.2 it was stated *the employer is under no obligation to provide work*.

[34] Clause 4 provided there were no fixed days or hours of work, and that work would be scheduled according to weather conditions and seasonal requirements. There was a provision however in clause 4.1 that the employee agrees to work the hours on each day as required by the employer, although I shall refer to that shortly as to how that took effect in practice with the applicants.

[35] Clause 4.3 provided *there is no obligation on the employer to provide the employee with a minimum amount of work in any given period*. Clause 8 dealt with annual leave and provided that because of the seasonal and intermittent nature of the role, holiday pay for annual leave was calculated at 8% of gross earnings would be added to the normal pay and paid with the weekly pay.

[36] There was in clause 17 one day's notice of termination of employment to be given by the employer or employee. There was somewhat inconsistently with a casual relationship a provision in clause 17.2 that where the employee is absent from work for two or more consecutive scheduled working days without notification they shall be deemed to have terminated their employment by reason of abandonment.

[37] Mr Beck submits that the relationship between the applicants and the vineyard was more fixed, or temporary employment for a seasonal period rather than casual. He made this submission on the basis of the expectation that there would be ongoing work until March. I accept that four applicants believed that there would be ongoing work required of workers in the vineyard.

[38] Because of a short duration of the applicants' employment, I have only a limited timeframe to consider in terms of the relationship. From my analysis of the short period that the applicants worked at the vineyards their hours were not always regular and they felt able to start later or leave earlier each day as it suited them. I accept the evidence from Mr Cunliffe and Ms File that the applicants could have worked more hours if they had wanted to, but they chose not to. That is consistent with a casual arrangement because of its flexibility. I was not able to ascertain a regular number of hours per day or week, or regular pattern of work. Hours and days of work fluctuated. There was a period of a day or two in the second week where the applicants did not attend work and their evidence was that that was weather-related. They were not paid for that day.

[39] There were some inconsistencies within the written employment agreements with casual work. I have already indicated that in terms of the abandonment of employment clause. That would suggest that there was some expectation of notice being required if a worker was not intending to report. That notice in practice involved the applicants advising Ms File that they would not turn up the following day. There is no evidence that there was any objection to this or the leaving and starting at different hours.

[40] I find that although there was an expectation that the work was ongoing until March, depending on weather and other factors, the factors did not exist for the short period that I have been required to consider that would create a corresponding obligation on the vineyard to continue to offer work up until March.

[41] I find that when I analyse the day-to-day arrangements that they were more consistent with a casual arrangement than a continuous or permanent employment arrangement.

[42] Often in a casual employment arrangement there is no mention when a casual worker ceases employment or dismissal because the relationship simply terminates at the end of each engagement in accordance with the employment agreement.

[43] Mr Langton relies on the Employment Court judgment of *Jenkinson v Oceania Gold (NZ)*, CC/09, 13 August 2009 which contain a helpful analysis of casual employment. He submits in accordance with that judgment that outside of each engagement at the vineyard there was no corresponding obligation on either the applicants or the employer to offer further work.

[44] I find in conclusion that the four applicants were employed as genuinely casual workers for the short period that they were at the vineyard.

**Were the four applicants unjustifiably dismissed or unjustifiably disadvantaged in their employment?**

[45] In accordance with that finding that the four applicants were genuinely casual employees then I do not find that the four applicants were unjustifiably dismissed from their employment when Ms File advised them on Wednesday, 3 December 2008 that they would not have work at the vineyard from the end of the working day on Friday, 5 December 2008.

[46] I now turn to consider whether they were unjustifiably disadvantaged in their employment. I have considered the test for justification in s 103A of the Employment Relations Act 2000. I conclude that even though the applicants were casual employees there was an obligation on New Zealand Vineyards to deal with the applicants fairly and with good faith. I have considered in this case all the circumstances at the time they were advised that there would be no further work.

[47] The circumstances were these. The four applicants were casual but it was not a *call in* arrangement. The applicants drove to the vineyard each day and expected, unless weather or something else was an issue, to be assigned work. They expected this work to be available until about March. Further employees had been hired on the same week the applicants were advised there was no further work. The applicants clearly knew that. The applicants aside from a feeling that there was a change in

attitude toward them were never told that their performance was such that they could be at risk of not being offered further engagements. I find it was not clear to the applicants the reason why no further work would be offered to them from the pool of workers.

[48] I find that the obligations of fair dealing and good faith including the obligation to be responsive and communicative required the applicants to be advised that their performance was such that it put them at risk of not being offered further work in the circumstances as outlined above. That would have given the applicants some understanding as to why there was to be no further work offered to them. A fair and reasonable employer would in circumstances where new casuals had been hired that same week have advised the applicants of the reasons why they had been selected. I find a failure to advise the applicants that their performance was below the standard expected and further the reason why they were selected out of the pool of 37 workers not to be offered any other work was unjustified in these circumstances.

[49] The four applicants were disadvantaged in their employment with New Zealand Vineyards because they had an expectation that they could continue as part of a pool of workers to attend at the vineyard and be allocated work unless there was a good reason for that not to continue. Had the four applicants been advised of the performance concerns then they could have either improved their performance to the standard expected and/or at least not have been left without an understanding as to why work was no longer to be offered to them. They lost something of value and this disadvantaged them.

[50] The four applicants have a personal grievance that they were unjustifiably disadvantaged in their employment with the respondent.

### **Remedies**

[50] I do not find that this is a situation where the applicants can be said to have contributed to the situation giving rise to the personal grievance.

#### *Lost wages*

[51] Three of the applicants I find had an opportunity to continue to work until 5 December 2008. Their employment agreements provided for one day's notice and they were given two days notice. They are not entitled to any lost wages award.

[52] I consider the situation is different with respect to Ms James. Ms File was intending to advise Ms James when she attended at work on Thursday, 4 December that there would be no work available for her after 5 December. I am not satisfied that Ms James was aware following her telephone conversation with Mr Cunliffe on 3 December that she still could undertake further work. I am not satisfied she was properly given notice under the terms of her employment agreement. Ms James is entitled to payment of one day's notice in terms of her employment agreement. I have averaged out the hours worked by Ms James at 6 hours per day for the six days I found she in all probability worked. If counsel agree with that calculation then I would ask that they attempt to agree the appropriate hourly rate given that payment was on a piece rate. Leave is reserved for either party to return to the Authority if necessary.

### *Compensation*

#### *Natasha James*

[53] Ms James gave evidence that she was hurt by the way she was treated and that she had had previous experience in working in vineyards and she did not consider her performance to be below standard. Ms James said in her written evidence that Mr Cunliffe made her feel *stupid* and *unappreciated*. The compensation in these circumstances is to compensate for the way Ms James was treated and not for the fact that further work was not offered. In all the circumstances I am of the view that a suitable award is the sum of \$800.

I order New Zealand Vineyards Estates Limited to pay to Natasha James the sum of \$800 without deduction under s. 123 (1) (c) (i) of the Employment Relations Act 2000.

#### *Ally Jaye-McVea*

[54] Ms Jaye-McVea felt that she was treated rudely and without respect. In her evidence she referred to the way that she was advised there was no work as being hurtful and not really getting a reason why she would not be offered work. Again the compensation is directed toward the treatment of Ms Jaye-McVea and not the fact that she was not offered ongoing work. I am of the view a suitable award is the sum of \$800.

I order New Zealand Vineyards Estates Limited to pay to Ally Jaye-McVea the sum of \$800 without deduction under s. 123 (1)( c)(i) of the Employment Relations Act 2000.

*Janita Galbraith*

[55] Ms Galbraith said that she felt degraded and humiliated because of the situation that led to he not being offered further work and that it was a setback at Christmas. In terms of how she felt about the situation and being advised that there was no further work I consider a fair compensatory award would be the sum of \$800.

I order New Zealand Vineyards Estates Limited to pay to Janita Galbraith the sum of \$800 without deduction under s. 123 (1)( c)(i) of the Employment Relations Act 2000.

*Shelley Papworth*

[56] Ms Papworth said that she was stressed by the situation and in her written evidence said that she was offended with the way she was treated and that she remained upset. I consider a fair compensatory award would be the sum of \$800.

I order New Zealand Vineyards Estates Limited to pay to Shelley Papworth the sum of \$800 without deduction under s. 123 (1)( c)(i) of the Employment Relations Act 2000

**Costs**

[57] I reserve the issue of costs. Failing agreement with respect to costs Mr Beck has until 14 May to lodge and serve submissions as to costs and Mr Langton has until 28 May to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority