

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 136  
3031572

BETWEEN CASSANDRA WEAVER  
Applicant

AND TRUCK WASH STATION  
LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Cassandra Weaver in person  
No appearance for the Respondent

Investigation Meeting: 26 February 2019

Date of Determination: 11 March 2019

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**DETERMINATION OF THE AUTHORITY**

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- A Cassandra Weaver was unjustifiably dismissed from her employment with Truck Wash Station Limited.**
- B Truck Wash Station Limited is ordered to pay to Cassandra Weaver:**
- (i) The sum of \$10,497.50 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.**
  - (ii) The sum of \$12,000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**

**C Ms Weaver did not believe that she would incur costs for earlier representation before the investigation meeting. I have reserved the right for her to return to the Authority within a week and advise by close of business 18 March 2019 if that is not the position.**

**D Truck Wash Station Limited is ordered to pay to Cassandra Weaver the sum of \$71.56 being reimbursement of the filing fee.**

### **Employment Relationship Problem**

[1] Cassandra Weaver was employed as a Wash Attendant by Truck Wash Station Limited (Truck Wash) from 5 March until she was dismissed on 16 March 2018.

[2] Ms Weaver says that she was unjustifiably dismissed from her employment and that Truck Wash could not rely on a 90 day trial provision in her employment agreement because she was not a new employee having been previously been employed by Truck Wash in 2015. Ms Weaver says that there was no substantive reason that would justify her termination.

[3] She seeks reimbursement of lost wages and compensation for hurt and humiliation in the sum of \$15,000.

[4] The statement in reply was lodged by the sole director of Truck Wash, Clinton Tamatea. Truck Wash says that Ms Weaver worked for another company in June 2015. There was reference to a company Truck Wash Drainage and Roding NZ Limited. Mr Tamatea wrote that he did not take ownership of the Truck Wash Station until June 2016. Truck Wash relied on the 90 day trial provision.

### **The Investigation Process**

[5] This investigation meeting was originally scheduled to be held on 5 February 2019. For a variety of reasons, the matter could not proceed. Mr Tamatea advised he could not attend on that day and there were technical difficulties connecting Ms Weaver to a video call.

[6] The matter was rescheduled for an investigation meeting on 26 February 2019 in Timaru and heard consecutively with another personal grievance against Truck Wash lodged by Ms Weaver's partner, Scott Bruning.<sup>1</sup> Shortly before the investigation meeting was to take place the Authority received an email from Mr Tamatea that he would not be able to attend

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<sup>1</sup> *Scott Bruning v Truck Wash Station Limited* [2019] NZERA 137

the hearing in Timaru on 26 February 2019. The Senior Authority officer thanked Mr Tamatea for that advice and advised that both meetings would proceed in his absence.

### **The Issues**

[7] The issues for determination in this case are as follows:

- (a) Was Truck Wash able to dismiss Ms Weaver in reliance on a trial period in her employment agreement?
- (b) If the trial period could not be relied on then was the dismissal justified?
- (c) If the dismissal was unjustified then what remedy is Ms Weaver entitled to and are there issues of contribution and mitigation?

### **Was Truck Wash able to dismiss Ms Weaver in reliance on a trial period in her employment agreement?**

[8] Ms Weaver was dismissed on the morning of 16 March 2018. Later that same day she received a letter from Mr Tamatea that was headed 90 Day Trial Period Termination. It provided as follows:

Dear Cassandra

Effective as from today, Friday 16 March 2018, the Truck Wash Station Limited, will **not** be continuing with your 90 day Trial Period of employment at the Truck Wash Station Limited.

As per the terms and conditions of your 90 day trial period as defined in the New Zealand employment act 2009 I have decided that it is in the best interests of both parties, namely the Truck Wash Station Limited and yourself, that you will cease your 90 day trial period of employment, at the Truck Wash Station Limited, today at 7:30 a.m. Friday 16 March 2018.

Therefore, as per the terms and conditions of your employment contract, the Truck Wash Station Limited will pay you (1) weeks wages in lieu of notice.

These wages and your final pay will be processed in the next company pay run and will be made available to you on Thursday 22<sup>nd</sup> March 2018.

### **Was Ms Weaver previously employed by Truck Wash?**

[9] The statement in reply lodged on behalf of Truck Wash provided that Ms Weaver worked for Truck Wash Drainage and Roding NZ Limited in 2015. There is no company by that name on the Companies register.

[10] Truck Wash was incorporated on 16 April 2014 and Mr Tamatea is shown as the sole director from that date.

[11] There is evidence to support that Ms Weaver had worked for Truck Wash in 2015. Ms Weaver provided a copy of her Inland Revenue statements from 1 April 2014 – 31 March 2015 and 1 April 2015 to 31 March 2016. Payments are shown as having been made by Truck Wash in February, March and August 2015. Ms Weaver was also able to produce a final payslip from Truck Wash dated 26 August 2015 showing a payment for holiday pay that she says was never received.

[12] Ms Weaver recalled when she worked for Truck Wash in 2015 that Mr Tamatea suddenly stopped offering her work and made no further contact with her. She said that she was on a 90 day trial period at that time and, whilst finding the lack of communication unsatisfactory, concluded that there was no more work for her to undertake.

[13] Ms Weaver was looking for work in March 2018 and telephoned Mr Tamatea and asked him if there was any work available. She was somewhat hesitant to do so after her 2015 experience but needed money.

[14] She commenced her employment on 5 March 2018. A letter was provided which was headed 90 day trial period. Although the letter was signed 5 March 2018 Ms Weaver said that she did not recall being given this letter on that date and was reasonably emphatic that she was not.

[15] She said that she was not given the employment agreement that contained the trial period provision until 15 March 2018. The employment agreement was signed on 15 March 2018. Ms Weaver recalled being advised that her terms and conditions in her 2015 employment agreement continued to apply before she was asked to sign the new employment agreement.

[16] Clause 3.0.5 of the employment agreement provides that:

If you have worked for us before then, instead of a trial period, you will be required to undergo a 90 day probationary period of employment.

[17] It is unclear if there was reliance on the probationary period. If there was then there are difficulties for Truck Wash. Ms Weaver was dismissed well before her probationary period was up. Further a probationary period does not affect the law relating to an unjustifiable dismissal - s 67(1)(b) of the Employment Relations Act 2000 (the Act). The dismissal still has to be justifiable.

[18] An employment agreement may contain a provision for a trial period under ss 67A and 67B of the Act if an employer is employing a person who has not been employed previously by the employer. A trial period under ss 67A and 67B offers protection for an employer from a personal grievance in respect of a dismissal. That protection is not available in this case because it is quite clear, I find, that Ms Weaver was previously employed by Truck Wash in 2015 and worked under the instruction of the sole director Mr Tamatea in 2015 as she did in 2018.

[19] Further the evidence disclosed that the employment agreement containing the 90 day trial period was not signed until 15 March 2018 but Ms Weaver commenced work on 5 May 2018.

[20] Ms Weaver is not prevented from bringing a personal grievance of unjustified dismissal to the Authority.

**If there was a dismissal then was it unjustified?**

[21] The Authority must apply the justification test in s 103A of the Act. In doing this the Authority does not determine justification by considering what it may have done in the circumstances. It determines justification on an objective basis by assessing whether the actions of Truck Wash and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of dismissal.

[22] The Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether, before dismissing Ms Weaver, any allegations against her were sufficiently investigated, concerns were raised with her and she had a reasonable opportunity to respond to them and have her explanations considered genuinely by Truck Wash. The Authority may take into account other factors as appropriate and must not determine a dismissal to be unjustified solely because of defects in the process if they were

minor and did not result in an employee being treated unfairly. Truck Wash could also be expected as a fair and reasonable employer to comply with good faith obligations set out in s 4 of the Act.

[23] There was no attempt in the statement in reply to justify the dismissal in the event the trial period was not able to be relied on. Although timetabled there was no statement of evidence provided by Truck Wash.

[24] Ms Weaver thought she was dismissed for two events. The first was that she had a very bad asthma attack on 14 March 2018. She was told that she needed to have someone with her so Mr Bruning stayed home as there was no-one else to do so. Ms Weaver said in evidence that Mr Tamatea was fine with that when she advised him and she did not sense that he was unhappy.

[25] The next day Ms Weaver returned to work and said that she was a bit slower because of the asthma attack and was told by Mr Tamatea to *pick up the pace*. She said she was also asked on that day to sign the new employment agreement as he had misplaced the 2015 one.

[26] Ms Weaver and Mr Bruning travelled to work together. On the morning of 16 March 2018 they had difficulty starting the car. Before the start time of 7am Ms Weaver telephoned Mr Tamatea and advised that they had some car trouble and may be late. Ms Weaver said that Mr Tamatea responded *sweet as*.

[27] The car was able to be started and Ms Weaver arrived at the work site at about 7:20 a.m. Mr Bruning went into the office before Ms Weaver and then returned to Ms Weaver, who was still retrieving some items from the vehicle, and advised that Mr Tamatea has *fired us*.

[28] Ms Weaver and Mr Bruning left the Truck Wash premises and went to her mother's house unable to understand what had occurred. A series of text messages were sent to Mr Tamatea about wanting written notice of dismissal and wages. One text message sent confirms what had occurred with the car and the lateness.

If you have terminated our contracts we want it in writing but either way it is unfair dismissal as we never got verbal or written warning. We would also like our wages you owe us tonight. We let you know that we were going to be late as the car is having issues as you already new [sic] about.

[29] There was an absence of any procedural fairness in this matter and therefore the dismissal does not satisfy any of the procedural factors in s 103A (3) of the Act.

[30] In terms of the substantive reason for dismissal, I do not find that there was any conduct that a fair and reasonable employer could have found to be misconduct in this case. This is aptly illustrated by clauses 28.0.2 and s 28.0.11 in the employment agreement Ms Weaver signed on 15 March 2018. There are some examples in clause 28 of misconduct for which the penalty is a warning. A failure to report lateness or absence to the supervisor is one. Ms Weaver reported in a timely manner both her absence on 14 March and her lateness on 16 March to Mr Tamatea. Another example of conduct, for which the penalty was a warning, is continued lateness. The evidence supports only one example of lateness.

[31] A fair and reasonable employer could not have dismissed Ms Weaver in all the circumstances. I find that Ms Weaver was unjustifiably dismissed from her employment and having made out her personal grievance is entitled to a consideration of remedies.

## **Remedies**

### *Contribution*

[32] I do not find that Ms Weaver contributed to the situation that gave rise to her dismissal.

### *Lost Wages*

[33] Ms Weaver said that after she was dismissed she tried to get back on the benefit but there was a stand down period because of the dismissal. At the time of the investigation meeting Ms Weaver had not obtained a job although is hopeful that she may obtain employment in the near future. The applications for roles attached were from October and November 2018. Ms Weaver said that she had applied on Trade Me and Facebook for roles.

[34] Some medical information was disclosed in the nature of consultation notes to support a significant lack of confidence after the dismissal. It is sensitive and except for what I shall set out I prohibit all medical information from publication.

[35] The medical information supports that as a result of the dismissal Ms Weaver's wellbeing deteriorated and, as Ms Weaver said, *spiralled downhill*. There is support from the medical notes including on an *objective* basis that Ms Weaver had reduced confidence. The first medical consultation notes supplied were on 22 March 2018.

[36] There were a number of other stressors that I accept impacted on Ms Weaver's confidence to search for a new job, at least within the first three months. Ms Weaver and her partner got into rent arrears after the dismissal and were taken to the Tenancy Tribunal. They lost their rental accommodation and had to shift to another town to live with a family member. The money situation was so difficult they had to get food grants from the Salvation Army. These matters are also referred to in the medical notes.

[37] I accept that Ms Weaver suffered from a serious lack of confidence after dismissal and as a result it took a while before she could look for jobs.

[38] In those circumstances I consider an award under s 128(2) of the Act of 3 months ordinary time remuneration is appropriate.

[39] The Inland Revenue Department earning information shows that for the period Ms Weaver was employed in 2018, being the one week and 4 days between 5 March and 16 March, she received \$2194. Ms Weaver was unsure whether that included a week's payment in lieu of notice. The hours of work in the employment agreement and the letter of offer are different. There is no time and wage record or pay slips.

[40] The letter of offer shows a start time of 7am and 4pm finish Monday to Friday and Saturday 7am to 12 noon. Ms Weaver said that there was never time for a proper break and that she was working longer hours. However I think the letter of offer is the most suitable information on which to make an assessment and I will make an allowance for a half hour break each week day. On that basis, each weekday Ms Weaver worked 8.5 hours per day (42.5 hours) and on Saturday she worked 5 hours. That is a 47.5 hour week at \$17 per hour which is a weekly gross pay of \$807.50.

[41] As a cross check I have assessed that weekly gross pay assessment with what was actually received. I note that on the second week commencing Monday 12 March 2018 Ms Weaver was dismissed on the Friday before commencing work and did not therefore work on the Saturday. She also did not work 14 March as she was unwell. Taking those matters into account a weekly gross sum of \$807.50 is not inconsistent with actual pay. Considering the above I find that the total gross earnings received by Ms Weaver in all likelihood include payment of one week's notice in lieu.

[42] I calculate 3 months ordinary time remuneration on the basis of \$807.50 multiplied by 13 weeks (three months) which is \$10,497.50 gross.

[43] I order Truck Wash Station Limited to pay to Cassandra Weaver the sum of \$10,497.50 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.

#### *Compensation*

[44] Even though this was a short period of employment I am satisfied that the dismissal had a serious impact on Ms Weaver's health, self-esteem and her financial situation. Ms Weaver said that she loved her job washing trucks and she got on well with Mr Tamatea, considering him to be a great boss. She found the situation of dismissal very stressful and lost her home because of an inability to pay rent and had to shift towns. There were pre-existing health conditions but Ms Weaver said these improved when she was working and she felt *much better*. As she described at her medical consultation, after dismissal things became *worse again*. To deal with the stress there was a return to some, but not all, previous behaviours however Ms Weaver did take steps to obtain help which was positive.

[45] I find that an award that recognises the impact of the humiliation, loss of dignity and injury to feelings in all the circumstances is \$12,000.

[46] I order Truck Wash Station Limited to pay to Cassandra Weaver the sum of \$12,000 without deduction being payment of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

## **Costs**

[47] Ms Weaver had previously been represented but was not at the time of the investigation meeting. She did not consider she would be liable for any costs. I will however reserve the right for Ms Weaver to advise the Authority by close of business 18 March if that is not the situation. If necessary I will timetable for an exchange of submissions about costs.

[48] In the meantime I will make an order for reimbursement of the filing fee of \$71.56.

[49] I order Truck Wash Station Limited to pay to Cassandra Weaver the sum of \$71.56 being reimbursement of the filing fee.

**Helen Doyle**  
**Member of the Employment Relations Authority**