

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 251
5396873

BETWEEN DYLAN ANDREW JAMES
PRICE-BRENNAN
Applicant

A N D JIREH AUTO TYRES
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Keshila Fayen, Advocate for Applicant
William Hung, Representative for Respondent

Investigation Meeting: 28 May and 10 June 2013 at Auckland

Date of Determination: 13 June 2013

DETERMINATION OF THE AUTHORITY

- A. Jireh Auto Tyres Limited (Jireh Auto) unjustifiably dismissed Mr Dylan Price-Brennan.**
- B. Jireh Auto is ordered to pay Mr Price-Brennan:**
- (a) \$4,860 lost remuneration**
 - (b) \$5,000 distress compensation**
 - (c) Unpaid holiday pay to be calculated by the parties.**
- C. Mr Price-Brennan's remedies are reduced by 10% to reflect his contribution to the situation which gave rise to his dismissal grievance.**

Employment relationship problem

[1] Jireh Auto employed Mr Price-Brennan under a Work and Income New Zealand (WINZ) subsidy as a Trainee to work in its Auto Workshop. He started work on 20 February 2012.

[2] Mr Price-Brennan claims he was procedurally and substantively unjustifiably dismissed when he was handed a termination letter on 19 August 2012. He also claims unpaid annual holiday pay.

[3] Jireh Auto denies Mr Price-Brennan was dismissed. It says he was employed on a six months' fixed term engagement so his employment ended when the fixed term expired on 19 August 2012.

[4] Jireh Auto says if there was a dismissal it was because Mr Price-Brennan's performance was unsatisfactory. Jireh Auto says Mr Price-Brennan is not owed holiday pay because he used up his paid annual holiday while employed.

Issues

[5] The following issues are to be determined:

- a. Was Mr Price-Brennan dismissed?
- b. If so, was his dismissal justified?
- c. If not, what if any remedies should be awarded?
- d. Is Mr Price-Brennan entitled to unpaid holiday pay?

Was Mr Price-Brennan dismissed?

Legal requirements of fixed term engagements

[6] The expiry of a genuine fixed term engagement is not a dismissal. Section 66 of the Employment Relations Act 2000 (the Act) sets out the requirements of fixed term employment. Section 66(2) of the Act states that before a fixed term engagement is entered into the employer must:

- a. have genuine reasons based on reasonable grounds for using a fixed term; and
- b. advise the employee of “*when or how the employment will end and the reasons for the employment ending in that way*”.¹

[7] A fixed term agreement cannot be used to exclude or limit an employee’s rights under the Act or under the Holidays Act 2003 (HA03) or to establish the suitability of an employee for permanent employment.²

[8] If the parties agree to enter into a fixed term engagement then s.66(4) of the Act requires the employee’s employment agreement to record:

- a. The way in which the employment will end; and
- b. The reasons for ending the employment in that way.³

[9] Failure to comply with s.66(4) of the Act means the employer cannot rely on the expiry of the fixed term to end the employment if the employee elects to treat the fixed term as ineffective.⁴

Was there a written employment agreement?

[10] There is a conflict over whether the parties entered into a written employment agreement. When Jireh Auto filed its witness statements in advance of the investigation meeting it provided a copy of an employment agreement which appeared to have been signed by both parties on 15 March 2012.

[11] Jireh Auto says it returned the original signed employment agreement to Mr Price-Brennan after he signed it. Mr Price-Brennan claims he never signed the employment agreement and the first time he saw it was when he received Jireh Auto’s witness statements for the Authority’s investigation.

[12] This conflict is to be resolved on the balance of probabilities. I have preferred Mr Price-Brennan’s evidence for the following reasons:

¹ Section 66(2) of the Act.
² Section 66(3) of the Act.
³ Section 66(4) of the Act.
⁴ Section 66(6) of the Act.

- a. Although Jireh Auto appended relevant documents to its Statement in Reply the employment agreement was not provided. It was a critical document which on Jireh Auto's version of events proved Mr Price-Brennan was not dismissed so it is surprising it was not provided at the outset;
- b. An employer would usually keep the original signed employment agreement on file and provide the employee with a copy only, not the original. Jireh could not explain why it gave Mr Price-Brennan the only signed version of the agreement;
- c. The two date entries on the sign off page of the agreement have been written by the same person. If Mr Price-Brennan had signed the agreement I would have expected him to have entered the date beside his signature, however person who signed for Jireh Auto's recorded both dates;
- d. The parties agreed Mr Price-Brennan was not given a copy of the proposed employment agreement before he started work for Jireh Autos;
- e. There is nothing in writing (apart from the purported agreement) to show that Mr Price-Brennan was ever given an employment agreement;
- f. Mr Price-Brennan's supervisor Mr Stephen Gu the Workshop Manager told the Authority he was not aware Mr Price-Brennan had a written employment agreement;
- g. The Office Manager and the Director (at the relevant time) were also both unaware Mr Price-Brennan had a written employment agreement;
- h. The purported employment agreement contains a disciplinary procedures clause⁵ and an appendix which sets out the applicable disciplinary procedures.⁶ No attempt was made to apply or follow

⁵ Clause 13.

⁶ Appendix 3.

these contractual requirements when Jireh Auto imposed two written warnings on Mr Price-Brennan which I consider was unusual if there had there been a signed employment agreement.

[13] I find on the balance of probabilities there was no written employment agreement so the requirements of s.66 cannot have been met. This means Mr Price-Brennan's employment was not for a fixed term so the letter Jireh Auto's gave him on 19 August 2012 summarily dismissed him.

Compliance with s.66 of the Act

[14] Even if the parties had signed the employment agreement I find it did not meet the requirements of s.66 of the Act so there would not have been a valid fixed term engagement which means Mr Price-Brennan was still dismissed.

[15] I also find there was no genuine reason for using a fixed term engagement. Jireh Auto used the first six months of Mr Price-Brennan's employment to assess his suitability for permanent employment which s.66(3) expressly prohibits. Jireh Auto told the Authority it would have given Mr Price-Brennan permanent employment if it had been happy with his performance.

[16] Instead it issued him with a letter on 19 August 2012 which states "*we would not provide anymore training or employment with you as from the 19/8/2012 week.*" I find Jireh Auto's dismissed Mr Price-Brennan because its letter of 19 August amounts to a summary dismissal.

Was dismissal justified?

Justification test

[17] Justification is to be determined in light of the s.103A justification test in the Act. This requires the Authority to assess whether "*the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*".⁷

⁷

Section 103A of the Act.

Poor performance

[18] Jireh Auto says it was justified in not continuing Mr Price-Brennan's employment after the WINZ subsidy ended because it "*did not feel able to develop a long term employment relationship with him because of concerns about his performance*".

[19] Jireh Auto was concerned Mr Price-Brennan was not working as hard as he should have been. It alleges Mr Price-Brennan's colleagues reported he had been smoking outside, walking around and talking when he should have been working. I find it is not open to a fair and reasonable employer to respond to these performance concerns by a summary dismissal.

[20] These performance concerns should have been addressed by a formal performance management process which was designed to help Mr Price-Brennan reach the standard of performance required of him. That did not occur.

Written warnings

[21] Jireh Auto issued Mr Price-Brennan with two undated written warnings. There is a conflict over the date the first written warning was conveyed to Mr Price-Brennan.

[22] Mr Price-Brennan says he was handed both disciplinary letters by the Office Manager, Mrs Gagandeep Sran on 2 August 2012. Jireh Auto's witnesses were in conflict over who gave Mr Price-Brennan the first warning and when that occurred and also over whose decision it was to issue it.

[23] The Workshop Manager, Mr Stephen Gu says the then Director, Mr Davi Xue told him to give Mr Price-Brennan a warning about the way Mr Price-Brennan had interacted with Mr William Hung on 6 June 2012. Mr Price-Brennan was disrespectful to Mr Hung and threw his car keys on the floor when Mr Hung raised concern that Mr Price-Brennan had been using the company vehicle and petrol for his own personal use. Mr Xue says the warning was Mr Gu's sole decision which he (Mr Xue) merely approved.

[24] Mr Gu says he drafted the warning and handed it to Mrs Sran to pass on to Mr Price-Brennan. Mrs Sran says Mr Gu handed the first written warning disciplinary

letter to Mr Price-Brennan who refused to accept it, so she put it on Mr Price-Brennan's file.

[25] Mrs Sran says Mr Gu gave her the second written warning (which related to complaints by other staff that on 10 and 20 July 2012 Mr Price-Brennan was not doing his job but was just walking around and talking while there was work for him to do). Mrs Sran says she handed that and the first written warning to Mr Price-Brennan on 2 August 2012 but he refused to take them.

[26] Mr Price-Brennan says that he took both the letters but refused Mrs Sran's request to sign them because he did not recognise them as valid warnings due to the lack of process around them.

[27] I find both written warnings were unilaterally issued to Mr Price-Brennan without any prior investigation and without a disciplinary process having been held. Mr Price-Brennan was given no information about the disciplinary concerns so he was deprived of an opportunity to comment on his employer's concerns before he was issued with the warnings.

[28] I find the decision to issue Mr Price-Brennan with two written warnings and the way in which Jireh Auto imposed the warnings was not what a fair and reasonable employer could have done in all the circumstances at the time the actions were taken.⁸ Jireh Auto therefore cannot justify either of the written warnings. It therefore cannot rely on any previous warnings to justify Mr Price-Brennan's dismissal for unsatisfactory performance.

Compliance with statutory obligations

[29] A fair and reasonable employer would comply with its statutory obligations. Jireh Auto did not do so which undermines the justification of its decision to dismiss Mr Price-Brennan.

[30] I find Jireh Auto breached its s.4(1A) good faith obligations because it did not provide Mr Price-Brennan with access to information relevant to his on-going employment or an opportunity to comment on relevant the information before he was dismissed. Jireh Auto also failed to comply with any of the four procedural fairness tests set out in s.103A(3) of the Act.

⁸ Section 103A(2) of the Act.

Conclusion

[31] I find Jireh Auto is unable to justify its dismissal of Mr Price-Brennan, A fair and reasonable employer could not have summarily dismissed Mr Price-Brennan in all the circumstances at the time his dismissal occurred.⁹ This is also not a case where Mr Price-Brennan was dismissed after the conclusion of a graduated warning process because Jireh Auto cannot rely on the written warnings which were unjustified.

[32] I find Jireh Auto's dismissal of Mr Price-Brennan was substantively and procedurally unjustified.

What remedies should be awarded?

Mitigation

[33] An employee seeking to recover lost remuneration has an obligation to mitigate their loss by taking appropriate steps to obtain new employment. I am satisfied Mr Price-Brennan took adequate steps to mitigate his loss by actively seeking new employment.

Lost remuneration

[34] Mr Price-Brennan claims three months' lost remuneration of \$4,860¹⁰. I am satisfied Mr Price-Brennan lost more than three months' remuneration as a result of his unjustified dismissals so Jireh Auto is ordered to pay him \$4,860 lost remuneration under s.128(2) of the Act.

Distress compensation

[35] The evidence established Mr Price-Brennan's unjustified dismissal had a seriously adverse effect on his life. I accept he suffered considerable hurt, humiliation and distress.

[36] Mr Price-Brennan and his partner and 3 year old child had to move out of their rental accommodation because they could not afford to pay their rent. They forfeited their bond because they failed to pay their last two weeks' rent. They moved into the

⁹ Section 103A of the Act.

¹⁰ \$405 per week x 12 weeks.

garage of Mr Price-Brennan's mother's two bedroom house which was already occupied by four people and they had to live in the garage for a number of months.

[37] Mr Price-Brennan says he and his partner had to sell everything they owned because they were so desperate for money. They suffered serious financial strain and are only just slowly getting back on their feet now after Mr Price-Brennan obtained employment in March this year.

[38] Jireh Auto is ordered to pay Mr Price-Brennan \$5,000 distress compensation under s.123(1)(c)(i) of the Act to compensate for the humiliation, loss of dignity and injury to feelings his unjustified dismissal caused him.

Contribution

[39] Having determined that Mr Price-Brennan has a dismissal grievance, s.124 of the Act requires me to consider the extent to which his actions contributed towards the situation that gave rise to his dismissal grievance and if required to reduce remedies accordingly.

[40] Contribution denotes blameworthy conduct on behalf of the employee which must be proved on the balance of probabilities. The concerns that Jireh Auto raised about Mr Price-Brennan's performance were not proved to the required standard because no investigation or disciplinary process had been undertaken. I consider them mere allegations so they do not affect remedies.

[41] However, I am satisfied on the balance of probabilities that on 6 June 2012 Mr Price-Brennan spoke loudly, rudely and disrespectfully to Mr Hung who was trying to raise issues regarding Mr Price-Brennan's use of the company vehicle and petrol. I also consider it likely that Mr Price-Brennan threw the company car keys to the ground (not just onto the couch as he admitted) in anger.

[42] I consider these actions are blameworthy conduct. Mr Hung was raising legitimate work issues in an appropriate way so Mr Price-Brennan should not have reacted as he did. I therefore reduce Mr Price-Brennan's remedies by 10% to reflect his contribution to the situation which gave rise to his dismissal grievance.

Is Mr Price-Brennan entitled to unpaid holiday pay?

[43] The parties agree Mr Price-Brennan was not paid any holiday pay upon termination. I do not accept Mr Price Brennan's evidence that he did not take any paid annual holiday whilst employed. It is clear he had a number of days off work and that he continued to be paid his normal wages when he was not at work.

[44] Jireh Auto's leave records reflect Mr Price-Brennan took 11 full days leave (three of which was recorded in its records as sick leave) plus two half days sick leave and he arrived at 12pm one day one and left at 3pm on another occasion. I consider this record is accurate so find Mr Price-Brennan received eight days' paid annual holiday.

[45] I am not satisfied Mr Price-Brennan has received his full annual holiday entitlements because Jireh Auto did not do the necessary calculations upon termination. Jireh Auto is ordered to calculate Mr Price-Brennan's holiday entitlements under s.23(2) HA03 by paying him 8% of his total gross earnings less the amount paid to him for the eight days' paid annual holiday he took in advance whilst employed.

[46] The parties have 14 days to agree the amount (if any) of annual holiday pay due to Mr Price-Brennan. If agreement is not reached the parties have a further 7 days within which to apply to the Authority to fix this amount. This time limit will be strictly enforced so an application outside of this timeframe will require the prior leave of the Authority.

Outcome

[47] Jireh Auto unjustifiably dismissed Mr Price-Brennan.

[48] Jireh Auto is ordered to pay Mr Price Brennan:

- a. \$4,860 lost remuneration.
- b. \$5,000 distress compensation.
- c. Unpaid holiday pay, to be calculated by the parties.

[49] However Mr Price-Brennan's total remedies of \$9,860 (being lost remuneration plus distress compensation) are reduced by \$986 (being 10% contribution) leaving a balance to be paid to him by Jireh Auto of \$8,874.

[50] It is only the awards of lost remuneration and distress compensation that are reduced to reflect his contribution any unpaid annual holiday pay remains to be paid in full.

Costs

[51] Mr Price-Brennan as the successful party is entitled to a contribution towards his actual costs. Any costs application must be supported by proof of the actual costs he has incurred.

[52] The parties are encouraged to resolve costs by agreement. If agreement is not reached costs will be dealt with by an exchange of memoranda. Mr Price-Brennan has 14 days with which to file a cost memorandum and Jireh Auto has 14 days within which to file its costs memorandum in response. This timetable will be strictly enforced.

[53] To assist the parties in resolving costs, the Authority can indicate it will adopt its usual notional daily tariff based approach to costs. The current notional daily tariff of \$3,500 will be adjusted in a principle manner to reflect the particular circumstances of this case. The parties are therefore invited in their costs submissions to identify any factors which they say should result in an adjustment to the notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority