

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 56
5437886

BETWEEN CHRISTINE CASSIDY
 Applicant

AND BRETT WENTWORTH and
 ANGELA CHAMBERS t/a
 WENTWORTH CARRYING
 Respondent

Member of Authority: Helen Doyle

Representatives: Carren McDonald and Robert Thompson, Advocates for
 Applicant
 Robyn Loversidge, Counsel for Respondent

Investigation Meeting: 11 March 2014 at Christchurch

Submissions received: On the day

Determination: 11 April 2014

DETERMINATION OF THE AUTHORITY

- A. I have found that the applicant was unjustifiably dismissed from her employment.**
- B. I have made the following orders:**
- (a) The respondent is to pay to the applicant unpaid wages in the sum of \$360 net and holiday pay on the gross of \$360 at 8%. Interest is payable at 5% on the amount from 20 September 2013 until the date of payment.**
- (b) The respondent is to pay to the applicant the sum of \$7,150 net being reimbursement of lost wages under s.123 (1) (b) of the Employment Relations Act 2000.**

(c) The respondent is to pay to the applicant the sum of \$5,000 without deduction being compensation under s 123 (1) (c)(i) of the Employment Relations Act 2000.

C. Penalties have not been awarded.

D. Costs are reserved and failing agreement a timetable for an exchange of submissions has been set.

Identity of the respondent

[1] By agreement, the name of the respondent is amended to reflect that it is the partnership of Brent Wentworth and Angela Chambers that carries on business as Wentworth Carrying. The statement of problem was only in the name of Brent Wentworth trading as Wentworth Carrying. I shall refer in the determination to the partnership as Wentworth Carrying.

Employment relationship problem

[2] Christine Cassidy completed a driving course in Christchurch on 30 August 2013 and obtained her Class 2 licence, dangerous goods licence and forklift licence.

[3] Shortly thereafter, she accepted work at Wentworth Carrying and commenced her employment on 9 September 2013. Her employment was terminated on 19 September 2013 and Ms Cassidy says that her dismissal was unjustified and that she suffered an unjustified disadvantage. It was accepted that grievance was effectively absorbed into the unjustifiable dismissal claim.

[4] Wentworth Carrying says that Ms Cassidy was employed on a temporary casual basis for a period of two weeks with no expectation of ongoing work and only a possibility of future work later in the year. They say that her actions led to the end of the two week period of employment.

[5] Ms Cassidy seeks the following in her statement of problem:

- Reimbursement of lost wages;
- Compensation of \$7,000;
- Costs;

- Penalties for failing to provide an employment agreement and wages and time records.

Issues

[6] The issues for the Authority to determine are as follows:

- Was Ms Cassidy employed on a temporary casual basis with Wentworth Carrying?
- How did the employment relationship end on 19 September 2013?
- Was Ms Cassidy unjustifiably dismissed from her employment?
- If she was, is she entitled to remedies and are there issues of contribution or mitigation?
- Should penalties be awarded?

Was Ms Cassidy employed on a temporary casual basis with Wentworth Carrying?

[7] Wentworth Carrying says that Ms Cassidy was employed on a casual basis for a two week period to cover for another driver. Mr Wentworth and Ms Chambers do not accept they ever offered permanent employment to Ms Cassidy. They say that the casual nature of the employment was made clear to her before she commenced employment although any agreement was never reduced to a written employment agreement. The period of two weeks was referred to by Mr Wentworth as also being a period to assess Ms Cassidy's suitability for any work that may be available at a future date. Wentworth Carrying said that there was a possibility of future work if Ms Cassidy turned out to be suitable.

[8] Ms Cassidy says that she was not told that her employment was on a casual basis for two weeks with only a possibility thereafter of other work.

[9] Given the relationship with Ms Cassidy ended before the end of the two week period, the nature of the employment relationship and any expectation it would continue beyond two weeks will be particularly relevant if the Authority gets to the point of assessing remedies.

[10] Both casual and fixed term engagements are in the nature of temporary employment. In casual relationships an employee works from time to time on an irregular basis and the engagement is for a short duration. Fixed term engagements have set hours and days for a fixed period of time and an employee is not free to simply reject work on a particular occasion as would be the case with a casual engagement. The requirements of s.66 of the Employment Relations Act 2000 (the Act) require a fixed term agreement to be in writing and the genuine reasons for a fixed term engagement do not include establishing the suitability of the employee for permanent employment. These statutory requirements of s.66 were not met by Wentworth Carrying and although that would not affect the validity of the agreement reached it would mean that Wentworth Carrying would not be able to rely on a fixed term to end the employment relationship.

[11] There may be an issue as to whether an engagement for a two week period is the type of short duration normally associated with casual employment. In this case though I have focused, at least initially, on the intention of the parties when the position was offered, and whether the very brief period Ms Cassidy worked was more consistent with casual employment for a two week period or an ongoing relationship.

[12] On or about 4 September 2013 Mr Wentworth spoke to Ms Cassidy about the possibility of a driving position with Wentworth Carrying. Ms Cassidy acknowledged that there was some discussion about a two week period of employment but she believed work thereafter would probably be ongoing.

[13] Ms Cassidy was invited to an interview on 6 September 2013 at 1pm with Ms Chambers and Mr Wentworth.

[14] Ms Cassidy said in evidence that she understood from Mr Wentworth that the business was doing well and needed a driver who could do all of the runs and take on the extra work the business was receiving. She said that there was also discussion about putting her on the Wednesday night run to Ashburton regularly if she was open to working nights for a period up to Christmas. Ms Chambers undertook that run but it was not really convenient for her. Ms Cassidy was also advised that she had to know all the runs the business operated and would spend a week learning them.

[15] Ms Cassidy was told that two weeks work was available immediately because an employee was leaving. She gave quite a detailed explanation in her evidence about

what she was told at her interview would happen after two weeks. She said that she understood the employee who was leaving was a Class 4 licence holder and had been replaced with the new employee due to begin in two weeks' time. Mr Wentworth, she said, advised that there were two Class 2 trucks and one Class 4 truck available so for the two weeks until the new employee began another driver, Stu, would drive the Class 4 truck. Ms Cassidy was advised that she would drive Stu's Class 2 truck for that two week period. Ms Cassidy said that Mr Wentworth went on to say that after two weeks the new employee would take over the Class 4 truck and Stu would return to his Class 2 truck and Ms Cassidy would drive the other Class 2 truck.

[16] Mr Wentworth, in his evidence, said that he did not have a conversation with Ms Cassidy along the lines outlined in the paragraphs above. He said that he had been unable to find an experienced driver to cover the two week period but that he hoped Ms Cassidy would prove to be suitable long term for permanent employment later in the year. He said that the business still does not have drivers for all the trucks that it has and did not agree with Ms Cassidy's evidence as to what would happen when Stu returned to work. He said that the two weeks' work was discussed as available and that if Ms Cassidy *was able to do the job* extra work would be available over Christmas. His evidence was supported by Ms Chambers.

[17] It is common ground that Ms Cassidy accepted the position when it was offered to her on 6 September 2013 with an agreed start date on 9 September 2013. Ms Cassidy said that she was told the position was a salaried one and that all drivers were on a salary because it was fairer and encouraged *give and take* regarding hours. She was offered the sum of \$600 net per week. The hours were discussed as Monday to Friday between 9am and 5pm but there was some flexibility expected. Mr Wentworth agreed he had told Ms Cassidy that all drivers were on a salary but said the discussion was about \$600 net each week for two weeks. A casual worker would not normally be paid on the basis of a salary.

[18] I could not be satisfied from the evidence I heard about the interview process that the offer of employment to Ms Cassidy was clearly expressed to be casual employment for two weeks with only a possibility of work in the future if she was deemed suitable. I was not able to form a clear view about the intention of Wentworth Carrying about Ms Cassidy's position. I have therefore had regard to the relationship after employment commenced.

[19] Ms Cassidy cancelled her job seekers benefit on 9 September 2013 for the reason that she had obtained full time employment. Ms Cassidy said that prior to this she discussed with Mr Wentworth on 6 September 2013 that she would use her pre-arranged appointment with WINZ on 9 September 2013 to let them know she had a job. A document was provided from WINZ confirming this occurred on that day. Further she confirmed with Mr Wentworth that she had cancelled her benefit so when she commenced employment on 9 September 2013 and asked him for written confirmation about her job. It is common ground that that was not provided although during the second week Mr Wentworth provided his business card to Ms Cassidy asking her to have someone from WINZ call him. The relationship ended before that occurred.

[20] Mr Wentworth said he advised Ms Cassidy that she should only tell WINZ that she had a position for two weeks but he had no control over what she told WINZ. Ms Cassidy did not accept that a conversation took place where Mr Wentworth emphasised a two week period of employment.

[21] Having heard from Ms Cassidy it seems very unlikely that she would advise WINZ she had full time work before she commenced employment if it was clear to her that she would only have two weeks work. Ms Cassidy has custody of her 14 year old son. I prefer Ms Cassidy's evidence that it was not clear to her that she only had casual work when she spoke to WINZ because if she had accepted the role on that basis that in all likelihood I find she would have advised WINZ differently.

[22] During her first week of employment Ms Cassidy, consistent with what had been mentioned at the interview, accompanied Ms Chambers on the run to Ashburton starting from Christchurch at 7pm.

[23] Ms Cassidy undertook training for a whole week. Mr Wentworth said he was unable to find an experienced driver to cover for the two weeks. I accept that Ms Cassidy would require some training as a new driver, and some familiarisation of the duties, even if only employed for two weeks on a casual basis with no expectation of further work. Nevertheless it is somewhat unusual that Ms Cassidy was trained, and therefore unproductive, for a week on the various runs at Wentworth Carrying, if her employment was only guaranteed to last one further week.

[24] On 12 September 2013, Ms Chambers sent a text message to Ms Cassidy asking what size she was for a shirt uniform purchase. Ms Chambers did not accept that she was asking that on the basis of any particular uniform for Ms Cassidy but said she was undertaking a general top-up of uniform requirements for the firm and that shirts took some time to arrive. I find that request for size detail was more consistent with ongoing employment rather than employment for a two week period even if there was a possibility of later work.

[25] Ms Cassidy was asked to clean out the unused Class 2 truck and understood that that was her responsibility from now on. Ms Cassidy said in her evidence that there was no mention to her during her period of employment that it was ending on Friday 20 September. I accept her evidence on both those matters.

[26] In conclusion I am not satisfied from the evidence Ms Cassidy was offered employment as a casual employee for two weeks by Wentworth Carrying. It follows that I do not find that she agreed to employment on that basis. The real nature of the working relationship, although brief, was not consistent with a casual relationship with no expectation of ongoing employment. Objectively assessed for all the reasons outlined above I find that the relationship was one of ongoing employment of a permanent nature.

How did the employment relationship end on 19 September 2013?

[27] On Wednesday 18 September Ms Cassidy connected with Mr Wentworth's parked truck when reversing down the lane where Wentworth Carrying have its business. Mr Wentworth, Ms Chambers and Mr Wentworth's father joined Ms Cassidy in assessing what, if any, damage there was to the truck. Ms Cassidy apologised immediately to Mr Wentworth and Ms Chambers. Mr Wentworth left and went into his office. He was quite angry at this time.

[28] Ms Cassidy went into Mr Wentworth's office to apologise to him. Ms Cassidy said that Mr Wentworth advised Ms Cassidy to *go home, I don't want to look at you*. Mr Wentworth did not agree he had used the words *I don't want to look at you*. I prefer Ms Cassidy's evidence about what was said because Mr Wentworth was upset and angry and his recollection was therefore in all likelihood less clear. Ms Cassidy said that she felt very upset about this and went to her car and left the business site.

[29] Ms Cassidy sent Mr Wentworth later that day a text message that provided *I am so sorry Brett I will pay for the damage can I please have another chance please don't fire me*. There was no response to that text message.

[30] Ms Cassidy spoke to her father, Melvin Cassidy, about the situation because she was concerned that she had been dismissed and was worried about the financial repercussions. Ms Cassidy's father told her very sensibly that Mr Wentworth's comments on that day were not that clear that she had been dismissed and that she should keep going to work. Mr Wentworth was clearly angry about the damage to his truck but his words did not amount to a clear sending away so that Ms Cassidy could safely rely on them to conclude she had been dismissed. It is not a dissimilar situation to where an employee after a heated exchange states or presses by action that he or she wishes to resign. The Authority and Employment Court have concluded in a number of those cases that it is unsafe to rely on a resignation given in those circumstances without confirming what was intended.

[31] On 19 September 2013, Ms Cassidy returned to work and went to the house to talk to Ms Chambers. There was no answer to her knocking and Ms Cassidy commenced getting ready for her day's work. As she was walking towards her truck she heard banging on the window and turned around and saw it was Ms Chambers. Ms Cassidy went back towards the house. Ms Chambers came out and said that she could not drive the truck anymore and confirmed I find that Ms Cassidy's employment was at an end.

[32] I find that on Thursday 19 September 2013 Ms Cassidy was dismissed from her employment.

Was Ms Cassidy unjustifiably dismissed from her employment?

[33] From my questioning of Mr Wentworth and Ms Chambers a view had been reached before Ms Cassidy was dismissed that she was struggling. That was on the basis that there had been in the short period of employment a number of concerns about her performance as a driver. Mr Wentworth agreed that Ms Cassidy probably did not understand that he had reached that view. Mr Wentworth described the incident where her truck made contact with his truck as the *last straw*.

[34] Although a number of concerns were referred to in evidence about Ms Cassidy and her driving, even to the extent that her driving posed a risk to other road users, I

am not satisfied that these were specifically raised with her before she was dismissed. Ms Cassidy could recall advice being given about day to day matters which would be consistent with her being a new and inexperienced employee. She did not understand Mr Wentworth and Ms Chambers were unhappy or dissatisfied with her performance as an employee as they now state to the Authority they were. She felt the relationship was a good one and enjoyed working with both of them. I do not find that the performance issues on the part of Ms Cassidy would have justified summary dismissal before they had been brought to her attention and she had been given an opportunity to improve.

[35] Mr Wentworth said that he had an issue about Ms Cassidy talking over him when he tried to address matters with her. He accepted that he did not talk to her about that. Ms Cassidy was therefore unaware that he was concerned about that and did not accept in any event that she did behave in that way. There was a view Ms Cassidy required further training but that was not discussed.

[36] The incident with the truck was in all likelihood the main reason for dismissal. Ms Cassidy was reversing very slowly down the drive at the time of impact. She thought about 5kpm. There was no dispute from Mr Wentworth and Ms Chambers about the speed. When Ms Cassidy felt she had connected with the truck she immediately jumped out, apologised and later offered to pay. Ms Cassidy said that she saw a scratch on the bumper and a rivet missing from the dangerous goods sign on the truck where she had connected. Mr Wentworth said the damage was more far reaching than that and that the whole bumper would need to be replaced. He provided a quote for the work of \$1,876.80 (GST inclusive) to fix the damage.

[37] Ms Cassidy was not confident about her reversing ability. In time this problem could have either fixed itself as Ms Cassidy became more confident or it may have led to the end of the relationship. Whilst Mr Wentworth was understandably angry when connection was made with his truck I do not find that it was the sort of conduct that justified summary dismissal. Ms Cassidy was inexperienced and although a more experienced driver would have been unlikely to have caused the damage there was no suggestion of deliberateness on the part of Ms Cassidy. It was objectively assessed a situation caused by her inexperience and perhaps a failure to use her mirrors correctly. She was immediately contrite and pleaded to retain her job.

[38] Further under s.103A(s) of the Act there was no investigation at all of allegations that Wentworth Carrying may have had. There was no opportunity for Ms Cassidy to respond to any concerns. She was unaware of the conclusion reached by Mr Wentworth and Ms Chambers that she did not have the ability or skills to continue to drive for the business. No genuine consideration therefore could be given to her response.

[39] For those reasons I find that the dismissal was unjustified because it was not what a fair and reasonable employer could have done in all the circumstances.

[40] For completeness there was no counterclaim for the damage to the truck. In the absence of a clear contractual obligation it would be unlikely that there could be any obligation in this regard. Had Ms Cassidy remained an employee she indicated a willingness to make good any damage but she did not remain employed.

[41] Ms Cassidy has a personal grievance that she was unjustifiably dismissed from her employment and is entitled to remedies.

Remedies

Unpaid Wages

[42] Ms Cassidy was not paid for the three days she worked in the week she was dismissed and she is entitled to payment for days worked. It seems this money was withheld for the damage to the truck. On the basis of payment of \$600 net per week which was the agreed payment Ms Cassidy would receive net each week the sum of \$360.00 net remains unpaid.

[43] Ms Cassidy is entitled to holiday pay but this is to be calculated on 8% of the gross sum payable. I am sure that Wentworth Carrying can calculate this but failing this I reserve leave for either party to return to the Authority.

[44] Interest is payable on the sum of \$360 net and the holiday pay sum under clause 11 of the second schedule to the Act at the rate of 5% being the rate prescribed under s. 87 (3) of the Judicature Act 1908 from 20 September 2013 until the date of payment.

Lost Wages

[45] The reimbursement of 24 weeks lost wages was sought as Ms Cassidy was still without employment at the time of the investigation meeting. Ms Cassidy said in evidence that she applied for 10 advertised roles and that she had to show WINZ she was actively searching for work. She agreed she did not look for work for a two week period of Christmas.

[46] She did undertake work for her father for two hours per week and received \$50 net for doing so.

[47] I accept that Ms Cassidy took steps to mitigate her loss although I would not describe them as particularly extensive. I accept that she suffered some loss of confidence which reduced her confidence to apply for driving jobs initially. The Authority can in its discretion order an employer to pay to an employee by way of compensation for remuneration lost as a result of the personal grievance a sum greater than in this case 3 months ordinary time remuneration. Ms Cassidy had some issues with reversing. She may well have overcome these but they may also have been a continuing issue and ended the relationship. I do not know if they could not have been overcome then the relationship would probably not have lasted. In all the circumstances I am not prepared to exercise my discretion and make an order for reimbursement of a sum greater than 3 months lost wages because I cannot be certain the relationship would have lasted beyond that period.

[48] Ms Cassidy is entitled to reimbursement of 13 weeks lost income from and including 19 September 2013. To calculate I have simply taken the agreed amount Ms Cassidy was to receive net each week. Wentworth Carrying will have to account to IRD for the tax component.

[49] I have calculated \$600 multiplied by 13 weeks to equal \$7,800 net. This is to be reduced by \$650 received by Ms Cassidy during this period for working for her father for which she was paid \$50 per week. The lost wages entitlement is \$7150 net subject to any findings about contribution.

Compensation

[50] Although Mr Wentworth spoke angrily to Ms Cassidy on 18 September 2013 that was, I accept, a heat of the moment reaction to the truck being damaged and

Ms Cassidy was prepared to return and see if she still had a job the next day. The focus of any claim for compensation must be following dismissal. Ms Cassidy said that after dismissal she experienced low moods and became withdrawn. She lost confidence in her driving ability and said it took two weeks to start feeling like her *old self*.

[51] I accept that Ms Cassidy did suffer distress. This was accepted in final submissions from Ms Loversidge. In all the circumstances I am of the view that a suitable award would be the sum of \$5,000 subject to findings about contribution.

Contribution

[52] The Authority must under s.124 of the Act assess whether the employee contributed to the situation that gave rise to the grievance and then consider whether that contribution should reduce any remedies awarded.

[53] Although Ms Loversidge in her submission suggested that there were a number of instances where Ms Cassidy contributed these were not brought to her attention in a disciplinary or performance process. These issues arose because of inexperience and a lack of knowledge where guidance was required. They could not in those circumstances have contributed in a blameworthy way to her dismissal. Further it is unclear whether they formed the basis of the dismissal. The connection made with the truck was an accident. It was most unfortunate that it occurred but Ms Cassidy's actions in connecting did not amount I find to conduct of a blameworthy nature so as to find contribution and reduce remedies.

[54] I do not find awards made should be reduced for reasons of contribution.

Penalties

[55] There are two penalty claims for the failure to provide an individual employment agreement and to keep and produce wages and time records.

[56] In respect of the claim for a penalty for the failure to provide an employment agreement Wentworth Carrying agree that an employment agreement should have been provided. Ms Cassidy did not ask for an employment agreement and she said that she did not know that one was required. I am not minded to impose a penalty in addition to awards already made.

[57] Although wages and time records were not provided Ms Loversidge did provide details when these were requested and the relationship was so short that there were no extensive records. I am not minded to award a penalty.

Orders made

[58] I order Brent Wentworth and Angela Chambers trading as Wentworth Carrying to pay to Christine Louise Cassidy the sum of \$360 net being unpaid wages.

[59] There is to be holiday pay on the gross amount of unpaid wages at 8%. If agreement cannot be reached about the gross amount leave is reserved for either party to return to the Authority. Interest is also payable on unpaid wages and holiday pay from 20 September 2013 until the date of payment at 5%.

[60] I order Brent Wentworth and Angela Chambers trading as Wentworth Carrying to pay to Christine Louise Cassidy the sum of \$7,150 net being the reimbursement of lost wages under s 123 (1) (b) of the Act.

[61] I order Brent Wentworth and Angela Chambers trading as Wentworth Carrying to pay to Christine Louise Cassidy the sum of \$5,000 compensation without deduction being compensation under s. 123 (1)(c)(i) of the Act.

Costs

[62] I reserve the issue of costs. If agreement cannot be reached then Ms McDonald and Mr Thompson have until 2 May 2014 to lodge and serve submission as to costs and Ms Loversidge has until 16 May 2014 to lodge and serve submissions in reply.

Helen Doyle

Member of the Employment Relations Authority