

Employment Relationship Problem

[4] The applicant, Mr O'Connell, alleges that he was unjustifiably dismissed by the respondent (Landform) in a telephone discussion which took place between Mr O'Connell and Landform's Mr Hyde on 30 April 2007.

[5] Landform resist the contention that Mr O'Connell was dismissed from his employment and contend that Mr O'Connell resigned his employment in the context of some threatened disciplinary process.

[6] Also relevant is Landform's contention that Mr O'Connell was employed on a casual basis and Mr O'Connell's contention that he was in fact a permanent employee.

[7] Mr O'Connell was employed by Landform as a labourer on 1 November 2006.

[8] There was never an employment agreement provided to Mr O'Connell although a letter dated 18 April 2007 (some 12 days before the termination of the employment) purports to confirm Mr O'Connell's status as a casual worker.

[9] The evidence was that Mr O'Connell typically worked more than 50 hours a week and, with the exception of the last two weeks of his employment at Landform, seldom worked less than 38 hours a week.

[10] No evidence was given of any disciplinary warnings during the employment.

[11] On 23 April 2007, Mr O'Connell did not work but he worked the remainder of the week. On 30 April 2007, (a week later) Mr O'Connell was again asked not to report to work on the Monday. Mr O'Connell expected that, like the previous week, he would simply report to work on the Tuesday, 1 May.

[12] In fact, at around 4pm on Monday 30 April 2007 Mr O'Connell received a telephone call from Mr Hyde who was Landform's manager. Mr O'Connell received this telephone call on his cell phone while sitting with a Mr Nathan Masters, an electrician who was friendly with the man Mr O'Connell was boarding with. It follows that Mr Masters overheard Mr O'Connell's end of that conversation and Mr Masters filed a brief of evidence in the Authority in respect to the conversation.

[13] Mr O'Connell's evidence, which I accept, was that in that conversation, he was dismissed from his employment. Because Landform chose not to appear in the Authority, it was impossible for me to talk to Mr Hyde but I am satisfied on the evidence of Mr Masters that what Mr O'Connell understood happened in that conversation was in fact accurate. Mr Masters reports that Mr O'Connell's:

posture change(d) he looked stunned and was asking the person on the other end if he was sacked. I did not hear the applicant (Mr O'Connell) verbally abuse the caller; he just seemed concerned to know whether he had a job.

After the applicant got off the phone he told me he had just been sacked.

[14] It seems to me inconceivable that Mr O'Connell could have completely misunderstood the nature of the telephone call from Mr Hyde so as to believe he was dismissed from his employment when he was not. Further, Mr O'Connell's evidence is absolutely consistent with Mr Masters recollection of events and it follows that I accept that the evidence discloses that Mr O'Connell was in fact dismissed from his employment in this telephone discussion.

[15] Mr O'Connell then reported these events to Mr Reihana, the man with whom he boarded and Mr Reihana took the matter up on his behalf. Mr Reihana spoke with a Mr Blackler who had been instrumental in getting Mr O'Connell the job with Landform in the first place. Mr Blackler told Mr Reihana that Mr O'Connell had been dismissed for giving *backchat*.

[16] When the statement in reply was subsequently filed, a variety of other explanations were offered as to the basis for the employment relationship becoming problematical.

[17] Mr O'Connell sought professional advice in relation to his dismissal and subsequently raised a personal grievance alleging he had been unjustifiably dismissed from his employment. Landform commenced to defend the claim, then there was a lengthy delay when it changed counsel, causing the vacating of an original investigation meeting in the Authority, and then, contemporaneously with the present investigation meeting fixture, advice was received in the Authority that Landform was in the process of going into liquidation and the expectation was that that process

would happen before the Authority had dealt with the matter and issued its determination.

[18] It was for those reasons that I determined that the matter be dealt with as urgently as practicable and accordingly the matter was disposed of by an oral decision and the issue of this determination on an urgent basis.

Issues

[19] The issues the Authority needs to decide are whether in truth there was a termination of Mr O'Connell's employment in a telephone discussion on 30 April 2007 and the nature of the employment agreement under which Mr O'Connell was engaged.

The termination

[20] Having heard the evidence of Mr O'Connell and Mr Reihana and having considered the brief of evidence filed by Mr Masters, and noting there has been no appearance from Landform, I am satisfied that Mr O'Connell was dismissed from his employment by Landform in the telephone conversation initiated by Mr Dean Hyde on 30 April 2007 but such dismissal was unjustified.

[21] I do not accept the version of events advanced by Landform concerning what happened on this day because that version is not consistent with the evidence I heard. In particular, the evidence of Mr Nathan Masters, who overheard the relevant conversation supports Mr O'Connell's evidence that he was dismissed in that telephone call and that Mr O'Connell's behaviour during the call was not in any way inappropriate, as Landform alleged.

[22] A dismissal by telephone, where there is no opportunity for the applicant to adequately respond, be emotionally prepared, seek and obtain advice, or address the alleged deficits will usually be difficult to justify. That is the case here and I hold the dismissal was unjustified. It follows that Mr O'Connell has a personal grievance and is entitled to remedies.

The agreement

[23] Landform claims Mr O'Connell was employed on a casual employment agreement. I do not accept that as the evidence is otherwise. I have seen a summary

of Mr O'Connell's wages over the period of the employment and they confirm Mr O'Connell's oral evidence that he worked regular hours typically over 50 hours a week and only rarely was he told not to come in on a particular day.

[24] I hold that Mr O'Connell was a permanent employee with flexible hours.

[25] Mr O'Connell had no written employment agreement; that is accepted by Landform. Had there been a written agreement some of the inevitable confusion might have been avoided.

Determination

[26] Giving my finding that Mr O'Connell has been unjustifiably dismissed from his employment and is entitled to remedies I direct that Landform is to pay him the sum of \$4,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 for hurt, humiliation and injury to his feelings which was amply demonstrated in the investigation meeting before me.

[27] I am satisfied there was no inappropriate behaviour from Mr O'Connell (despite that allegation being made in the statement in reply by Landform) and that there is no other evidence available to me to reach the conclusion that Mr O'Connell's behaviour contributed in any way to the circumstances of his dismissal.

[28] Given my finding, based on unchallenged evidence that there was no employment agreement, and the mistaken reliance that Landform place on their notion of what the employment agreement actually entailed, I think it appropriate that a penalty be paid by Landform for its failure to comply with the law and in all the circumstances of this case, I direct that that penalty which I fix at \$1,000, be paid to Mr O'Connell.

[29] As a consequence of losing his job with Landform, Mr O'Connell has had difficulty in obtaining replacement work and although he has had a number of short term engagements as a labourer, he has lost income and he was able to give me evidence at the investigation meeting of the extent to which that was the case.

[30] As a contribution to Mr O'Connell's lost wages, I direct that Landform is to pay to him the sum of \$3,000 gross to assist to make up the short fall in that regard.

[31] Finally, Mr O'Connell is entitled to a contribution to his costs in bringing this claim. Of necessity, these costs must be modest but nonetheless they are real enough and Mr O'Connell is entitled to some assistance in meeting his obligations to his professional advisers. I direct that Landform is to pay to Mr O'Connell the sum of \$820 as a contribution to his costs which figure includes the \$70 filing fee.

Summary

[32] I have made the following orders:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$4,000;
- (b) Payment of a penalty for Landform's default in failing to provide a written employment agreement, such penalty to be paid to Mr O'Connell, in the sum of \$1,000;
- (c) A contribution to Mr O'Connell's lost wages in the sum of \$3,000 gross;
- (d) A contribution to Mr O'Connell's professional costs in the sum of \$820.

James Crichton
Member of the Employment Relations Authority