

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 137  
3031538

BETWEEN            SCOTT BRUNING  
                                 Applicant

AND                    TRUCK WASH STATION LIMITED  
                                 Respondent

Member of Authority:        Helen Doyle

Representatives:            Scott Bruning in person  
                                 No appearance for the respondent

Investigation Meeting:        Timaru 26 February 2019

Date of Determination:        11 March 2019

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**DETERMINATION OF THE AUTHORITY**

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- A Scott Bruning was unjustifiably dismissed from his employment with Truck Wash Station Limited.**
- B Truck Wash Station Limited is ordered to pay to Scott Bruning:**
- (i) The sum of \$10,497.50 being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.**
  - (ii) The sum of \$8000 being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**

**C Mr Bruning did not believe that he would incur any costs for earlier advice received in this matter from an advocate. If in fact that is not the position then I have reserved the right for him to advise the Authority by close of business 18 March 2019.**

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

### **Employment Relationship Problem**

[1] Scott Bruning was employed as a Truck Wash Attendant by Truck Wash Station Limited (Truck Wash) from 12 March until he was dismissed on 16 March 2018.

[2] He says that he was unjustifiably dismissed from his employment and that Truck Wash could not have relied on a 90 day trial provision in his employment agreement. Mr Bruning commenced work for Truck Wash on 12 March 2018 and was an employee from that date but he did not sign his employment agreement containing the trial provision until 15 March 2018.

[3] Mr Bruning says that the dismissal was unjustified and there was no substantive reason that would justify his dismissal.

[4] Mr Bruning seeks reimbursement of lost wages and compensation for hurt and humiliation in the sum of \$10,000 together with any costs.

[5] The statement in reply was lodged by the sole director of Truck Wash, Clinton Tamatea. Truck Wash says that it terminated Mr Bruning's employment in reliance on a trial provision in his employment agreement. It says that Mr Bruning was supplied with the employment agreement along with a letter on 12 March 2018 and advised to read it carefully and seek advice.

### **The investigation process**

[6] The investigation meeting was originally scheduled to be held on 5 February 2019. Mr Tamatea advised that he could not attend on that day and there were technical difficulties connecting Mr Bruning to a video call.

[7] The matter was rescheduled for an investigation meeting on 26 February 2019 in Timaru and was heard consecutively with another personal grievance against Truck Wash lodged by Mr Bruning's partner Cassandra Weaver.<sup>1</sup>

[8] 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 the meeting in Timaru. The Senior Authority officer thanked him for that advice and advised that the meeting involving both matters would proceed in his absence.

### **The issues**

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

- (a) Was there a valid 90-day trial provision?
- (b) If the trial provision could not be relied on by Truck Wash then was the dismissal justified?
- (c) If the dismissal was unjustified then what remedy is Mr Bruning entitled to and are there issues of contribution and mitigation?

### **Was Truck Wash able to dismiss Mr Bruning in reliance on the trial provision in his employment agreement?**

[10] Mr Bruning was dismissed in reliance on the 90-day trial provision in his employment agreement on the morning of 16 March 2018. He received the following letter that confirmed his termination:

Dear Scott,

Effective as from today, Friday 16<sup>th</sup> 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 7.30a.m. Friday 16<sup>th</sup> March 2018.

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<sup>1</sup> *Cassandra Weaver v Truck Wash Station Limited* [2019] NZERA 136

Therefore, as per the terms and conditions of the employment contract, the Truck Wash Station Limited will pay you one (1) week's 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.

Yours Faithfully,  
Clint Tamatea.

### **When did Mr Bruning sign the employment agreement?**

[11] Mr Bruning said that he commenced work on Monday 12 March 2018. That is consistent with the date for commencement of employment in the signed employment agreement. The employment agreement is dated 15 March which is the date Mr Bruning says it was given to him and then he signed it on the same date.

### **Is the letter dated 12 March significant?**

[12] A copy of a letter dated 12 March 2018 to Mr Bruning from Truck Wash was provided with the statement in reply. The letter is headed 90 day trial period and confirms the offer of employment and some important aspects of employment such as commencement date, hours of work and pay. It refers to employment commencing on a 90 day trial but does not include a trial provision. There is reference to a formal review at the completion of the first 30 days of the 90 day trial to discuss work progress and any issues. The letter advises Mr Bruning in paragraph 5 to read the employment agreement provided to take home and *peruse at his leisure*. He is encouraged to seek advice and make sure that he fully understands the terms and conditions before he signs it.

[13] Even if the letter of offer was signed on 12 March it was always clear that Mr Bruning would need to additionally sign the employment agreement and before doing so ensure understanding and acceptance of the terms and conditions therein. The letter of offer therefore could not be said to simply incorporate the employment agreement if it was provided at the same time. This is strengthened by the fact that the employment agreement in clause 2.0.2 is stated to replace all previous employment agreements, terms, conditions, agreements and understanding between the employer and employee.

[14] The employment agreement was signed on 15 March 2018 and that was the date that it became effective. Section 67A of the Employment Relations Act 2000 (the Act) provides that an employment agreement containing a trial provision may be entered into by an employee as defined in subsection (3) and an employer. Employee is defined as an employee who has not previously been employed by the employer in subsection (3). When Mr Bruning signed the employment agreement on 15 March 2018 he was already an existing employee of Truck Wash and therefore the trial provision was invalid and cannot be relied on.

[15] Mr Bruning is not prevented from bringing a personal grievance of unjustified dismissal to the Authority.

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

[16] The Authority must apply the justification test in s 103A of the Act. It 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 the dismissal.

[17] The Authority must consider four procedural fairness factors which are set out in s 103A(3) of the Act. These are whether before dismissing Mr Bruning any allegations against him were sufficiently investigated, concerns were raised and that Mr Bruning had a reasonable opportunity to respond and have his explanations considered genuinely by Truck Wash. The Authority may take into account other factors as appropriate and must not determine the 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 the good faith obligations set out in s 4 of the Act.

[18] There was no attempt in the statement in reply to justify the dismissal in the event that that trial period was not able to be relied on. No statement of evidence was provided although one was timetabled to be provided by Truck Wash.

[19] Mr Bruning travelled together with Ms Weaver to Truck Wash each day. He believed that he was dismissed because he was late to work on 16 March 2018. There was difficulty that morning with starting the car. Ms Weaver advised Mr Tamatea well in advance of their start time at Truck Wash of 7am that car problems were being experienced. She advised Mr Bruning that Mr Tamatea was not unduly concerned. Her evidence was that he responded *sweet as*. The car was then able to be started and Mr Bruning and his partner arrived at Truck Wash at about 7.20am. Mr Bruning went to the office and says that Mr Tamatea then told him in no uncertain terms that he had a business to run and to *piss off*. Mr Bruning went back to the car where Ms Weaver was retrieving some items and told her they had been fired. That was confirmed by Mr Tamatea in writing as set out earlier.

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

[21] I do not find that there was any conduct on the part of Mr Bruning that a fair and reasonable employer could conclude was serious misconduct. Mr Bruning was late but Mr Tamatea was advised well in advance and there was no evidence that there was repeated lateness which may be a more serious matter.

[22] I find that Mr Bruning was unjustifiably dismissed from his employment. He has made out his personal grievance and is entitled to consideration of remedies.

## **Remedies**

### *Contribution*

[23] I do not find that Mr Bruning contributed to the situation that gave rise to his dismissal.

### *Lost Wages*

[24] Ms Bruning was able to return to a benefit quite quickly. He said that he suffers from very bad anxiety and his dismissal knocked his confidence and he was unable to apply for other roles until just before the Authority investigation meeting. I accept that at the time of

dismissal Mr Bruning was impacted in a more significant way because of the debilitating anxiety he suffers from. That impacted on his confidence to apply for a new role. He said that it had taken all his confidence to apply for the role at Truck Wash and then he was dismissed in a very unsatisfactory manner.

[25] I intend to limit reimbursement of lost wages to 13 weeks or three months because there is no supporting medical information about the impact of the anxiety on job searching for an extended period beyond that.

[26] Mr Bruning was to have been paid \$17 per hour for 47.5 hours of work each week with the hours of work set out in the letter of offer. He was required to work on Saturday morning. I have assessed on the basis that there was a half hour lunch break each weekday in accordance with the employment agreement. \$17 multiplied by 47.5 hours per week is ordinary time remuneration of \$807.50 per week.

[27] \$807.50 multiplied by 13 weeks is the sum of \$10,497.50 gross.

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

#### *Compensation*

[29] I accept that Mr Bruning's confidence was impacted because of his dismissal. There was an impact on his ability to pay outgoings as he was the only person with a benefit income for a period of time. He could not afford the rent and lost the rental property he was living in with Ms Weaver resulting in a Tenancy Tribunal case and the need to shift to another town to live with a family member. There were other financial stressors such as the inability to purchase food and a risk of homelessness.

[30] In all the circumstances I find an appropriate award would be the sum of \$8000.

[31] I order Truck Wash Station Limited to pay to Scott Bruning the sum of \$8000 without deduction, being payment of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

## **Costs**

[32] Mr Bruning had previously been in receipt of advice from an employment advocate. He did not think there was any liability for costs. I will err on the side of caution and reserve the right for Mr Bruning to advise the Authority by close of business 18 March 2019 if that is not the situation. If necessary I will timetable for an exchange of submissions.

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

[34] I order Truck Wash Station Limited to pay to Scott Bruning the sum of \$71.56 being reimbursement of the filing fee.

Helen Doyle  
Member of the Employment Relations Authority