

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 234/10  
5280139

BETWEEN                      GEORGINA TE AWA  
   Applicant  
  
AND                              CROSS COUNTRY RENTALS  
   LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Applicant in Person  
   Anthony Nolan for Respondent  
  
Investigation Meeting:      16 February 2010 at Hamilton  
  
Additional Information      23 February 2010 from Applicant  
and Submissions:          1 and 8 March 2010 from Respondent  
  
Determination:              19 May 2010

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**DETERMINATION OF THE AUTHORITY**

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[1] Ms Georgina Te Awa was employed by Cross Country Rentals Limited (“CCR”) as a maintenance person to carry out general cleaning and maintenance duties on vehicles on 9 March 2009. Ms Te Awa gained her employment through her Accident Compensation Corporation (“ACC”) Case Manager.

[2] Ms Te Awa was dismissed on 3 July. She claims that dismissal was unjustified and seeks reimbursement of lost wages and compensation. CCR denies Ms Te Awa’s dismissal was unjustified.

[3] Pursuant to section 103A the Authority must scrutinise the respondents actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer’s actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[4] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer<sup>1</sup>.

[5] Although the Authority does not have unbridled licence to substitute its decision for that of the employer<sup>2</sup> it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred<sup>3</sup>.

### **Employment Agreement**

[6] Ms Te Awa says she was not presented with a written employment agreement prior to her commencing employment. It was common ground that a written agreement was provided to Ms Te Awa after she commenced employment but that Ms Te Awa would not sign the agreement.

[7] At the investigation meeting Ms Te Awa initially told the Authority that she would not sign the agreement because it had nothing to do with her. However, on further questioning and after considering some aspects of the written agreement, Ms Te Awa explained that she would not sign the agreement as it was not her name on the footer of the document.

[8] In answer to further questions by the Authority Ms Te Awa told me that she raised the issue of the employment agreement with her Accident Compensation Corporation (ACC) case manager but did not raise it with her manager.

[9] I am satisfied Ms Te Awa had received and read her copy of the employment agreement, however, it was never properly concluded because it remains unsigned. CCR relies on the fact that Ms Te Awa had agreed to a trial period and it was as a result of her poor performance that she was dismissed at the end of the trial period.

[10] The written agreement did provide for a trial period of 3 months pursuant to section 67 of the Employment Relations Act 2000 and Ms Te Awa acknowledged at the investigation meeting that at her interview she agreed that she would be subject to a 3 months trial period. However, Ms Te Awa was not dismissed either during or at

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<sup>1</sup> *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

<sup>2</sup> *X v Auckland District Health Board* [2007] 1 ERNZ 66.

<sup>3</sup> *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

the end of the trial period. She was dismissed on 3 July 2009 which was nearly one month after the trial period had ended.

### **The employment relationship**

[11] Ms Te Awa's immediate supervisor was Joy. Joy was the Chief Executive Officer at CCR. It was common ground that Ms Te Awa's performance was constantly under scrutiny and Joy raised performance issues with her on a regular basis.

[12] Ms Te Awa told the Authority that she noticed that Joy's conduct towards her was worsening and in May 2009 she began keeping a diary of incidents as advised by her ACC case manager. A copy of the diary was produced to the Authority.

[13] In her evidence Joy gave a number of examples of Ms Te Awa's performance where it failed to meet her expectations. These examples were put to Ms Te Awa for her response. Most of the examples given to the Authority were accepted by Ms Te Awa as having been raised with her.

[14] Ms Te Awa says that even though there may have been issues with her performance she was never provided with fair warning of her unsatisfactory performance and was not provided with the support and training to improve.

[15] I do not accept that evidence from Ms Te Awa. Having considered all of the evidence around the issues raised about her performance directly by Joy, Ms Te Awa could be under no misapprehension as to what was expected of her with regard to any of the tasks she was required to undertake.

[16] Further, the uncontested evidence of Mr Jim Kyle, a retired mechanic, is that he was called in about six weeks into Ms Te Awa's employment and provided her with specific training on battery care, charging and testing, electrolyte levels, charger connections, polarities and the connecting up of batteries in 12 and 24 volt situations. Mr Kyle also told the Authority that he returned to CCR at least twice after the initial training and provided additional training to Ms Te Awa on how to test batteries and how to connect batteries to a charger.

### **The Dismissal**

[17] On 19 June Joy met with Ms Te Awa and advised her that she was not happy with her performance. Ms Te Awa says this came as a surprise to her as she says Mr Geoff Largesson had praised her work throughout her employment. Joy advised Ms Te Awa that as a result of her performance, they had reconsidered her position and would be employing a part-time mechanic to take care of the mechanical issues with the vehicles. Joy advised Ms Te Awa that this would have an impact on her job which would now only be available for four hours each day.

[18] On 2 July Mr Geoff Largesson, the owner of CCR advised Ms Te Awa that he had to let her go. Ms Te Awa says she asked for a reference and he advised her one would be provided. Ms Te Awa was paid one month's wages in lieu notice.

### **Determination**

[19] CCR appears to be relying on the one hand, on Ms Te Awa's performance to justify its dismissal, while on the other claims it had restructured her position to the extent that it was no longer viable to retain her services full-time and therefore she was redundant.

#### *Poor performance/trial period*

[20] As set out earlier in this determination, the trial period could not be relied upon by CCR to dismiss Ms Te Awa. The trial period had ended nearly a month earlier. Joy says that as she was away on leave when the trial period ended it needed to be dealt with on her return. However, the diary notes kept by Ms Te Awa indicate that Joy was back from leave nearly a week before she discussed the performance issues with her and in any event, it was Mr Largesson who eventually terminated Ms Te Awa's employment and he could have done that while Joy was on leave.

[21] Besides which, there was no record of any warnings given to Ms Te Awa about her poor performance and neither was she told that if her performance did not improve, that her job was in jeopardy.

#### *Redundancy*

[22] If CCR is relying on redundancy as the reason for dismissal, it must show that the redundancy was for genuine commercial reasons. I am not satisfied that it was. Firstly, it is clear from the evidence from Joy that the predominant reason for Ms Te Awa's dismissal was her lack of performance. Secondly, the only reason why CCR

considered making Ms Te Awa's job part-time was because of its concerns that she was failing to meet the performance standards it expected of her.

[23] In all the circumstances of this case an employer acting fairly and reasonably would have set out formally to Ms Te Awa the issues it had with her performance, provided an opportunity for improvement which would be followed by a fair assessment as to whether any improvements had been made, and put her clearly on notice that in the absence of any improvements, her job was in jeopardy.

[24] I find Ms Te Awa was unjustifiably dismissed and is entitled to remedies.

### **Remedies**

[25] Ms Te Awa is seeking reimbursement of lost wages and compensation. Section 128(2) of the Employment Relations Act requires the reimbursement of three months' lost wages in the event of a dismissal being found to have been unjustified. Any greater award is both discretionary and subject to proof of loss and mitigation.

[26] Ms Te Awa has provided little evidence of the efforts she made to find alternative employment following her dismissal. I therefore exercise my discretion not to award more than three months lost wages which I calculate as being \$580.00 per week. Ms Te Awa was paid for one month in lieu of notice and is therefore entitled to 8 weeks lost earnings being \$4,640.00 gross.

[27] Ms Te Awa also claims an unspecified amount as compensation for hurt and humiliation. Ms Te Awa says Joy yelled at her and abused her throughout her employment relationship at CCR. Joy, on the other hand says it was not her that yelled and was abusive, rather, it was Ms Te Awa.

[28] I find on the balance of probabilities and having interviewed and observed both women at the investigation meeting, that it is more likely than not that Ms Te Awa was quick to anger when told to correct her work. The evidence has not established to my satisfaction that Joy yelled at, or abused Ms Te Awa during the employment relationship.

[29] In all the circumstance I think it appropriate that Ms Te Awa be compensated at the lower end of the scale and award her \$3,000.

[30] I am required to consider the extent to which the actions of Ms Te Awa contributed toward the situation that gave rise to the personal grievance, and, if required, reduce the remedies that would otherwise have been awarded accordingly.

[31] Ms Te Awa's performance was, from all accounts, not entirely satisfactory. She was told on many occasions, as documented by her, of the issues CCR had with the job she was doing. It was clear on the evidence that had Ms Te Awa undertaken her tasks to the expected standard the need to employ another employee to undertake some of the maintenance tasks not being carried out properly by Ms Te Awa would never have arisen.

[32] In all the circumstances of this case I consider that I must apply some reduction to the monetary remedies but not to the extent that Ms Te Awa should be deprived of any remedy. I consider that a 50% reduction is appropriate.

### **Summary of orders**

[33] Cross Country Rentals Limited is ordered to pay to Ms Te Awa the following sums within 28 days of the date of this determination.

- \$2,320.00 gross pursuant to section 123(1)(b) of the Employment Relations Act 2000;
- \$1,500 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

### **Costs**

[34] Ms Te Awa was not represented at the investigation meeting and in that case she is entitled to reimbursement of her filing fee of \$70.00. **Cross Country Rentals Limited is ordered to reimburse Ms Te Awa the filing fee.**

Vicki Campbell  
Member of Employment Relations Authority