

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 323  
5394316

BETWEEN	CAROLYN JONES Applicant
A N D	FORCE 10 LIMITED First Respondent
A N D	BVS FRESH PRODUCE LIMITED Second Respondent

Member of Authority: James Crichton

Representatives: Dave Vinnicombe, Advocate for Applicant  
Appearance of First Respondent excused  
No appearance for Second Respondent

Investigation Meeting: 22 April 2013 at Tauranga

Date of Determination: 29 July 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Ms Jones) alleges that she was unjustifiably dismissed from her employment on or about 3 February 2012.

[2] While neither respondent attended the investigation meeting, each provided both affidavit evidence and submissions on their position.

[3] Ms Jones was employed in a business trading as Greerton Produce and Florist and commenced her employment there on 26 April 2010. The then owners sold the business to the first respondent (Force 10) and it took over on or about 17 July 2011. Ms Jones had a written employment agreement with Force 10 although she was not provided with a copy of it.

[4] Force 10 sold the business to the second respondent (BVS). BVS commenced trading the business on or about 1 February 2012.

[5] Having survived one change of ownership while preserving her employment, Ms Jones not unnaturally took an interest in the sale to BVS. Before it took effect, Ms Jones says that she sought assurances from Force 10 (Mr Fitzsimmons) that her job was secure and she was assured it was. Ms Jones' evidence is that she sought those assurances more than once and got them more than once. Mr Fitzsimmons for Force 10 agrees that he reassured Ms Jones about the continuity of her employment. He says the reason he did that was because BVS (Mr Ranjodh Singh) had told him that Ms Jones would be re-employed. However, Mr Singh's evidence is different; he says that he told Mr Fitzsimmons that Ms Jones was **not** required for future employment.

[6] That view is flatly contradicted not just by Mr Fitzsimmons but also by Ms Jones herself because her evidence is that on or about 27 January 2012, Mr Singh was present in the business, prior to handover, and she asked him if her job was secure, was assured it was, and that she would be being provided with a new employment agreement once BVS took over the business.

[7] On that basis, Ms Jones continued to work in the business after BVS took over on 1 February 2012.

[8] On that day, Ms Jones assisted with the finalisation of the stock take that was required by both Force 10 and BVS.

[9] On 2 February 2012, Ms Jones again attended work at her usual time but became disconcerted by the sense that she was not wanted. Her evidence is that two other staff members were effectively doing what she expected to do. She was told these were members of Mr Singh's family.

[10] Ms Jones' evidence is that she got further reassurance at this point from Mr Fitzsimmons (who was still working in the business) and Mr Fitzsimmons' evidence accepts that that happened.

[11] Ms Jones also alleges that at the same time she had some sort of conversation with Mr Singh in which he talked about a new till system and suggested that things would settle down once that was installed. Some 45 minutes later, Ms Jones says she

was reassured again by Mr Fitzsimmons but then Ms Jones says that around 10.30 that morning, she had a telephone discussion with Mr Fitzsimmons in which he dismissed her from the employment, in effect acting on behalf of Mr Singh.

[12] Mr Fitzsimmons denies that this call happened in the morning, claiming that it happened in fact around 2pm that afternoon, and he also denies that he dismissed Ms Jones on Mr Singh's behalf. He says the burden of the conversation from his side was that as Ms Jones was distressed about the way she was being treated, she should take the balance of the day off. He was not acting as an agent for Mr Singh and was simply concerned for her personally, he says.

[13] About a week later, Mr Fitzsimmons took to Ms Jones' home an envelope containing three days' pay. Mr Fitzsimmons says that the money in the envelope was contributed to by both BVS and Force 10.

[14] Ms Jones says that she was dismissed unjustifiably either on the sale of the business from Force 10 to BVS or by the telephone call she received from Mr Fitzsimmons on 2 February 2012.

[15] A personal grievance was promptly raised on 10 February 2012 and the matter came to the Authority in the usual way.

### **Issues**

[16] The Authority will need to answer the following questions in order to determine this matter:

- (a) What is the relevant case law;
- (b) Who employed Ms Jones when the employment ended; and
- (c) Is Ms Jones entitled to remedies?

### **What is the relevant case law?**

[17] In *Mehta v. Labour Inspector Elliott* [2003] 1ERNZ 451, His Honour Chief Judge Colgan, in considering the identity of the employer, posed the question in the following way:

*“Who would an independent but knowledgeable observer have said was ( the employee’s ) employer..”*

[18] Member Appleton applied that test in the Authority’s decision in *Frost v. Cullen and Others* [2012] NZERACHristchurch43 after considering the subsequent decision of the Employment Court in *Colosimo v. Parker* ( Employment Court, Auckland AC 68/06 ) per Judge Perkins. His Honour emphasized that the onus of demonstrating who the employer was rested on the applicant, on the balance of probabilities. Moreover, the test is objective in nature.

[19] It follows that while the beliefs of the parties about the identity of the employer may be part of the equation, in the end the Authority must decide, on the objective evidence, as the *“..independent and knowledgeable observer..”* of *Mehta* who, on objective grounds, the employer actually is.

#### **Who employed Ms Jones when the employment ended?**

[20] It will be apparent from a foregoing section of this determination that there was an historical employment relationship between Ms Jones and Force 10. The first question the Authority must resolve is when that employment relationship came to an end, if at all, and if it did come to an end, whether Ms Jones was subsequently employed by BVS or not.

[21] The timing is critical because identifying when the employment relationship came to an end will not only point to who the employer was but may also eliminate parties who were not the employer.

[22] The Authority thinks it easiest to work backwards in this case. On this approach, it is plain, for instance, that Ms Jones’ employment had come to an end by the time she received a visit from Mr Fitzsimmons with her final three days’ pay. Ms Jones’ evidence is that that visit happened approximately a week after she left the workplace. As a working hypothesis, that might have been 9 February 2012 or thereabouts. Although Mr Fitzsimmons’ evidence is less precise about when he visited Ms Jones at home with the three days’ wages, he does nonetheless confirm that the visit happened. It is plain then that at the point at which that final pay was made, Ms Jones was no longer employed.

[23] Furthermore, it seems common ground (certainly between Mr Fitzsimmons and Ms Jones) that she was paid in that transaction for three days, presumably 1, 2 and 3 February 2012. While there is no other documentation for the Authority to support that conclusion just reached, the Authority thinks it reasonable to make the assumption that the employment ended, in a physical sense, on or about the close of business on 3 February 2012.

[24] While, on a simplistic view, Force 10 no longer owned the business on 3 February 2012, the transfer to BVS having taken place with effect from 1 February 2012, it is nonetheless plain on the evidence that Force 10 had some sort of employment relationship with Ms Jones after the sale of the business. The Authority reaches that conclusion because Mr Fitzsimmons confirms in his evidence to the Authority that some of the money that was paid to Ms Jones in that final pay was from Force 10.

[25] Moreover, on Mr Fitzsimmons' evidence, Ms Jones was working for Force 10 on 1 February 2012 assisting with the stock take and accounts.

[26] Mr Fitzsimmons said in his evidence that the split between Force 10 and BVS was recorded on the envelope with the cash in it but if that is right, then certainly Ms Jones does not recall that and the envelope itself is not before the Authority.

[27] So one postulation is that Ms Jones worked for Force 10 up to the transfer of ownership on 31 January 2012, then by some form of special arrangement worked 1 February 2012 for Force 10 before she returned to what she imagined to be her normal duties on 2 February and following, believing as she plainly did that she was employed by BVS.

[28] The Authority turns now to consider the telephone discussion between Ms Jones and Mr Fitzsimmons. Ms Jones thinks that she was dismissed in that telephone discussion and whether or not that is true, it is certainly true that she never worked in the business again after that telephone call.

[29] What is true is that the call took place. That much is common ground. But there is disagreement about when it took place with Ms Jones saying it took place in the morning of 2 February 2012 and Mr Fitzsimmons saying it took place in the afternoon of the same day.

[30] But more important than that, while Ms Jones says that Mr Fitzsimmons dismissed her in that telephone discussion, and in a classic “sending away”, told Ms Jones to get her personal property and leave quietly, Mr Fitzsimmons flatly denies that he dismissed her. And Mr Fitzsimmons makes a number of pertinent observations about the telephone call. First, he says he was in no position to dismiss her because he did not employ her on that date, although he had done previously. Second, and perhaps even more persuasively, he points out that throughout the day in question, he had on his evidence, and on Ms Jones’ evidence, consistently reassured her that all would be well and that her employment with BVS would continue after the settling down period.

[31] Mr Fitzsimmons says that all he said to Ms Jones in the telephone discussion was that she should go home for the rest of the day as she was plainly upset by the altercation of sorts that she had had with two of Mr Singh’s family members who appeared to have usurped her role.

[32] Mr Fitzsimmons says that at the time the telephone conversation took place, he was no longer in the business having left for the day and that he was telephoned by one of the other staff members who was concerned about Ms Jones and in that context, he asked that other staff member to put Ms Jones on the phone so that he could talk to her.

[33] Having said that, it seems to the Authority that what happened in that telephone discussion may be less important than the way that both Mr Fitzsimmons and Ms Jones behaved after the telephone conversation had happened, because it seems fair to say that both parties subsequently behaved as if the employment relationship had come to an end in any event.

[34] BVS protest that Ms Jones behaved throughout as though her relationship, if any, was with Force 10 and not with BVS. They ask why Ms Jones never questioned Mr Singh about the purported dismissal, why she seems to have simply accepted the situation at face value. The Authority thinks the answer is that Ms Jones regarded herself as having been dismissed. Even if she should have talked to Mr Singh, in pursuance of her “.. good faith..” obligations, Mr Singh had a countervailing duty to have spoken to her, and he did not. She was in his business apparently to work and yet, on his evidence, not employed by BVS.

[35] Returning then to the fundamental question of who the employer was when the employment relationship came to an end, it seems clear on the facts that Ms Jones was employed by Force 10 up to close of business on 31 January 2012 and that there was a private arrangement between Force 10 and Ms Jones for her to assist in the stock take on the first day of trading of the new entity being 1 February 2012.

[36] But the very fact that Ms Jones was still present in the business after the sale had taken effect seems to the Authority to support the conclusion that BVS was Ms Jones' employer when the employment finally ended.

[37] Mr Singh protests that he had always made clear that he did not require Ms Jones' services and thus could not be held responsible when she was still in the business after his purchase of it. But there are a number of difficulties with that thesis. The first is that Ms Jones' evidence is very clear that she received assurances from both Mr Fitzsimmons and Mr Singh and indeed the pair of them together that her position in the business was secure. Ms Jones' evidence is not just that she was reassured by Mr Fitzsimmons in private but also that she was reassured by Mr Fitzsimmons when Mr Singh was present, and indeed that she was reassured by Mr Singh himself. Mr Singh denies that but it is more difficult for him to deny that Mr Fitzsimmons reassured her when Mr Fitzsimmons has confirmed that that is his evidence.

[38] On the face of it, it would be an extraordinary circumstance where a worker employed in a business that had been sold would turn up in the workplace when they had been definitively told that they were no longer required. What on earth was Ms Jones doing in the business after the effective of the sale and purchase agreement, if she was not operating under the apprehension that she was continuing in the employment? Her presence in the business makes no sense unless the assurances that she gave evidence of having received, were in fact received.

[39] What is more, if Ms Jones was in the business and was not required by the new owners, as they maintain, surely they would have immediately made clear to Ms Jones that she ought not to be there.

[40] But Mr Singh maintains that he was told by Mr Fitzsimmons that Ms Jones was there to assist Force 10 with the stock take. That much is common ground but Ms Jones worked the following day, 2 February 2012, as well, at least until she got

the telephone call from Mr Fitzsimmons, and, on Mr Fitzsimmons' evidence, BVS gave him money to pay Ms Jones' wages presumably for two of the three final days that she worked.

[41] Mr Singh maintains that this confusion has been created by Mr Fitzsimmons and not by him and he alleges that Mr Fitzsimmons:

*... was whispering all kinds of things to her about her job and contracts and totally misrepresenting my position and the agreement that he had with me. I did not know what he was saying to her then but if I had known I would have made sure that she was told the truth.*

[42] So Mr Singh maintains that he did not employ Ms Jones and yet she was plainly in the workplace performing duties. If, as Mr Singh maintains, he never intended to employ Ms Jones, he surely has an obligation to make that crystal clear to her and yet he did not and indeed on her evidence, which the Authority prefers, he positively reassured her that her job was safe. On the evidence Mr Singh now gives to the Authority, she was never ever going to be offered continued employment, yet there is evidence that he reassured her, that Mr Fitzsimmons reassured her, and everybody agrees that she actually turned up for work after the sale and purchase of the business had taken effect.

[43] BVS invites the Authority to conclude that Ms Jones was culpable in not following matters up with him, if she regarded him as her employer, especially after the telephone call from Mr Fitzsimmons. But why should she; She regarded herself as having been dismissed in that call.

[44] Further, BVS say that if BVS has given the assurances claimed then surely Mr Fitzsimmons would have challenged them on renegeing on promises made. But again, Mr Fitzsimmons, by this time, had no status in the business. He may well have thought Ms Jones had been let down but that there was nothing he could do about it.

[45] But the real difficulty about this line of argument is the evidence that Ms Jones was promised continued employment by Mr Fitzsimmons, by Mr Fitzsimmons and Mr Singh together and by Mr Singh alone. While it is clear that Mr Singh denies those promises he personally was implicated in, the weight of evidence is against him. Both Ms Jones and Mr Fitzsimmons say the promises ( all of them ) were made.

[46] Moreover, Ms Jones was the only one of the protagonists that gave evidence in person. To be fair, Mr Fitzsimmons is now in Western Australia. But Mr Singh is still in Tauranga, and did not offer to give evidence in person, even although he could have. The Authority heard only from Ms Jones personally and preferred her view to that advanced by the respondents, when there were differences.

[47] In all the circumstances, the only innocent party in this proceeding in the Authority's view is Ms Jones. Both of the potential employers seem to be accusing each other of bad faith and seeking to blame the other for Ms Jones' predicament.

[48] If as Mr Singh maintains, he had always been clear that Ms Jones was not going to be offered employment in the business going forward, then in the Authority's considered view, both BVS and Force 10 have an absolute obligation to make that crystal clear. In relation to Force 10, that obligation would have been underpinned, at the time, by the fact that, as her then employer, Force 10 was obliged to fulfil its obligations under s.4 of the Employment Relations Act 2000 (the Act).

[49] While the Authority is satisfied that BVS would have had no good faith obligation to Ms Jones prior to 1 February 2012, but thereafter, in the Authority's judgment, it too has good faith obligations because even if it was able to satisfy the Authority that it did not employ Ms Jones on 2 February 2012, she was nonetheless a person in the workplace there because she was "intending to work" within the meaning that phrase has in the Act. She would not have been in the workplace if she had not been a person intending to work and had not believed on reasonable grounds that she had continuing employment.

[50] In all the circumstances then, the Authority's considered view is that Ms Jones was employed by Force 10 on 1 February 2012 and by BVS at least on 2 February 2012. Clearly the employment relationship was treated as having come to an end by Force 10 and Ms Jones anyway after the telephone conversation between Mr Fitzsimmons and Ms Jones and according to Mr Fitzsimmons, Force 10 and BVS shared the cost of Ms Jones' final pay. On that footing then, there were at least two days' employment provided, one of which on the facts seems to have been provided to Force 10 and one or more of which seems to have been provided to BVS. Liability then, if any, is shared more or less equally between the two employers.

**Is Ms Jones entitled to remedies?**

[51] It will be apparent from the foregoing analysis that there can be little question that Ms Jones was unjustifiably dismissed from her employment. If as Mr Singh maintains, she was not required for the new business then she never got that message. The failure to ensure that that message was adequately conveyed, if in truth that was the message, rests on her then employer, Force 10. It is responsible for conveying that information and if it failed to do that appropriately then it is culpable.

[52] Conversely, given that Ms Jones never got that message, assuming it was ever transmitted or ever intended, and turned up for work in good faith as a person intending to work for BVS, and actually provided work to BVS on the second day, then the failure to deal in good faith with Ms Jones once she was in the business as an employee rests squarely on BVS. It was in the employ of BVS that Ms Jones was when the employment came to an end, finally. It too is culpable because whether or not Ms Jones ought to have got a message that she was not required, the fact is that that message was not properly conveyed, if it was indeed the message, and she turned up for work in good faith after the change of ownership and provided work and whether through the phone call or otherwise, got the message that she was not required.

[53] There is no doubt that this constitutes an unjustified dismissal. In the Authority's opinion, when Ms Jones was dismissed from her employment she was employed by BVS. However it happened, she became aware she was no longer required and she left the business. That was not a voluntary departure. She had turned up in good faith two days previously in order to work, but by the end of the second day it was apparent that she was not wanted. She was, in truth, "sent away". She is entitled to be compensated for that wrong.

**Determination**

[54] Because of the unusual features of this claim, the Authority's analysis is that both Force 10 and BVS are responsible for Ms Jones' situation. As a matter of law, the Authority is satisfied that Force 10 has committed an unjustified action in failing to properly notify Ms Jones of the results of the change of ownership, this causing Ms Jones apparent disadvantage. By contrast, BVS has unjustifiably dismissed Ms Jones by " sending her away...".

[55] While the “sending away” took place at the very end of the employment, the lead up to that event was the thoroughly inadequate communication which both employer parties contributed to. On balance, in the period prior to BVS taking control of the business, the onus must be on Force 10 to correctly inform its staff of their future under the new arrangements. It is painfully apparent that Ms Jones was not correctly told what her future circumstances were.

[56] And because she was not correctly told what her future circumstances were, she in good faith turned up for work with the new employer believing that she had continuing employment and was let go.

[57] The evidence of the distress Ms Jones suffered was comprehensively provided to the Authority, both in her written brief of evidence and in her oral evidence. The Authority accepts there is a compensatable wrong to be addressed.

[58] The Authority has considered whether Ms Jones has contributed in any way to the circumstances giving rise to her personal grievances and has concluded that she has not: s.124 of the Act applied.

[59] To remedy Ms Jones’ grievance then, the Authority directs that Force 10 and BVS are to each pay to Ms Jones as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 the sum of \$3,000.

[60] Ms Jones has also suffered lost wages because of her inability to find another position consequent upon the unjustified dismissal. She was out of work for 5½ months. A contribution to lost wages of 13 weeks (about half of Ms Jones’ actual loss) would be \$6,000. I direct that Force 10 and BVS are each to make a payment to Ms Jones as a contribution to her lost remuneration in the sum of \$3,000.

[61] Each respondent is also to contribute to the cost of Ms Jones’ lodging her application in the Authority. Each respondent will pay to Ms Jones the sum of \$36.00.

### **Costs**

[62] Costs are reserved. As Ms Jones has been completely successful in her claim, she is entitled to look to the unsuccessful respondents for a contribution to her costs.

[63] If she is unable to get the respondents to address that issue, leave is reserved for her to revert to the Authority and costs will be fixed.

[64] Should that be necessary, Ms Jones has already filed submissions with the Authority. If Ms Jones is unable to resolve costs satisfactorily, by agreement, she is to notify the Authority and the respondents that she wishes the Authority to fix costs; the respondents then have 14 days from that date to file their submissions in reply.

James Crichton  
Member of the Employment Relations Authority