

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 206
3110314

BETWEEN CAMERON HUGH WILSON
Applicant

AND CEDENCO FOODS NEW
ZEALAND LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Peter McRae, advocate for the Applicant
Gretchen Stone, counsel for the Respondent

Investigation Meeting: 21 February 2021, in Nelson

Date of Determination: 18 May 2021

DETERMINATION OF THE AUTHORITY

- A. Cedenco Foods New Zealand Limited is to pay Cameron Hugh Wilson \$7,500.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.**
- B. Cedenco Foods New Zealand Limited is to pay Cameron Hugh Wilson \$4,759.00, pursuant to s 123(1)(b) of the Employment Relations Act 2000.**
- C. I reserve costs, subject to the set timetable for submissions.**

Employment relationship problem

[1] Cedenco Foods New Zealand Limited operates a fruit processing plant and a juicing plant at Nelson. The plants typically run from February to November, dependant on fruit availability and customer demand. Peak processing generally runs from March/April through to September, by utilising cool storage to manage the peak of fruit supply during March/April to July. The plants require a seasonal workforce during the processing season.

[2] Cameron Wilson was offered and accepted fixed term employment by Cedenco and started work on 29 April 2019. There is a signed written employment agreement. The agreement is the standard form used by Cedenco at the time.

[3] Mr Wilson worked on the AJC (Apple Juice Concentrate) line throughout his employment. That plant is some distance from Cedenco's fruit processing plant. The AJC line produced juice from waste product transported across from the fruit processing plant and from fresh fruit not suitable or required for the fruit processing plant. From early August, Cedenco mostly only had waste product available for the AJC line. AJC line hours of work were then reduced from 45 per week to 40 per week and it operated on fewer days.

[4] On Thursday 3 September 2019, the membrane filter on the juicing line broke. Mr Wilson was given cleaning instructions by a team leader. However, Mr Wilson thought it was not the correct response, given the broken membrane, and checked the instructions with a manager. Mr Wilson says that the team leader took exception to this.

[5] On Friday 4 September, the team leader told Mr Wilson that his season was over and that his employment would end on Friday 11 September. The team leader gave Mr Wilson a "Termination of Employment Seasonal" form. Mr Wilson was paid but not required to work to 11 September.

[6] Mr Wilson by his representative's letter dated 11 October raised his personal grievance claim that he had been unjustifiably dismissed from his employment. Cedenco replied on 22 October saying that Mr Wilson's employment ended by operation of the fixed term provision in the employment agreement.

[7] Despite mediation, the problem was not resolved. Mr Wilson commenced this action in the Authority in September 2020. This determination resolves the employment relationship problem.

[8] The following issues arise:

- (a) What happened on 3 and 4 September 2019?
- (b) Did the end of Mr Wilson's employment amount to a dismissal?

- (c) If so, was it justified?
- (d) If unjustified, what remedies are appropriate?

What happened on 3 and 4 September 2019?

[9] It is helpful to set out the events around Mr Wilson being given the “TERMINATION OF EMPLOYMENT SEASONAL” form on 4 September.

[10] During Mr Wilson’s time working on the AJC line, the filter membrane sometimes broke. It broke on 3 September. Mr Wilson spoke to the duty team leader (Rod Sinclair). Mr Sinclair told Mr Wilson to do a basic clean. Mr Wilson queried that, but felt he did not get a satisfactory response from Mr Sinclair. Mr Wilson thought that a full clean was required. He phoned a manager based in Hastings, who confirmed that understanding. Craig Phillips was a team leader for the packing part of the AJC line. Mr Wilson saw Mr Phillips shortly after that phone call and explained what had happened. Mr Phillips’ evidence is that Mr Wilson seemed “agitated” about a “disagreement” with Mr Sinclair. I did not hear any evidence from Mr Sinclair, but Mr Phillips’ evidence just mentioned is consistent with Mr Wilson’s evidence that he was concerned about how Mr Sinclair would react, upon learning that Mr Wilson had called the manager.

[11] Mr Phillips evidence is that he spoke to Mr Sinclair, who confirmed there had been a “difference of opinion” about the clean. Mr Phillips and Mr Sinclair rang the manager. Mr Wilson followed the cleaning process discussed between him and the manager. The manager sent an email, making the cleaning process clear to all staff.

[12] The 11 October 2019 letter raising the grievance states that “Mr Sinclair did voice some displeasure” that Mr Wilson had contacted the manager. The statement of problem alleges that at about or before 9am on 4 September 2019, Mr Sinclair indicated that he was unhappy about Mr Wilson “going over his head” and remained “very annoyed”, despite Mr Wilson’s attempt to explain. In his statement of evidence, Mr Wilson says that quite early on 4 September Mr Sinclair called him to an office, told him that he was “very unhappy” with him “going over his head” to check with the manager, and made it clear that he was “very annoyed, and angry” as “that’s not how we do things here”. However, Mr Wilson told me

that the incident happened on 3 September, “a short while” after the exchange with Mr Phillips. Mr Wilson described it as an “absolute bollocking”.

[13] Mr Phillips described Mr Sinclair as a “direct person” who called a “spade a spade”. Mr Sinclair did not give evidence. No-one else was present.

[14] I find from the foregoing evidence that Mr Sinclair was annoyed that Mr Wilson had contacted the manager when he learnt about that on 3 September and made that clear to Mr Wilson during their exchange. There is only Mr Wilson’s evidence about when the exchange took place. I see no proper basis on which I can resolve the inconsistency between Mr Wilson’s oral evidence and his statement of evidence as to when this exchange took place. I proceed on the basis it was either on 3 September or 4 September. I accept that Mr Sinclair voiced his displeasure.

[15] Subsequently, Mr Wilson attended a meeting on 4 September. Mr Sinclair and Mr Phillips were present. There is a diary note written by Mr Phillips¹ that records the meeting started at 10.55am and ended at 10.57am. Mr Wilson does not dispute the note and I accept that it accurately records what happened. Mr Sinclair told Mr Wilson that as the season was drawing to a close and work production requirements had slowed down significantly, Cedenco was terminating him as per his contract, with one week’s notice so his final day of work would be 11 September. Mr Wilson was thanked for his service and wished well. Mr Sinclair asked if there were any questions, and Mr Wilson said “No”. Mr Wilson was given the signed termination form that records “End of Season” as the reason for termination. The meeting ended.

[16] Mr Wilson says that a short while later he was called back upstairs by Mr Sinclair who told him that “in the circumstances” Cedenco had decided that he did not need to work out but would be paid his notice, so he could finish up then. Mr Wilson left the office, tidied up his work area, cleaned out his locker and left, between 11.00am and 12.00pm. Mr Phillips in evidence confirmed that Mr Sinclair had this discussion with Mr Wilson.

¹ The note was written on the 3 September diary page, but it is accepted that the meeting was on 4 September.

[17] Geoffrey Hunter was general manager for Cedenco, covering Nelson and Hastings sites. Mr Hunter's evidence is that he called a meeting with Mr Sinclair and Mr Phillips on 4 September, following a 9.00am production meeting, and let them know that Cedenco would need to reduce staff numbers in the AJC plant due to reduced volume. Mr Hunter's evidence is that he decided to terminate Mr Wilson's employment, as one other employee was being trained for the next season and another employee was able to operate several machines that Mr Wilson had not been trained on. Mr Hunter says he did not know about the exchanges between Mr Wilson and Mr Sinclair at the time, but it would not have affected his decision even if he had. There is no reason to doubt Mr Hunter's evidence, just described.

[18] Mr Phillips' evidence is that typically they would look at volumes, try to project workload, discuss how to manage staff and rosters, days of work and shift hours and consider whether permanent staff could cover that, then look at reducing seasonal staff numbers. Decisions were generally arrived at by joint consultations with team leaders, but the final decision would lie with Mr Hunter. That general evidence does not detract from Mr Hunter's evidence. There is also an email from Mr Sinclair to Mr Hunter (copied to Mr Phillips) on 7 January 2020, describing their 3 September 2019 meeting where they agreed that Mr Wilson would be given notice on 4 September 2019. However, I accept that the meeting was on 4 September.

[19] At the time, Mr Wilson was not aware that Mr Hunter had decided that he should be given notice of termination of employment. Unsurprisingly, when raising his grievance, Mr Wilson associated the termination of his seasonal employment with the issue between him and Mr Sinclair, his representative writing:²

We do not know why Mr Sinclair dismissed Cameron on 4 September. At the time, Mr Sinclair did voice some displeasure that Cameron had contacted Cedenco Hastings ...to check on a technical point he and Mr Sinclair had previously discussed. But this was not stated to be a reason for dismissing Cameron... ,

[20] In light of the finding that Mr Hunter knew nothing about that incident, I accept that Cedenco terminated Mr Wilson's seasonal employment because of its view that the fixed term had come to an end.

² 11 October 2019 letter to Mr Hunter.

Did the end of Mr Wilson’s employment amount to a dismissal?

[21] I will summarise or set out relevant terms of the employment agreement.

[22] Mr Wilson was employed as an operator. No job description was included. However, Cedenco was entitled to vary the duties involved with the position following consultation.

[23] Clause 3 is headed “Term”. It reads:

3.1 The purpose of this employment agreement is to provide temporary seasonal labour during the processing season at the Company’s processing facilities in Nelson.

3.2 Your employment is for a fixed term only, the fixed term being because the Company requires additional labour during the food processing season to meet the seasonal demands of its business.

3.3 Your employment will commence on **29.04.2019** and it will terminate closer to or at the end of the processing season, (approx. **OCTOBER**) unless terminated earlier in accordance with the provisions of this agreement. The Company will notify you of the date on which your fixed term employment will come to an end, but it will be for less than 12 months. The reason for your employment ending in this way is that the processing of the relevant food crops will have come to an end.

3.4 There is no guarantee or expectation of ongoing employment or re-employment.

...

[24] The location of Mr Wilson’s work was the Company’s premises at Nelson. Cedenco was entitled to make reasonable changes to the place of work, following consultation. Clause 7 described the work responsibilities as requiring a minimum of 20 hours per week, but as employment was in a seasonal processing industry, days and hours may vary according to whether the department was operating in “Peak” or “Off Peak” season. During the Peak Season (typically **March – Sept**) ordinary hours would be set by roster or as directed, on any seven days, subject to work availability. It was anticipated that the roster would be 9 hour shifts, 5 days per week, night or day shifts including weekends. This was subject to a “stand-down” without pay if the Company was not able to offer work. Clause 7 also provided:

7.4 You accept that due to the nature of your employment in a seasonal processing industry, availability of work is dependent upon crop maturity, operational/production factors, and weather conditions, and that your days and hours of employment will be reviewed on a daily basis.

[25] Clause 29 covered termination of employment prior to “EXPIRY”. It provided for one week’s notice, which the company could pay in lieu. It allowed dismissal without notice for serious misconduct. Clause 31 covered redundancy.

[26] The clause immediately above where Mr Wilson signed the agreement included an acknowledgement that:

“you accept that this is a genuine fixed-term employment agreement, and understand the reasons for this, and have no expectation of continued employment after the term ends.

[27] Employment that ends by operation of a lawful fixed term agreement is not a dismissal. The use of fixed term employment agreements is constrained by s 66 of the Employment Relations Act 2000. Before agreeing that the employment will end in a manner allowed by the statute, the employer must first have genuine reasons based on reasonable grounds for specifying that the employment is to end that way, must advise the employee of when or how their employment will end, and must advise the reasons for it ending that way.³ Parties may then agree that the employment ends at the close of a specified date or period, on the occurrence of a specified event or at the conclusion of a specified project.⁴

[28] Here, clause 3.1 expressed the purpose of the employment. Clause 3.2 added to that. It is not suggested that Cedenco had any other purpose or reason for seeking to employ Mr Wilson for a fixed term. I accept that Cedenco had genuine reasons based on reasonable grounds for Mr Wilson’s employment for a fixed term. Cedenco complied with s 66(2)(a) of the Act.

[29] Cedenco was then entitled to seek Mr Wilson’s agreement that his employment would end in a manner specified by s 66(1) of the ERA. No date was specified in the agreement. Cedenco and Mr Wilson could agree that the employment would end at the close of a specified period, on the occurrence of a specified event or the conclusion of a specified project. The period, event or project is referenced in slightly different ways in the agreement. Clause 3.1 mentions the processing season for the facilities in Nelson. Clause 3.2 mentions the food processing season and seasonal business demands. Clause 3.3 refers to the end of the processing of the relevant food crops.

[30] Cedenco must show that it advised Mr Wilson of when or how his employment would end. The company must also show that it advised Mr Wilson of the reasons for his

³ Employment Relations Act 2000, s 66(2).

⁴ Employment Relations Act 2000, s 66(1).

employment ending in that way. The obligation to advise Mr Wilson required Cedenco to give notice of or to bring to his attention information to satisfy both limbs. If Cedenco does not satisfy both limbs of s 66(2)(b), the provision as to termination of a fixed term agreement would be ineffective.⁵

[31] There is no evidence that Mr Wilson had any relevant knowledge about how or when his employment would end or the reasons for it ending that way, apart from what was expressed in the signed employment agreement. Whether Cedenco can satisfy s 66(2)(b) rests on the written agreement.

[32] Cedenco says that clause 3.3 of the agreement (employment would terminate closer to or at the end of the processing season (approx. OCTOBER) and Cedenco to notify of that date) is sufficient to satisfy the first limb of s 66(2)(b). The words “closer to” expressly give Cedenco flexibility about selecting the date for the employment to end before the close of the specified period, the occurrence of the specified event or the conclusion of the specified project. That flexibility does not sit easily with the certainty associated with the words used in s 66(1) – “at the close”, “on the occurrence” or “at the conclusion” in relation to the specified period, event or project. However, Mr Wilson accepts that if “closer to” was taken to mean “immediately before” or similar, Cedenco would be able to satisfy the first limb of s 66(2)(b) of the ERA. I proceed on that basis.

[33] The issue that remains is whether Cedenco can show that circumstances when it advised Mr Wilson that his employment was at an end, matched the reason given at clause 3.3 of the agreement – “processing of the relevant food crops will have come to an end”.

[34] The AJC line processed waste fruit from Cedenco’s other production facility and apples not suitable or rejected for that process. Unsuitable and rejected apples supplied to the AJC line are described as bins being tipped. Production data produced in evidence shows that bins were tipped until the week ending 3 November 2019. However, the tonnage and the number of bins tipped decreased substantially from August. The AJC line received waste from the other production facility for processing through September and October, at a rate similar to what it received in August 2019. A graph shows the total tonnage processed

⁵ *Norske Skog Tasmin Ltd v Clarke* [2004] s NZLR 323 at [70].

weekly in a declining pattern from early August through September before increasing in October, ahead of the cessation at the beginning of November. Another graph shows the decline in the volume of apple concentrate produced from early August.

[35] The picture the data shows is that the processing of the relevant food crops continued, but at lower levels through September and October, before ending at the start of November. The AJC line processing of the relevant food crop did not end until the beginning of November. It had to operate while the other production facility operated. I find from this information that it was not until the beginning of November 2019 that circumstances matched the reason expressed in clause 3.3 of the agreement, such as would properly bring Mr Wilson's employment to an end in accordance with the period, event or project.

[36] Counsel submits that Mr Wilson's employment could not have extended beyond 25 September 2019, that being the date by which the employment of other fixed term workers in the Juice plant had ended. Permanent employees (with one exception) covered the workload from then. The difficulty with the submission is that the processing of the relevant food crop had not ended. Processing continued through October. Cedenco could have differentiated between processing operations in its other plant and in the AJC plant, when offering fixed term employment agreements, but it did not. Cedenco could have managed its reduced labour requirement by offering Mr Wilson his minimum working hours, in accordance with the agreement. However, the fixed term agreement did not entitle Cedenco to treat Mr Wilson as if he was a casual worker.

[37] Cedenco ended Mr Wilson's employment before the expiry of the agreed fixed term. I find that Cedenco dismissed Mr Wilson.

Was the dismissal justified?

[38] Good faith requires an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of employment of an employee to give that employee access to relevant information and an opportunity to comment before the decision is

made.⁶ Cedenco did not comply with this obligation when Mr Hunter decided that Mr Wilson should be put off.

[39] A fair and reasonable employer could not have dismissed Mr Wilson, before the end of his fixed term employment, without complying with this obligation.

[40] I find that Cedenco unjustifiably dismissed Mr Wilson.

What remedies are appropriate?

[41] Mr Wilson lost remuneration as a result of his personal grievance. There is a claim for reimbursement of the lost remuneration.

[42] I am required to order Cedenco to pay the lesser of the sum equal to the lost remuneration, or 3 months' ordinary time remuneration. Here, Mr Wilson lost remuneration from 11 September until when the fixed term employment would have ended. Mr Wilson fixes that period at 8 weeks by reference to the date when the last fixed term employee in the AJC plant ended their employment. Most fixed term employees at the other plant finished up at that time. I accept that marks the duration during which Mr Wilson suffered a loss of remuneration as a result of his grievance.

[43] Mr Wilson's evidence is that his loss was \$4,759.00 (gross) over that period after allowing for benefit income. I accept Mr Wilson's evidence. There will be an order for Cedenco to pay that amount.

[44] Mr Wilson gave compelling evidence about the emotional effects he has suffered. However, Cedenco is only liable to compensate Mr Wilson for emotional harm resulting from the personal grievance. Significant, but unrelated issues pre-dated the personal grievance. There is a note by Mr Wilson's doctor dated 25 September 2019. It identifies the "work dispute" as the trigger for Mr Wilson's state over the previous few weeks, but notes another cause. The doctor also notes "finances a stress". The note includes some positive observations. There is also a general note that Mr Wilson's condition was "worsened" by the "work dispute". There is an unrelated cause as well. I accept that the personal grievance

⁶ Employment Relations Act 2000, s 4(1A)(b).

contributed to the effects noted by the doctor in September. Mr Wilson subsequently suffered another condition, noted by a doctor on 5 November 2019. Mr Wilson says that people suffering stress are more liable to catch diseases, including that condition. However, that is not sufficient to establish a causal connection to Mr Wilson's personal grievance.

[45] I fix \$7,500.00 as the amount of compensation required to restore Mr Wilson for the harm caused by the personal grievance, arising from the termination of his employment eight weeks before it would have ended by operation of the fixed term.

[46] I am asked to and will reserve costs. If costs are not resolved, a claim may be made by lodging and serving submissions in support within 28 days. The other party may lodge and serve submissions in reply within a further 14 days. A determination on costs will follow.

Philip Cheyne
Member of the Employment Relations Authority