IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 8
5470131

	BETWEEN	KARENA SPENCER Applicant
	AND	BD AND LC JONES LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	Tim Hesketh Counsel for Applicant Barry and Linda Jones for Respondent
Investigation Meeting:	23 December 2014 at Palmerston North
Determination:	29 January 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Karena Spencer claims that she was unjustifiably dismissed and is seeking lost wages and compensation. Karena Spencer claims that she was a permanent employee and has a right to bring a personal grievance. She claims lost wages, compensation, compensation for the lost benefit of paid parental leave, a penalty for the respondent failing to retain a copy of an employment agreement, and she claims the filing fee.

[2] BD and LC Jones Limited trading as the Ashhurst Service Centre deny all Ms Spencer's claims.

Issues

[3] Was Ms Spencer a permanent employee, and is she entitled to bring a personal grievance?

[4] Was Ms Spencer unjustifiably dismissed, and if so was the action a fair and reasonable employer could take? Did the respondent follow the correct procedure under s 103A (3) of the Act-to put any concerns to Ms Spencer, conduct an investigation, provide an opportunity for Ms Spencer to reply and to genuinely consider her reply before making any decision?

[5] Is Ms Spencer entitled to a penalty under s 64 (4) and s 65 (4) of the Employment Relations Act?

Facts

[6] BD and LC Jones Limited (Ashhurst Service Centre) operates as a service station outside of Ashhurst in the Manawatu. Ms Spencer commenced work at the Ashhurst Service Centre on 10 February 2014 as a sole charge customer service operator. Barry Jones, one of the owners decided to employ her to undertake his hours and shifts while he was undertaking other business activities. There was no individual employment agreement signed off by the parties. Mr Jones employed Ms Spencer on an oral arrangement to cover his hours for casual work until a self-pay system was installed.

[7] The fuel part of the business had been sold to Allied Petroleum Limited on 1 October 2013. This involved the change of ownership of the forecourt, the tanks at the service centre and the implementation of a self-pay system was planned to be installed, but the latter was delayed. The shop on site was sold on 1 August 2014. The company then ceased trading.

[8] Not long after starting Ms Spencer became pregnant (with her third child) and was unwell. Ms Spencer had a history of unwellness with the early stages of pregnancy. She continued to work, but Mr and Mrs Jones became concerned about Ms Spencer being able to complete her duties and complaining of feeling unwell. Mr Jones and Ms Spencer talked about the situation and how to deal with it. The Jones' say they received complaints from customers concerning Ms Spencer not coping with her work. This raised for them the prospect of health and safety issues.

[9] The accounting records show that Ms Spencer worked seven (7) weeks at an average of 28.75 ordinary hours per week. She was paid $13.75 per hour. She was paid until 30 March 2014, when she says that she was dismissed. The Jones' made the decision not to allow Ms Spencer to continue because of their concerns about her health and their responsibilities for health and safety, that Mr Jones had to cover for her anyway and that she was too unwell to work and had to go into hospital in the final week of her shift.

Determination

[10] Both parties have been polarised in their views on the contractual nature of the employment. Mr and Mrs Jones say they did not have an employment agreement because of the casual nature of the arrangement to cover Mr Jones's hours and that they did not have details such as dates and length of employment to include in an employment agreement. Mr and Mrs Jones also argue that that there was no real job and that it was only an offer of some shifts to free up Mr Jones who ended up covering for her anyway. The Jones' claim is entirely misconceived. There was an employment relationship because Ms Spencer was paid by BD and LC Jones Limited for work that she undertook over seven weeks when she worked for them. Ms Spencer's employment did not end at the end of each shift. I hold that Ms Spencer's employment was based on the occurrence of a specified event and that her employment would have ceased at some point around the arrangements being made to install the self-pay system with the sale of the forecourt and tanks, the planned introduction of the self service system of payment and the preparation to sell the shop. The record shows that there were regular hours worked by Ms Spencer although they varied from shift to shift each week. Her rate of pay was clear from the record. Her holiday pay accumulated over the seven weeks. The Employment Relations Act requires an employer to retain a copy of an employment agreement, whether or not it is signed. The failure to have an individual employment agreement with Ms Spencer was deliberate. Mr Jones acknowledged that he took the chance at the time when he employed her to cover his hours. I hold that his action was for his own convenience and the result was to minimize the risk of Ms Spencer becoming aware of her rights as an employee because nothing was put in writing. The failure to retain a written individual employment agreement has not been helpful for determining the nature of the employment, except to conclude that even if it was casual-ongoing/ fixed

term/permanent part time, Ms Spencer has rights under the Employment Relations Act and the minimum entitlements of employment. On the information available Ms Spencer is entitled to bring a personal grievance with her claim. This is because her position was a casual ongoing arrangement based on shifts that were regular and therefore made her position ongoing. She was employed and the respondent failed to put in place a proper fixed term agreement for any arrangement associated with the planning for the introduction of the self-pay system.

[11] The failure to retain an individual employment agreement is a breach of the Employment Relations Act and there is a penalty for such a breach. The claim has been brought within time under the Act. However to obtain a penalty, only a Labour Inspector can bring a claim.

[12] Section 64(4) and s 65(4) of the Employment Relations Act Act are as follows:

> ***64***...
>
> *(4) An employer who fails to comply with subsection (1), (2), or (3) is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.*
>
> ***65***...
>
> *(4) An employer who fails to comply with this section is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.*

[13] Ms Spencer's claim has not been brought by a Labour Inspector as required under s 64 (4) and s 65 (4) of the Employment Relations Act 2000 for a penalty. Therefore I am not able to impose a penalty as claimed under s 64 (4) of the Act, although I hold that the breach was deliberate when Mr and Mrs Jones employed Ms Spencer and they did not retain an employment agreement in writing and containing the required statutory terms.

[14] I now turn to the dismissal. In the background Ms Spencer's pregnancy genuinely did cause concern to the Jones in regard to her wellbeing and their responsibilities as to health and safety. However their decision was made on their assessment of the information without a proper investigation and did not follow the procedure under s 103A (3) of the Act. I have not been satisfied that Ms Spencer was informed properly of the Jones' concerns to enable her to get a representative and respond. First I hold that Ms Spencer did not have access to all the information such as the alleged complaints and/or concerns from customers and other employees and

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that she was not informed of the significance of any concerns on the continuation of her job. Evidence produced for the Authority was after the event. Statements provided were prepared for the Authority's investigation in regard to the nature of the employment arrangements and properly should have been available to Ms Spencer before her dismissal. Second, Mr and Mrs Jones did not provide the details of the customer and employee concerns sufficiently in writing to enable Ms Spencer to properly respond given the broad nature of the concerns and allegations being made. A fair and reasonable employer could be expected to provide the concerns in writing at the time as Mr and Mrs Jones did in the correspondence and their statement in reply for the Authority's investigation, to substantiate them. I hold that any discussion that Mr Jones says he had with Ms Spencer was not a formal discussion to deal with the concerns or to put Ms Spencer on proper notice that her job was in jeopardy or at risk. Third a fair and reasonable employer could have advised and allowed Ms Spencer to get advice and a representative before any decision. This is because of the uncertainty the employer caused with the nature of the employment arrangements by not having an individual employment agreement and the employer's claims on the law. Also, Ms Spencer's employment was at risk. Fourth a fair and reasonable employer could have requested medical details in regard to Ms Spencer's health and to assess any impact on health and safety before making any decision, which it failed to do. Finally, these failures mean that a fair and reasonable employer could not have genuinely considered Ms Spencer's response before any decision was made. I hold that the failures were not minor and resulted in Ms Spencer being treated unfairly.

[15] Mr and Mrs Jones have alleged that Ms Spencer set them up to obtain paid parental leave. There has been no basis for this claim since Mr Jones freely and with an open mind employed her to cover his shifts. Mr and Mrs Jones were satisfied that Ms Spencer had the knowledge to do the job. In any event Ms Spencer would not necessary have been eligible to meet the requirements for paid parental leave given the arrangements pertaining to her employment and the lack of any certainty that she would have been employed long enough having regard to the way that Mr and Mrs Jones have viewed the nature of the employment.

[16] This means that Ms Spencer has a personal grievance for unjustified dismissal. Her remedies entitle her to lost wages and compensation. Her claim for the lost benefit of paid parental leave has been withdrawn at the Authority's investigation

meeting. Her employment ended on 30 March 2014. Her employment, given the arrangements, would not have continued past 3 June 2014 when the self-service pay system became operative. Ms Spencer's loss would have been for at least fair notice that would have amounted to 4 weeks' pay given the length of her employment, her role and the nature of the work, in the absence of any employment agreement. I hold that she did not mitigate her loss, except with some informal approaches to at least one previous employer, but that it would have been difficult for her to get another job because of her pregnancy and thus explains her reluctance to apply. Also, Ms Spencer has accepted that she had been sick and had medical attention before returning to work to get her final pay. Her lost wages amount to $1,581.25 gross equivalent to the notice because Ms Spencer was not able to satisfy me that she had been cleared to return to work and that she would have worked for more time. I hold that there has been no blameworthy conduct identified to reach a conclusion that Ms Spencer contributed to her personal grievance to reduce the sum.

[17] I now turn to compensation. Ms Spencer was required to work out her last shifts, but became ill. She returned to work to get paid her final entitlements. She says that she was upset with the allegations that had been made and the way she had been treated to finish work and that there was a financial impact on her losing her wages. There is no adequate proof that her illness was related to her dismissal to include this in the compensation. I hold that compensation is at the lower end of the scale in the sum of $2,000 nett under s 123 (1) (c) (i) of the Act.

[18] Ms Spencer is entitled to be reimbursed the filing fee. There is no other claim for costs.

Summary of Orders of the Authority

[19] BD and LC Jones Limited is required to pay Karena Spencer:

a. $1,581.25 gross lost wages; and

b. $2,000 net compensation for hurt and humiliation under s 123 (1) (c) (i) of the Act; and

c. $71.56 filing fee.

$7571.56.

P R Stapp
Member of the Employment Relations Authority