

New Zealand Employment Relations Authority Decisions

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Williams v BSL Produce Limited (Wellington) [2018] NZERA 2093; [2018] NZERA Wellington 93 (25 October 2018)

Last Updated: 29 October 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON		
		[2018] NZERA Wellington 93
		3031531
	BETWEEN	CALEB WILLIAMS Applicant
	AND	BSL PRODUCE LIMITED Respondent
Member of Authority:	Vicki Campbell	
Representatives:	Adrian Plunket for Applicant Marie Robinson-Ledwith for Respondent	
Investigation Meeting:	23 October 2018	
Oral Determination:	23 October 2018	
Record of Oral Determination:	25 October 2018	
RECORD OF ORAL DETERMINATION OF THE AUTHORITY		

- A. Mr Williams employment was ongoing.**
- B. Mr Williams was unjustifiably dismissed and BSL is ordered to pay him the following remedies within 28 days of the date of this determination:**
- a. \$2,715.44 being lost wages under [s 123\(1\)\(b\)](#) of the [Employment Relations Act 2000](#); and
 - b. \$10,000 under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#).
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Caleb Williams worked for BSL Produce Ltd from 22 November 2017 until 11 April 2018. BSL says Mr Williams was employed on a casual seasonal basis. The terms of employment are set out in a written employment agreement. Mr Williams has initialed each page of the employment agreement and has confirmed that he was bound by the terms of the agreement.

[2] On 11 April 2018 Mr Williams was given two weeks' notice that the employment relationship would end. Mr Williams challenges the ending of the relationship on the grounds that it was a dismissal and it was unjustified. BSL says the relationship ended because it was the end of the season and therefore the employment agreement.

[3] Mr Williams claimed he was owed outstanding wages including holiday pay and payment for alternative days for working on a public holiday. During the investigation meeting he withdrew his claim for holiday pay. Mr William's claim for payment of the alternative days for working on a public holiday was not established at the investigation meeting and I have invited the parties to resolve this matter between them. I have reserved leave for Mr Williams to return to the Authority for a determination of this claim if it is not able to be resolved.

Issues

[4] In order resolve Mr Williams claims I must determine the following issues:

- a. What was the nature of the employment relationship?
- b. Was Mr Williams unjustifiably dismissed and if so, what if any remedies should be awarded?

[5] As permitted by [s 174E](#) of the [Employment Relations Act](#) (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Casual Employment

[6] BSL says Mr Williams was employed as a casual employee on a day to day basis for a season. Mr Dharminder Singh is the sole shareholder of BSL. At the investigation meeting Mr Singh was not able to identify the season for which Mr Williams was employed and the employment agreement does not specify this either.

[7] Mr Williams says his employment was not just one day at a time but he held a reasonable expectation that he would work on an ongoing basis.

[8] There is no definition in the Act of a "casual" employee. Cases on casual employment turn on their facts although the Court has identified some principles that may be applied:¹

- a. The substance of the employment relationship should prevail over the form of any agreement;
- b. The distinction between casual and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work;
- c. If those obligations only exist during periods of work, the employment will be regarded as casual;
- d. If there are mutual obligations that continue between periods of work, there will be an ongoing employment relationship;
- e. Regularity of work and continuity of the employment relationship are indicative of ongoing employment as opposed to casual employment;
- f. Where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.

¹ *Bay of Plenty District Health Board v Rahiri* [\[2016\] NZEmpC 67](#) at [\[46\]](#); *Jinkinson v Oceana Gold* [\[2009\] ERNZ 225](#).

Relevant terms of the employment agreement

[9] The individual employment agreement applicable to Mr Williams is titled "Fixed Term Casual Employment Agreement – Wages and Piece Work."

[10] The agreement describes the work to be undertaken as horticulture/pack house worker. Attached to the agreement is a schedule which sets out seasonal tasks which must be completed for specific types of crop during specified periods. For example:

GRAPES

May – September Winter Pruning, Planting, Training Young Vines, Grafting, Budwood Collection, Silvos Pruning

FLOWERS

December – March Weeding

June – August Packing

VEGETABLES AND SQUASH

April – February Weeding

[11] Clause 2 of the agreement states (verbatim):

The period of employment is from signing until approximately 1//20 being the conclusion of the Seasonal Worker ~~season~~. The employer is fixing the term of the employment due to the seasonal nature of the horticulture industry. The employee agrees that this period of employment may only be extended or renewed, If the Employer agrees to such an extension or renewal in writing. There is no expectation that the Employer will extend or renew.

[12] The employment agreement does not specify a date, an event or a project. Despite the clause referring to a season it is not clear which season from the list in Schedule A the term relates to.

[13] When read as an entire agreement including the job description at Schedule A the agreement provides an impression that the employment is ongoing with seasonal tasks specified to be undertaken for all crops.

[14] Clause 3 sets out an expectation that Mr Williams will be offered between 30 and 50 hours per week. It also states the parties agree the nature of the relationship is an “as required” employment relationship.

[15] While the employment agreement provides for either party to provide three days’ notice to terminate the agreement it does not specify the reasons for the employment ending in this way.

[16] The presence of the following provisions in the employment agreement are inconsistent with the employment relationship being on a day to day or casual basis:

- a. Clause four requires Mr Williams to be available “...to work EXCLUSIVELY” for BSL during the daytime between 7 am and 7 pm Monday to Saturday.
- b. Clause 11 provides for a 90 day trial period under s 67A of the Act. It does not describe how the 90 days will be met given the assertion that this is a day to day relationship.
- c. Clause 47 provides for the termination of the relationship in the event that Mr Williams does not turn up for work for three consecutive days. If this was truly a casual employment relationship Mr Williams would be free to reject work without having to provide a reason and could not be deemed to have abandoned his employment.
- d. Clause 50 requires Mr Williams to provide notice of three days to end the relationship. Clause 51 provides for a deduction of one day’s pay for each day not provided as notice to be made from Mr Williams final pay.

[17] In considering substance over form I find that at the time the employment relationship ended the reality of the relationship was more akin to an ongoing employment relationship and not a casual relationship despite the clauses in the employment agreement specifying the relationship as being casual.

[18] Mr Williams had worked on average 49 hours a week since he commenced employment in November 2017. The work was regular and weekly.

[19] The employment agreement provides mutual obligations on the parties including the obligation on BSL to provide at least 30 hours work each week and on Mr Williams being available to work exclusively for BSL for six days of the week.

Mr Williams did not undertake work for other employers as he worked full time hours for BSL.

[20] There are specified obligations regarding notice for the ending of the relationship and a default payment in the event that Mr Williams does not keep his end of the bargain to provide three days notice.

[21] It was common ground that horticulture and viticulture industries have challenges particularly when it comes the engagement of employees. That being so, it is still incumbent on an employer to clearly define the employment relationship.

[22] There appeared to be some confusion on the part of BSL between what constitutes casual work, the engagement of employees for seasonal work and those employed on an ongoing basis. The employment agreement specified the minimum number of hours each week as between 30 and 50. That is not consistent an arrangement to work as and when required on an intermittent basis and Mr Williams was not a casual employee.

[23] If the agreement was truly seasonal then the tests in s 66 of the Act must apply. Section 66 of the Act allows employers and employees to agree that the employment will end on specified date, on the occurrence of a specified event or at the conclusion of a specified project. Section 66 of the Act requires the employment agreement to state in writing the way in which the employment will end and the reasons for ending the employment in that way.² If these requirements are not met the employee may elect to treat the fixed term as ineffective.³

[24] The employment agreement does not specify a date, or event or a project and therefore the employment agreement does not meet the tests of s 66 of the Act. Given that and given my finding that the employment arrangement was not truly casual Mr Williams was able to treat the employment relationship as ongoing.

The dismissal

[25] It was raining on 10 April and Mr Williams had received a text telling him to have the day off. Because of the continued rain on 11 April and because he had received no further communication about attending work he stayed home on that day

² [Employment Relations Act 2000, s 66\(4\)](#).

³ [Ibid, s 66\(6\)](#).

also. Mr Williams checked his emails that day and had received an email from Mr Singh with a letter advising him that his employment was terminated due to the end of the season. Mr Williams was given two weeks' notice.

[26] Mr Williams was confused about the dismissal because four days earlier Mr Singh had told him there was plenty of work and he was asking for referrals for more staff. Mr Williams and his partner attended Mr Singh's office to clarify the situation. The meeting became heated. Mr Williams says Mr Singh accused him of theft. Mr Singh says he raised the issue of theft in case Mr Williams knew who had stolen parts from him. I am satisfied it is more likely than not that the issue of theft was in Mr Singh's mind when the letter terminating the employment relationship was sent to Mr Williams on 11 April.

[27] Whether a dismissal was justifiable must be determined under [s 103A](#) of the Act which provides the test of justification. The Authority must objectively determine whether BSL's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[28] In applying this test, the Authority must consider the matters set out in [s 103A](#) (3)(a)-(d). These matters include whether, having regard to the resources available, BSL sufficiently investigated any allegations, raised the concerns with Mr Williams, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[29] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Williams being treated unfairly.⁴ A failure to meet any of the [s 103A](#) (3) tests is likely to result in a dismissal being found to be unjustified.

[30] The process leading to Mr Williams' dismissal was defective. There is no evidence BSL met any of the mandatory considerations set out in [s 103A\(3\)](#). In the letter dated 11 April Mr Williams was advised he was being given two weeks notice due to the season coming to an end. This was contrary to advice given to Mr Williams four days earlier where Mr Singh had told him BSL had a lot of work available for him. There was no evidence provided to the Authority that the work of

⁴ [Employment Relations Act 2000](#) (the Act), [s 103A\(5\)](#).

the company decreased at the time of Mr Williams' dismissal. At the investigation meeting Mr Singh was unable to tell me which season Mr Williams had been employed for. Another employee gave evidence that he continued working after Mr Williams dismissal completing the same or similar work Mr Williams' had completed.

[31] Prior to terminating Mr Williams' employment Mr Singh was concerned Mr Williams may have been involved in theft. If BSL held concerns that Mr Williams may have been involved in stealing from it, BSL did not provide an

opportunity for him to respond to those concerns before dismissal and therefore there was no genuine consideration of any explanation. These defects were not minor and resulted in Mr Williams being treated unfairly.⁵ The actions of BSL were not the actions an employer acting fairly and reasonably could have taken in all the circumstances at the time the decision to dismiss was made.

[32] Mr Williams was unjustifiably dismissed and is entitled to a consideration of remedies.

Remedies

[33] Mr Williams has established a personal grievance for unjustified dismissal. He has asked the Authority to reimburse him for the wages lost as a result of his grievance and to award him with compensation of \$20,000 for humiliation, loss of dignity and injury to feelings.

[34] Mr Williams has produced evidence that shows he made significant attempts to mitigate his loss. He secured new employment on 7 May. He was out of work for a total of three weeks. Based on his average of 49.3 hours per week Mr Williams is entitled to lost wages amounting to \$2,514.30 gross plus holiday pay equivalent to 8% which amounts to \$201.14.

[35] As to his claim for compensation, Mr Williams and his partner gave compelling evidence of the impact the dismissal had on Mr Williams. Mr Williams and his partner had recently moved into a flat together and Mr Williams' partner was pregnant with their first child. Mr Williams partner was earning the minimum wage

⁵ The Act at s 103A(5).

working six days a week and had suddenly become the sole income earner in the household while suffering chronic morning sickness. After losing his job the couple were asked to leave their flat as they were unable to meet the rent payments. Because automatic payments were not being met late payment fees were charged which exacerbated the financial issues for the couple.

[36] The financial situation placed a lot of stress on the relationship and the couple separated for a short time. Mr Williams became stressed because of the loss of his job, a lack of financial income and his frustration about the situation including his sense that he had let his partner down.

[37] Mr Williams' partner told me Mr Williams became depressed and withdrew into himself. After previously being very social and enjoying catching up with friends he became resentful and excluded himself from his friends and family.

[38] In the particular circumstances of this case I consider an award of \$10,000 to be appropriate.

[39] As required under s 124 of the Act I have considered the extent to which Mr Williams actions gave rise to his personal grievance and find there were none. The remedies will not be reduced.

[40] BSL Produce Limited is ordered to pay to Mr Williams lost wages of

\$2,715.44 under s 123(1)(b) of the Act plus \$10,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Costs

[41] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Williams shall have 14 days from the date of this determination in which to file and serve a memorandum on the matter. BSL shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[42] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell

Member of the Employment Relations Authority