

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 181
5639390

BETWEEN FRANKLYN WATE
 Applicant

AND TALBOT AGRICULTURE
 LIMITED
 Respondent

Member of Authority: Andrew Dallas

Representatives: John Horan, Advocate for the Applicant
 Craig O'Connor, Counsel for the Respondent

Investigation Meeting: 11 April 2017 at Timaru

Submissions During the investigation meeting with further
 information received up to, and including, 9 June 2017

Determination: 26 October 2017

DETERMINATION OF THE AUTHORITY

- A. Mr Wate was unjustifiably dismissed by Talbot Agriculture Limited (Talbot).**
- B. Talbot must settle Mr Wate's personal grievance by paying him the following amounts within 28 days of the date of this determination:**
- (i) Three months gross pay as reimbursement for lost wages; and**
 - (ii) \$10,000.00 as compensation for humiliation, loss of dignity and injury to feelings.**

- C. Within 28 days of this determination, Talbot must pay Mr Wate for the period 2 May 2016 to 11 June 2016:**
- (i) minimum wages of \$3751.50 for 246 hours performing “work familiarisation”; and**
 - (ii) \$300.12 as gross holiday pay.**
- D. Within 28 days of this determination, Talbot must pay Mr Wate for the period 12 June 2016 to 29 July 2016:**
- (iii) \$6750.00 as gross wages; and**
 - (iv) \$540.00 as gross holiday pay**
- E. Costs are reserved**

Employment relationship problem

[1] Franklyn Wate claimed he was unjustifiably dismissed from his position as a mechanic with Talbot Agriculture Limited (Talbot) on 29 July 2016.

[2] Mr Wate, through his representative, also raised a number of other matters, many of which were outside the Authority’s jurisdiction including defamation. However, one claim Mr Wate did make, and one which would have some bearing on the validity of his dismissal, was that he performed work for Talbot for a period of approximately six weeks before his individual employment agreement came into effect. The parties had entered into a conditional employment agreement which required Mr Wate to obtain a work permit from Immigration New Zealand (INZ) before it came into effect.

[3] Talbot denied all of Mr Wate’s claims, whether within or outside jurisdiction. Talbot said Mr Wate was dismissed in reliance on a valid trial period provision in his individual employment agreement.¹

¹ Employment Relations Act 2000, s 67A

The Authority's investigation

[4] For jurisdictional and procedural reasons, the Authority's investigation proceeded on the basis of addressing the substantive issues between the parties.²

[5] Counsel for Talbot initially objected to John Horan acting for Mr Wate on the basis that Mr Horan had worked with Talbot as an immigration advisor on behalf of Mr Wate and had seemingly prepared the individual employment agreement that would bind Talbot and Mr Wate. Counsel said Mr Horan was conflicted and a potential witness.

[6] In response to counsel objection, the Authority communicated with the parties in the following terms:

The issue about Mr Horan's representation of [Mr Wate] is noted. However, having considered the issue it is not readily apparent to the Authority on what basis Mr Horan can be precluded from continuing to represent [Mr Wate].

Mr Horan is not a lawyer who has acted for [Talbot] and does not appear to be bound by any other professional obligations. In addition, the Authority's practice note on the conduct of representatives before the Authority does not address the issue. As counsel will know, there is also "no property" in a witness, assuming Mr Horan has relevant evidence to give the Authority. Counsel for [Talbot] is invited to [provide] submissions on this issue.

[7] Counsel was also referred to the determination of the Authority in *Brown and Ors v The Partners of The Partnership of International Football Academy of New Zealand*, a matter also involving Mr Horan and dealing with similar issues.³ Counsel did not press the matter further.

[8] During the investigation meeting, I heard evidence from Mr Wate, his wife, Salome Wate, Mr Horan, Jeremy Talbot, Stephen Talbot, Warren Talbot and Robert Talbot. Various documents were provided by the parties. The parties' representatives made submissions during the meeting and in writing afterwards.

² See, [11] below. See, also Employment Relations Act, s 160(3).

³ [2016] NZERA Christchurch 65

[9] This determination, reserved at the conclusion of a one day investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[10] As permitted by s 174E of the Act this determination has not recorded all the evidence received during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[11] The following are the issues for investigation and determination:

- (i) Was Mr Wate dismissed under a valid 90 day trial period;
- (ii) If not, was Mr Wate unjustifiably dismissed by Talbot;
- (ii) If Talbot's actions were not justified what remedies should be awarded, considering:
 - (a) compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act;
 - (b) compensation for lost wages under s 123(1)(b) of the Act;
- (iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Wate that contributed to the situation giving rise to their grievances?

Factual background

[12] Talbot is a family-owned mixed arable/livestock farming and agricultural contracting business based in Temuka, South Canterbury. Jeremy Talbot is managing director and the company is owned by him and his two brothers, Stephen and Warren Talbot.

[13] In March 2016, Talbot advertised on the *Trade Me* website for a full-time mechanic. While the work described in the advertisement was predominantly mechanical, it also identified that some farm work may need to be undertaken.

[14] On 16 April 2016, Mr Horan contacted Jeremy Talbot. Mr Horan advised Mr Talbot he was a licenced immigration adviser and his client, Mr Wate would be a suitable candidate for the position. Mr Horan subsequently emailed Mr Wate's curriculum vitae to Mr Talbot. Mr Horan provided additional information on 17 April 2016 including evidence of Mr Wate's qualifications and experience.

[15] Mr Wate attended Talbot's premises between 2 May 2016 and 4 May 2016 to undertake what Jeremy Talbot described as "an assessment of his abilities".

[16] On 4 May 2016, Talbot offered Mr Wate the advertised position. Mr Horan then drafted the letter of offer and prepared the individual employment agreement for Talbot.

[17] Mr Wate signed the agreement on 5 May 2016 and Jeremy Talbot signed it on behalf of Talbot on 6 May 2016.

[18] It was common ground between the parties the agreement was conditional upon Mr Wate obtaining a work permit from INZ. A review of the agreement confirmed this, although it was not apparent until the fine print on the last page. Relevantly, this stated:

This employment agreement becomes valid once INZ approves a work visa for the appropriate named mechanic and is signed and dated by both parties.

[19] Between 10 May 2016 and 14 June 2016, on Talbot's case, Mr Wate continued with the "familiarisation process" during which time he "was free to come and go as he pleased" from the farm and the workshop.

[20] However, according to Mr Wate – who provided the Authority with his diary for the relevant period and which detailed the activities he undertook during this familiarisation process – he performed a variety of tasks for Talbot including working on third party agricultural equipment. He also performed a limited amount of farm work.

[21] In the early part of this period, Jeremy Talbot provided Mr Wate with board and lodgings, for which he was not charged. Mr Wate subsequently moved into Jeremy Talbot's father's house. The parties did not enter into a tenancy agreement. However, Mr Talbot said in his evidence he had an expectation Mr Wate would contribute to expenses when he "obtained his work visa" and was "earning wages".

[22] Mr Wate obtained a work visa on 14 June 2016. On Talbot's case, Mr Wate "commenced" employment on 15 June 2016.

[23] Jeremy Talbot was away in the United Kingdom on business between 3 June 2016 and 5 July 2016. However, during this period Jeremy Talbot received regular updates from Mr Horan about Mr Wate's pending work visa. He also received updates from his brothers and son about various aspects of the family business, including the workshop. Mr Talbot said some of these updates from family members included criticism of Mr Wate's work performance.

[24] On his return to New Zealand, rather than taking up these concerns with Mr Wate directly, Jeremy Talbot said he contacted Mr Horan. Mr Horan then counselled Mr Wate about his performance. Mr Talbot said Mr Wate's performance did not improve.

[25] Jeremy Talbot said he was concerned for Mr Wate's welfare. He said he tried to assist Mr Wate's wife to obtain work by putting her in touch with some business contacts in South Canterbury. Mr Talbot said he did this so the potential loss of Mr Wate's employment would not jeopardise their immigration status. He also expressed concern Mr Wate was not coping with the cold South Canterbury winter.

[26] Jeremy Talbot raised Mr Wate's work performance directly with him on 6 July 2016. Mr Wate described these as "false problems" and said these had not been raised with him in the month he was working for Talbot before Mr Talbot left for the United Kingdom. Mr Wate also said Jeremy Talbot suggested during this discussion Mr Wate suffered from colour blindness and deafness. Mr Wate said neither was the case. On 13 July 2016, Mr Talbot sent Mr Horan an email saying he was considering terminating Mr Wate's employment. During a further discussion on 14 July 2016, Mr Wate said Mr Talbot told him he might terminate his employment.

[27] Jeremy Talbot said the decision was made to terminate Mr Wate's employment on 17 July 2016 under the 90 day trial period. The letter of termination issued to Mr Wate by Jeremy Talbot dated 18 July 2017 did not mention his dismissal being under a 90 day trial period. However, it did state "[w]e are doing this as we have not been satisfied that you possess the skills required to fill the position as advertised". The letter also advised Mr Wate his last day of work would be 29 July 2016.

[28] Mr Wate was not paid any wages by Talbot. However, he was given \$1100 during the course of his employment. This comprised \$300 cash from Jeremy Talbot on 13 May 2016 who, on Mr Wate's evidence, said words to the effect of "do not tell anyone about this cash payment"; \$500 cash from Stephen Talbot on 29 June 2016 who, again on Mr Wate's evidence, said words to the effect "for warm clothes and food" and \$300 cash from Jeremy Talbot on 19 July 2016, after he was dismissed.

Relevant post-dismissal matters

[29] Several matters subsequent to Mr Wate's dismissal are relevant.

[30] After raising the possibility of resolving the dismissal with Mr Wate, Jeremy Talbot sent Mr Wate's wife an email on 19 July 2016 which stated:

I must tell you that I have offered a solution to assist [Mr Wate] in the future. I do need confirmation that this is acceptable as I have to inform the immigration people of our decision. It will look a lot better if he has resigned due to home sickness and the cold weather which I am sure will allow him to come back on compassionate grounds. I am also offering to pay his return air fare but I can only do this for a limited time as well. I think you need to accept that at the present this is the best solution and accept it.

[31] However, Jeremy Talbot's attempts to find a solution came to nothing. Mr Wate said he felt he was being manipulated. He said this added to the distress caused by his dismissal. Mr Wate's wife told Mr Talbot she would rely on the advice of Mr Horan.

[32] On 27 July 2016, in a surprise twist in the tale, Mr Wate said Jeremy Talbot asked him to stay for three weeks as a casual employee on a reduced wage rate. In his evidence, Mr Talbot suggested this was only for a few days to enable Mr Wate to complete an engine rebuild. Mr Talbot said Mr Wate might have found the extra work “beneficial”. Mr Wate, in turn, said he was “astonished” by this proposal. He said he had been paid no wages at all during his employment and now was being offered casual work for lower wages. Mr Wate rejected the offer of casual work after consulting with Mr Horan. He said he believed it was illegal and contrary to immigration laws.

[33] As stated above, Mr Wate was not paid by Talbot’s for the work he performed. Talbot said this was because he did not provide it with an IRD or bank account number. Talbot said it repeatedly requested Mr Wate provide these numbers. It said this was the reason why he was never paid wages. Mr Wate said he was never offered assistance to obtain an IRD number or open a bank account. Jeremy Talbot said he never sought such assistance.

Evaluation

A valid 90 trial period?

[34] Talbot said Mr Wate was dismissed in reliance on a valid trial period provision in his employment agreement. This is a threshold issue in this case.

[35] I find Franklin Wate was not an employee of Talbot to whom a valid trial period could apply.⁴ At the point Mr Wate received his work permit and commenced, on Talbot’s case, as an employee under the terms and conditions of the individual employment agreement, he had performed 246 hours of “work familiarisation” for Talbot.

[36] As stated above, Mr Wate provided diary entries to Authority which meticulously detailed the activities he undertook during this familiarisation process. These entries record the tasks he performed including working on third party agricultural equipment and some farm work.

⁴ Employment Relations Act, s 67A.

[37] During the investigation meeting, Mr Wate's evidence about whether he expected payment for the period 2 May 2016 to 11 June 2016 was initially slightly confused, and the intervention of Mr Horan in this regard did not assist the Authority. However, Mr Wate was ultimately firm in his belief he would to be paid during the familiarisation process and combined with his diary entries, I find, on balance, he expected to be paid for the work he undertook. It follows then, and I find, Talbot and Mr Wate were employer and employee during the familiarisation process.⁵

[38] It is not necessary to decide whether Mr Wate was a fixed-term or casual employee of Talbot during this period because the result would still be the same.

Did Talbot satisfy the s 103A test for justification for dismissal?

[39] As Talbot cannot rely on a trial period to dismiss Mr Wate, did it meet the test for justification for dismissal set out in s 103A of the Act? Unfortunately for Talbot, the answer is no.

[40] On the evidence before the Authority, the principal concerns Talbot had with Mr Wate related to his performance. Such concerns appeared to emerge during Jeremy Talbot's absence in the United Kingdom, rather than during the month prior when Mr Wate was working directly with Mr Talbot.

[41] Jeremy Talbot directed initial concerns about Mr Wate's performance to Mr Horan. Seemingly, Jeremy Talbot relied on Mr Horan to communicate these to Mr Wate. This may have been because Jeremy Talbot was overseas, but he continued to engage with Mr Horan directly upon his return.

[42] When Jeremy Talbot eventually, and directly, raised performance concerns with Mr Wate, it was shortly before the termination of his employment. It was also undertaken in an unsatisfactory manner. By way of illustration, on 6 July 2016, Mr Wate, in evidence, which I accept, said Jeremy Talbot suggested he suffered from colour blindness and deafness.

⁵*The Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152

[43] In my view any concerns Talbot had about Mr Wate's work performance, legitimate or not, were not raised with him in a manner which would have enabled them to be sensibly addressed by the parties. As a fair and reasonable employer, Talbot having performance concerns about Mr Wate – and in consideration of ultimate compliance with its s 103A obligations – would have properly put Mr Wate on notice about these concerns and advised him how they could be addressed including offering necessary and appropriate training and support. This was not done.

[44] Further, the allegation of Mr Wate's poor performance is significantly undermined by Talbot's offer to re-employ him in the same position, albeit on a reduced pay-rate, post-termination. This is so, regardless of whether the offer of employment was for, on Jeremy Talbot's case, a few days or, on Mr Wate's case, several weeks.

Conclusion about Mr Wate's personal grievance

[45] I find Mr Wate was not a "new" employee at the time he was granted his work permit and commenced working under the terms and conditions of the employment agreement. Therefore, the trial period contained in that agreement, even if valid, cannot be relied on by Talbot.

[46] Talbot cannot meet the test for justification set out in s103(A) of the Act and it follows, therefore, Mr Wate has been unjustifiably dismissed.

[47] To the extent the findings in this determination raise issues with INZ and the Inland Revenue Department, it is a matter for those agencies to consider.

Remedies

[48] Having found that Talbot was not justified in dismissing Mr Wate, he is entitled to an assessment of remedies to settle his personal grievance.

Reimbursement for lost remuneration

[49] Based on Mr Wate's evidence, he did take active steps to find work and attempt mitigate the loss of his job with Talbot, despite the fact he derived no income from it. However, as a migrant worker, subject to work permit restrictions and having been dismissed, this clearly was not an easy process for him.

[50] I find that an award of three months' gross pay as reimbursement for lost wages under s 123(1)(b) of the Act is appropriate in all the circumstances.

Compensation for humiliation, loss of dignity and injury to feelings

[51] Mr Wate sought \$35,000 compensation for humiliation, loss of dignity and injury to feelings. Mr Wate said he was humiliated and upset by his dismissal. His evidence in this regard was supported by that of his wife. I accept that Mr Wate suffered humiliation, loss of dignity and injury to feelings because of his dismissal.

[52] Subject any consideration of contribution under s 124 of the Act, I find \$10,000 as compensation for that humiliation, loss of dignity and injury to feelings is an appropriate amount to award under s 123(1)(c)(i) of the Act.

[53] The amount is made mindful of the Court's guidance on granting such remedies.⁶

Contributory behaviour by Mr Wate?

[54] Having found that Mr Wate was entitled to remedies for his personal grievances, I was required by s 124 of the Act to consider whether he contributed to the situation giving rise to his grievance.

⁶ *Hall v Dionex Pty Limited* [2015] NZEmpC29 at [87]–[90] and *Rodkiss v Carter Holt Harvey Limited* [2015] NZEmpC 34 at [133].

[55] Having found Talbot's decision to dismiss Mr Wate was not what a fair and reasonable employer could have done in all the circumstances at the time, there is no deduction for contribution under s 124 of the Act.

Unpaid wages and holiday pay

Wages for the period 2 May 2016 and 11 June 2016

[56] Talbot must pay minimum wages to Mr Wate for the "work assessment" conducted by Talbot between 2 May 2016 and 11 June 2016. Based on an analysis of Mr Wate's diary entries, the Authority has calculated the minimum wages payable to Mr Wate as \$3751.50 gross for 246 hours work. In addition, Talbot must also pay Mr Wate statutory minimum holiday pay at a rate of 8% on these gross earnings, which has been calculated as \$300.12 gross.

[57] Mr Wate is also owed unpaid wages and holiday pay for the period 12 June 2016 to 29 July 2016. There was no evidence provided by Talbot in rebuttal to Mr Wate's claim for unpaid entitlements. However, as outlined above, Talbot said it never paid Mr Wate wages for this period because he did not provide a bank account or an IRD number.

Wages for the period 12 June 2016 to 29 July 2016

[58] Mr Wate never appeared to be provided with wage and time records by Talbot. However, based on the calculations provided to Mr Wate's representative by Talbot's solicitors on 26 October 2016, he is owed \$6750.00 as gross wages and \$540.00 gross as holiday pay for the period 12 June 2016 to 29 July 2016.

[59] Talbot sought to reduce these amounts by claiming a set-off of \$1100 for apparent advances on wages. Talbot also calculated the income tax payable by Mr Wate of 46.39%, being the non-notification of an IRD number rate. However, the evidence was not entirely clear as to what the payments made to Mr Wate totalling \$1100 were for. I am not prepared to accept these amounts were wages. It is also impermissible to set-off ad hoc payments such as these against unpaid minimum statutory entitlements.⁷ Further, given the factual dispute between Mr Wate and Talbot about the provision of his IRD number (and bank account), it is simpler and fairer to Mr Wate to order payment of the gross amounts of unpaid wages and holiday pay and for him to enter into discussions with IRD about the applicable rate of tax.

Orders

[60] In summary, the orders made are for Talbot to settle Mr Wate's personal grievances by paying him the following amounts within 28 days of this determination:

- (i) Three months' gross pay as reimbursement for lost wages; and
- (ii) \$10,000 as compensation for hurt, humiliation and injury to feelings.

[61] In addition, within 28 days of this determination, Talbot must pay Mr Wate for the period 2 May 2016 to 11 June 2016:

- (i) minimum wages of \$3751.50 for 246 hours performing a "work assessment";
- (ii) \$300.12 as gross holiday pay; and

For the period, 12 June 2016 to 29 July 2016:

- (iii) \$6750.00 as gross unpaid wages; and
- (iv) \$540.00 as gross unpaid holiday pay.

⁷ *Edwards (Labour Inspector) v Topo Gigio Restaurants Ltd*, Auckland, AEC109/95, 16 October 1995 at [5].

Costs

[62] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Mr Wate has 28 days from the date of this determination in which to file and serve a memorandum on costs. Talbot has a further 14 days in which to file and serve a memorandum in reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[63] If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff, \$4500 for a matter such as this commenced after 1 August 2016, and adjusted upwards or downwards for relevant factors.⁸

A handwritten signature in blue ink, appearing to read 'Andrew Dallas', written over a light blue horizontal line.

Andrew Dallas
Member of the Employment Relations Authority

⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.