

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 03
5306232

BETWEEN WILLIAM QUIN
 Applicant

AND TRUCKING RELIEF
 (WAIKATO) LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Rose Alchin for Respondent

Investigation Meeting: 30 September 2010 at Tauranga

Submissions Received: 3 November 2010 from Applicant
 21 October 2010 from Respondent

Determination: 7 January 2011

DETERMINATION OF THE AUTHORITY

[1] Mr William Quin responded to an advertised position for a casual delivery driver for Trucking Relief (Waikato) Limited (“Trucking Relief”). Mr Quin was successful in his application and commenced employment in July 2008.

[2] Trucking Relief provides relief truck drivers to various businesses in the nature of labour hire only. It is in the habit of offering only casual employment agreements because it says it is unable to guarantee ongoing work. Workflow is dependent on demand for driver placements with its clients.

[3] Mr Quin undertook delivery work on behalf of Trucking Relief for one of its major clients in Tauranga. That company was called Elgas Limited (“Elgas”). Mr Quin delivered LPG bottles through the Bay of Plenty and Waikato areas on behalf of Elgas.

[4] Mr Gary Cantwell, a director and shareholder of Trucking Relief says that when Trucking Relief employed Mr Quin it was understood that Elgas intended taking on permanent drivers or engaging owner/operator drivers, but that never eventuated.

[5] Mr Quin says that having worked for Trucking Relief solely on the Elgas contract he took time off over the Christmas/New Year period. When he returned he was advised by Elgas that it had no work available for him. After making enquiries with Trucking Relief Mr Quin says he was dismissed and that the dismissal is unjustified. Trucking Relief disputes there was a dismissal.

The issues for this determination are:

- What were the relevant terms and conditions of his employment;
- What was the nature of Mr Quin's employment;
- Was Mr Quin unjustifiably dismissed; and
- If so, what (if any) remedies is he entitled to?

What were the relevant terms and conditions of Mr Quin's employment

[6] On 25 July 2008 Mr Quin signed a written employment agreement which has the title of "Individual Casual Employment Agreement". Clause 2 of the agreement states [my emphasis]:

- 2.1 It shall be the duty of the Employee to carry out all reasonable instructions and to undertake any work reasonably required by the Employer as a **temporary truck driver**.
- 2.2 The employment is on a **casual basis** and there **is no expectation of ongoing work**. The work performed under this Agreement **is intermittent and irregular**.
- 2.3 The Employer **is under no obligation to provide work**. **The Employee is under no obligation to accept work ...**

[7] Clause 4 of the Agreement sets out the times and hours of work and states at clause 4.2:

The Work performed under this Agreement is intermittent and irregular. Work is on an "**as required**" basis and **as such there are not set hours of work**. **The hours of work will be arranged between the Employee and Employer as the need arises**.

[8] Clause 4.3 places no obligation on Trucking Relief to offer any particular hours of work to Mr Quin.

[9] The agreement provided for the payment of annual leave to be incorporated into the hourly rate of pay which was specified as being \$20.00 per hour.

What was the true nature of Mr Quin's employment

[10] Mr Quin answered an advertisement for a delivery driver's position with Trucking Relief. The advertisement advised that the work was part-time to begin with but would grow into a full-time position. There is no dispute that when Mr Quin was offered and accepted the job, he signed the casual employment agreement. In reliance on the statement that the position would grow into a full time position as contained in the advertisement, Mr Quin made enquiries several times during his employment as to when he would become a permanent employee.

[11] Mr Cantwell says Mr Quin accepted a casual position which remained unchanged during the term of his employment. Mr Cantwell told the Authority that the position was established to meet the requirements of Elgas to meet its delivery requirements for its customers.

[12] At the beginning of the employment relationship Mr Cantwell says it was anticipated that Trucking Relief would sign a long term contract with Elgas which would allow it to offer Mr Quin permanent employment.

[13] On 24 November 2009, in response to an enquiry from Mr Quin, Mr Cantwell advised that he was in discussion with Elgas regarding a fixed term commercial contract and that as soon as anything was confirmed in writing a new contract would be provided to Mr Quin.

[14] On 8 December Mrs Quin, on behalf of her husband, sent an email to Mr Cantwell acknowledging that the contract between her husband and Trucking Relief was casual. She outlined the frustration of not knowing from one day to the next where they were. Mrs Quin also advised Mr Cantwell that she was delaying employing a personal assistant in case Mr Quin was put off under his contract, which she acknowledged, could happen at any time.

[15] I find that while the employment agreement and a number of its provisions paint the picture that this was a casual employment relationship, the relationship was not operated in that way in reality.

[16] Mr Quin was employed by Trucking Relief which was, in turn, providing driver services to Elgas. There was no written commercial contract in place between the two entities, but there was an oral arrangement whereby Trucking Relief would provide a worker or workers to undertake the driving work for and on behalf of Elgas.

[17] I am satisfied that at the commencement of the employment relationship it was intended that at some point in the future the employment relationship would change in one or three possible ways:

- that Mr Quin would become an owner/driver contracting his services directly to Elgas;
- that Mr Quin would be employed permanently by Elgas; or
- that Trucking Relief would sign a formal commercial contract to provide ongoing services to Elgas in which case Mr Quin would be employed permanently for Trucking Relief.

[18] After 17 months, Trucking Relief had failed to secure a formal commercial contract with Elgas. During that time Mr Quin worked regularly for Trucking Relief providing driving services to Elgas every week. It was common ground that Mr Quin worked more than 40 hours each week. This arrangement does not accord with the written employment agreement which anticipated “irregular and intermittent” work.

[19] Mr Quin was expected to start work at the same time each day, which, also, is not in accordance with the employment agreement which anticipated that there would be no set hours of work.

[20] Mr Quin was required to provide notice of any time he wished to take off work. As an example, on 17 November 2009 Mr Cantwell told Mr Quin that he needed “...plenty of notice...” if Mr Quin wished to take time off.

[21] By way of further example Mr Cantwell told the authority that when Mr Quin took time off in October 2009 Trucking Relief was able to find a suitable replacement driver for his period of leave. However, in December 2009 Mr Quin only gave 10 days notice of his wish to take leave and Trucking Relief was not able to find a suitable replacement driver. The practice of requiring Mr Quin to provide notice to

take leave is inconsistent with the employment agreement which states that Mr Quin had no obligation to accepting work at any time.

[22] It is clear from the correspondence between Trucking Relief and Mr Quin (including the correspondence between Trucking Relief and Mrs Quin), that Mr Quin fully appreciated the conditions outlined in the employment agreement he had signed with Trucking Relief. However, Mr Quin was adamant that he believed the employment relationship had changed over the 17 months of his employment and set out to have that clarified by Mr Cantwell. Mr Cantwell, however, was unyielding. He was equally adamant that the employment relationship was unchanged and that it was, at all times, a “casual” arrangement.

[23] I am satisfied that as this employment relationship progressed the terms and conditions under which Mr Quin had been employed were varied to the extent that Mr Quin’s employment was not casual, but was ongoing in nature. The reality of the situation was that both Mr Quin and Trucking Relief varied key aspects of the employment agreement by the way in which they both operated under it.

Was Mr Quin unjustifiably dismissed

[24] Section 103A requires an employer to justify a dismissal by establishing that how the employer acted and the actions taken by the employer were fair and reasonable. Failure to establish either or both of the tests means that a dismissal will not be justified.

[25] In December 2009, Mr Quin’s daughter was returning home from overseas for a short holiday. He requested some additional time off over the Christmas/New Year period, which was granted.

[26] On his return to work, Mr Quin received an email from Elgas advising him that there was no work available for the next couple of weeks. Mr Quin contacted Trucking Relief to find out what was going on. Mr Quin says he received no responses to his enquiries, but that evidence is inconsistent with the documents he lodged with his statement of problem which show that Mr Cantwell did respond, but was not in a position to advise him about the work for Elgas.

[27] That situation changed and on 23 January 2010, Mr Cantwell advised Mr Quin that there was no longer any work available at Elgas. Mr Cantwell attributes this

situation to the fact that Trucking Relief was not able to find a suitable replacement driver when Mr Quin took leave over the Christmas/New Year period. He told the Authority that this led to Elgas hiring a delivery driver through another company.

[28] Mr Cantwell says he offered to find Mr Quin alternative employment but Mr Quin rejected that offer, advising Mr Cantwell that he did not want Trucking Relief to find him another job.

[29] Mr Quin can't have it both ways. He argued, and I have found, that Mr Quin had an ongoing relationship with Trucking Relief. Therefore, Trucking Relief had an obligation to find him alternative work once the work with Elgas was no longer available. At the point Mr Quin refused the offer of finding him alternative employment, Mr Quin terminated his own employment.

[30] Further, during the investigation meeting Mr Quin acknowledged that he had never been told he had been dismissed and that he had assumed, that because the work at Elgas was no longer available, he had been dismissed.

[31] I find Mr Quin was not dismissed from his employment with Trucking Relief and I can be of no further assistance to him.

Costs

[32] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Trucking Relief may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Quin will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[33] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell
Member of Employment Relations Authority