

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2023] NZERA 614
3175625

BETWEEN

SCOTT FOTHERGILL
Applicant

AND

E V CHARGER SOLUTION
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Paul Mathews, advocate for the Applicant
Rongzun Wang, representing the Respondent

Investigation Meeting: 6 October 2023

Submissions and/or further evidence: 6 October 2023 from the Applicant
13 October 2023 from the Respondent

Determination: 19 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Scott Fothergill, claims that he was unjustifiably dismissed by the Respondent, E V Charger Solutions Limited (EVC).

[2] EVC denies that it unjustifiably dismissed Mr Fothergill and claims he was a casual employee whilst working for it.

The Authority's investigation

[3] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Scott Fothergill, and his father, John Fothergill.

[4] The Authority received written and, under oath or affirmation, oral evidence by AVL from Rongzun Wang, the witness for the Respondent.

[5] Closing submissions were made on behalf of the Applicant, and leave was granted for Mr Wang to file submissions for the Respondent by 11 October 2023. These have been received.

[6] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received.

Issues

[7] The issues requiring investigation are whether or not Mr Fothergill was:

- A casual or a permanent employee when working for EVC.
- unjustifiably dismissed by EVC.

Background

[8] EVC is a small electrical business, providing electrical services in the house construction sector. Mr Wang is the sole director and shareholder. At the time Mr Fothergill worked for EVC, there were approximately four employees.

[9] Mr Fothergill was working as a part-time delivery driver for a local pizzeria when he saw an advertisement for EVC. He said the advertisement was for an Electrical Apprentice. He completed the online application form and submitted it. At the time of the application, Mr Fothergill said he was interested in working in the electrical services sector, and he believed the position offered an apprenticeship.

[10] Mr Wang said he thought the job advertisement was for an Electrical Assistant, but he could not recall exactly what it had stated. Neither party had kept a copy of the advertisement.

[11] Mr Fothergill said he had a very short telephone interview with Mr Wang. Following the interview, Mr Fothergill said he received a text message from Mr Wang on 27 November 2021 asking to meet to discuss the position and what it entailed.

[12] Mr Fothergill said that during the meeting, which was either later that day or the following day, he told Mr Wang that he had some limited experience in the electrical work field, and had not been on many work sites, but that he was very interested in the position.

[13] Mr Wang told him he wanted to engage a hard-working person who was interested in an apprenticeship. The working hours would be 40 per week, during the hours of 8.00 a.m. to 4.30 p.m. each day, Monday to Saturday.

[14] Mr Fothergill said the meeting ended with Mr Wang indicating that he was keen to offer him an apprenticeship, and would send him a contract, which Mr Fothergill understood as meaning he was being given a verbal offer of employment by Mr Wang.

[15] He said Mr Wang explained that an electrical apprenticeship involved time and discussed the necessary sign-off requirements.

[16] Mr Wang stated that Mr Fothergill told him he had done the Level 3 electrical training and he understood that as meaning Mr Fothergill had a certain level of capability. Mr Fothergill said he had completed a short electrical course at MIT and had completed Level 2.4 of the course.

[17] On 28 November 2021 Mr Fothergill said he received an email from Mr Wang which stated:

Jim here. I have attached an casual job agreement to you as the others. As the Christmas holiday coming soon. Ours holiday will be 20/12/2021 to 17/01/2022. As the advice from the accountant, we would prefer you start the job in 17/01/2022. Would that be ok to you?

As (we) discussed, we would give 6 days' job hours every week, and every day is 8 hours, which is from 8am to 430pm. And we do not work in the public holiday. For each public holiday, we would pay you 8 hours each public holiday. If we do need you work, and you happy to attend, we would give a double pay for that day work. And end of the year, we have 4 weeks off, we would give 160 hours payment for the 4 weeks, This is one off payment.

We have 15 mins morning tea break and 15 mins afternoon tea. You can set the break by your personal prefer. And 1 hour lunch break will be the same for everyone.

If you are happy with everything, so please sign and return back the agreement. And we can sort out your kiwisaver and IRD tax code later when you are formerly start the job in our team. We would be happy to see you then in the team.

[18] The attached employment agreement signed by Mr Wang on 28 November 2021 recorded Mr Fothergill's position as "Electrician Apprentice" and contained the following clauses:

Type of employment agreement

The employee will work on a casual "as required" basis with no expectation of ongoing employment. The employer will give reasonable notice when asking the employee to work, and the employee may choose whether to accept or decline the work. If the offer of work is accepted, the employee must complete it – unless either the employer or the employee ends this agreement.

Each time the employee accepts an offer of work it is considered a new period of employment. ...

Terms

Hours of work

The employee is employed on a casual "As required" basis and may agree to work if the employer asks them to. The employer may offer work during its usual hours of business Monday to Saturday, between the core hours of 8.00 a.m. to 4.30 pm. There is no obligation on the employer to offer work or the employee to accept offered work.

The employer will offer no minimum number of hours for each work session.

[19] Mr Fothergill said that while he thought a casual employment agreement with the hours stated in it was unusual, he did not query it. He signed the Employment Agreement beneath the Employee acknowledgment which stated:

In signing this agreement, I Scott Fothergill accept the terms and conditions of my employment as detailed within this offer and declare that:

- I have read, and fully understood the terms and conditions of this agreement, and have received a copy of it.
- I was told about my right to get independent advice on the terms and conditions of this agreement and I have been given time to take that advice.
- I have raised any issues I have about the terms and conditions of this agreement and my employer has responded to these issues.
- I understand that I am being employed on a casual "as required" basis. Which means my employer will only offer work as and when it is available. I also understand my annual holiday entitlement will be met by an employer giving me holiday pay on a 'pay as you go' basis. ...

[20] Mr Fothergill and Mr Wang exchanged text messages following the receipt of the Employment Agreement about the start date and hours of work:

RW: By the way, we would look you to start the job in 17/01/2022 as the accountant recommendation. Would that be ok to you? Thanks.

SF: Could currently work on days off till the xmas break, mainly Monday and Thursday and then resign current job at end of the break?

RW: It is ok. But in this case, we can only 3 weeks to go and we would start our Christmas holiday. And we can only pay you 40 hours for the 4 weeks off. Would this be ok?

Just we could not pay you 4 weeks 40 hours as there is only 3 more weeks to go and then it is the holiday start. But you can do the jobs from 8 am to 3 pm during these three weeks.

SF: Yes that should be fine. Just would have to work out what days im best available with my boss.

RW: Great. Since you work it out, we would prefer your start to work in 6th of December. Would this be ok?

[21] Mr Fothergill said he delayed his resignation with the pizzeria because he needed to generate an income until he could commence fully with EVC on 17 January 2022.

[22] The parties reached an agreement that until Mr Fothergill commenced in January 2022, he would work amended hours of 8.00 a.m. to 3.00 p.m. Monday to Saturday in order that he could retain his job at the pizzeria over the period to January 2022. He commenced on 6 December 2021.

[23] Mr Fothergill said that during the first week of work, he worked on different work sites, receiving a message the night before telling him the site location for the following day. Mr Wang was not normally on site and did not supervise his work or provide him with training as he had expected would be the case. He received some mentoring from another apprentice, but it was not the guidance and mentorship by Mr Wang which he understood he had been promised.

[24] On Saturday 11 December 2022 after he finished work, Mr Fothergill went to have a Covid-19 vaccination. On Monday 13 December 2021 he messaged Mr Wang telling him that he was not feeling well and would not be in to work that day.

[25] Mr Fothergill attended work on 14 and 15 December 2021. After work on 15 December 2021, he had a car accident and was taken to hospital. He contacted Mr Wang to let him know and told him what had happened. A few hours later he received a message from Mr Wang which stated:

Just got home from work and check the message. Are you ok now? You take care yourself. And sorry to tell you do not need to come anymore. As the other guys not happy with your work performance because they said you could not real help them out, so you need to find another sparky job. I would pay you tomorrow as well and sum up for 8%. Then we would not have any more work hours for you. Thanks for doing works with us in the past two weeks and best wishes.

[26] Mr Wang stated that there had been issues with Mr Fothergill's performance, and he had spoken to him about these on 7 December 202, and again on 15 December 2021. The most serious issue had been Mr Fothergill leaving the work site with live wires exposed.

[27] Mr Fothergill confirmed that Mr Wang had spoken to him on 7 December, the day after he started work at EVC, and also on 14 and 15 December 2021 but denied leaving any live wires exposed. The issues were not raised with him formally, nor were any formal disciplinary steps taken prior to the dismissal message.

Was Mr Fothergill a casual or a permanent employee while working for EVC?

[28] Casual employment is not defined in the Act, and therefore the factual evidence is of paramount importance in determining whether or not the employment is casual or permanent in nature.

[29] A strong indication that the relationship is that of casual employment is the lack of an obligation on the employer to offer ongoing work, or for the employee to accept it when offered.

[30] Mr Fothergill was provided with an employment agreement by EVC. The Employment Agreement is quite clear that what is being offered is casual employment, and states that: “The employee will work on a casual “as required basis with no expectation of ongoing employment”. It also states that: “There is no obligation on the employer to offer work or the employee to accept offered work”.

[31] Moreover, Mr Fothergill in signing the Employment Agreement confirmed that he understood that he was being offered casual employment and work would only be offered as and when it is available.

[32] Mr Fothergill’s evidence was that although he thought a casual employment with the stated hours was “strange”, he did not question Mr Wang about it or raise any concerns and signed the Employee Acknowledgment section in the Employment Agreement which contained that statement.

[33] I am surprised that Mr Fothergill, who had various periods of employment prior to EVC and therefore would have had sufficient understanding of an employment relationship and the nature of it, did not at the very least ask Mr Wang why the Employment Agreement set out that what was being offered, and what he was agreeing to, was casual employment.

[34] Turning to consider the real nature of the relationship, in *Jinkinson v Oceania Gold (NZ) Ltd* which is the leading case in this area, the Employment Court set out guidelines in paragraph [47] for determining whether or not the nature of the employment was casual or permanent:

- a) The number of hours worked each week.
- b) Whether work is allocated in advance by a roster.
- c) Whether there is a regular pattern of work.
- d) Whether there is a mutual expectation of continuity of employment.
- e) Whether the employer requires notice before an employee is absent or on leave.
- f) Whether the employee works to consistent starting and finishing times.¹

¹ *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225

[35] As His Honour Judge Couch said in *Jinkinson* in respect of the matter of determining the real nature of an employment relationship:

All relevant matters must be taken into account in making that decision and the parties' description of their relationship is not to be treated as determinative.²

[36] In *Jinkinson* Judge Couch quoted with approval a decision of the Canada Labour Relations Board in which the Board stated:

In the notion of casual work, there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have work done. Conversely, as soon as the need is foreseeable only part-time work is automatically created: the employee is not a casual worker but a part-time one.³

[37] I have therefore proceeded to analyse the employment relationship between Mr Fothergill and EVC against those factors.

a. The number of hours worked each week

[38] The hours of work were stated in the Employment Agreement as being 8.00 a.m. to 4.30 p.m. These hours would have applied after Mr Fothergill commenced work on 17 January 2022.

[39] It was agreed between Mr Fothergill and Mr Wang that Mr Fothergill's hours would be from 8.00 a.m. to 4.30 p.m. from 17 January 2022, but in the initial period from 6 December 2021 the hours worked would be from 8.00 a.m. to 3.00 p.m. Monday to Saturday.

[40] I find there were a consistent number of hours to be worked.

b) Whether work was allocated in advance by a roster

[41] EVC did not operate a roster system, however Mr Fothergill received a text message each evening telling him the location of the work site for the following day.

[42] I find that work was allocated in advance.

c) Whether there was a regular pattern of work

[43] The Employment Agreement stated that Mr Fothergill would be working core hours of 8.00 a.m. to 4.30 p.m. Monday to Saturday. This was to apply from 17 January 2022.

² Above n 1 at [37]

³ *Bank of Montreal v United Steelworkers of America* 87 CLLC 16,044

Following the agreement for the initial period Mr Fothergill worked from 8.00 a.m. to 3.00 p.m. during December 2021.

[44] I find there was a regular pattern of work.

d) Whether there was a mutual expectation of continuity of employment

[45] At the time of the job interview Mr Fothergill understood the job was for continuous employment. Following his commencing work with EVC, I find there was a mutual expectation of ongoing employment, noting that in the WeChat message sent by Mr Wang to Mr Fothergill on 9 December 2021 Mr Wang states:

... By the way, when you come back after Christmas holiday, need you to fill the form of trainee. Then you can have the Opportunity to get registration in next couple of years.

[46] At the Investigation Meeting, Mr Wang confirmed that had Mr Fothergill not been dismissed, the employment would have continued from 17 January 2022.

[47] I find a mutual expectation of continuity of employment.

e). Whether the employer requires notice before an employee is absent or on leave

[48] In the Employment Agreement it stated that the employee had to tell their manager as soon as they could that they were not going to be available for work due to illness.

[49] Mr Fothergill was absent on Monday 13 December 2021 after he had received the Covid-19 vaccine. Acting on his understanding of the requirement in the Employment Agreement, he informed Mr Wang he would not be able to attend work that day. Mr Fothergill also informed Mr Wang of the car accident on 15 December 2021.

[50] I find that as stated in the Employment Agreement EVC required notice before Mr Fothergill was absent, and Mr Fothergill acted in accordance with this requirement.

f) Whether the employee works to consistent start or finish times

[51] Mr Fothergill arrived for work as agreed at 8.00 each day, and left at 3.00 p.m., also as agreed with Mr Wang.

[52] I find that Mr Fothergill worked to consistent start and finish times.

Conclusion

[53] I have analysed the employment relationship between Mr Fothergill and EVC and find that there are several indicators that the employment of Mr Fothergill was more consistent with a continuous or permanent employment arrangement than with a casual arrangement.

[54] In light of these indicia, I find that Mr Fothergill was a permanent employee with EVC, initially on a part-time basis but intended from 17 January 2022 to be full-time employment.

Was Mr Fothergill unjustifiably dismissed by EVC?

[55] Mr Fothergill was dismissed from his employment with EVC on 15 December 2021. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as:

S103A Test of Justification

- 1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- 2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Substantive Justification

[56] EVC's reason for dismissing Mr Fothergill was that the other employees had complained Mr Fothergill did not perform to a level at which he could help them sufficiently. Mr Wang's evidence was Mr Fothergill did not perform as he expected, and he spoke to him about that. Mr Fothergill confirmed that there had been some performance issues raised with him.

[57] There is no evidence that EVC held a formal disciplinary process with Mr Fothergill in respect of performance concerns, although I accept that there may have been an informal conversation between him and Mr Wang about some performance concerns on 7 December 2021.

[58] However, there is no evidence that Mr Wang made Mr Fothergill aware that his continued employment would be in jeopardy as a result of any performance concerns.

[59] I find that there is a lack of substantive justification for the dismissal on 9 December 2018.

Procedural Justification

[60] In accordance with s 103A (3) of the Act, EVC was required to carry out a fair investigation and to follow a fair procedure. The Authority must also consider whether:

- (a) ... the employer sufficiently investigated the allegations against the employee ...
- (b) ... the employer raised the concerns that the employer had with the employee ...
- (c) ... the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...
- (d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[61] I note also that employers and employees are under a duty of good faith to behave towards each other in good faith pursuant to s 4 of the Act. In accordance with s 4(1A)(c) of the Act an employer who is proposing to make a decision that will, or is likely to have, an adverse effect on the continuance of an employee's employment is required to provide the affected employee with:

- (i) Access to information relevant to the continuation of the employees' employment, about the decision, and
- (ii) An opportunity to comment on the information to their employer before a decision is made.

[62] EVC's evidence is that there were performance issues with Mr Fothergill raised during his employment.

[63] Mr Fothergill confirmed he had some informal discussions with Mr Wang about his performance, but there was no formal process followed. There are no written warnings before the Authority that resulted in disciplinary outcomes; and there is no evidence supporting Mr Fothergill having received advice that failure to improve might result in the termination of his employment.

[64] There was no procedure followed prior to the issue which occasioned Mr Fothergill's dismissal on 15 December 2018. Specifically:

- There is no evidence that EVC carried out any investigation into the complaints from the other 'guys' about Mr Fothergill's work performance prior to dismissing him;

- Mr Fothergill was not provided with specific details of the complaints made by the other workers;
- Mr Fothergill was not provided with a reasonable opportunity to respond to the allegations against him; and
- There is no evidence that Mr Wang gave any consideration to any explanation Mr Fothergill might provide since he was denied such an opportunity prior to the dismissal text message.

[65] Whilst minor flaws which did not result in an employee being treated unfairly would not render a dismissal unjustifiable, in this case I find the flaws in the procedure adopted by the EVC were more than minor.

[66] In all the circumstances at the relevant time I find that dismissing Mr Fothergill was not a decision a fair and reasonable employer could have taken.

[67] I determine that Mr Fothergill was unjustifiably dismissed by EVC.

Remedies

Lost Wages

[68] Mr Fothergill said he did not seek alternative employment until June 2022. After he did start searching, he obtained alternative permanent employment in July 2022. He had however continued with his part-time employment in the pizzeria until he obtained the permanent employment.

[69] Employees are under an obligation to mitigate their loss, and Mr Fothergill did not start to seek alternative employment immediately. He did however retain part-time employment with the pizzeria until he obtained full-time employment on 13 June 2022.

[70] In these circumstances I consider it appropriate to award Mr Fothergill what he would have earned in the period between his dismissal from EVC on 15 December 2021 and starting full-time employment on 13 June 2022, less what he earned during that interim period.

[71] **EVC is ordered to pay Mr Fothergill the sum of \$4,490.13 gross (calculated as \$18,900.00 gross - \$14,409.87) pursuant to s 28(3) of the Act.**

Compensation

[72] Although the period of employment was only seven days in total, I accept that Mr Fothergill felt not only distressed, but betrayed by the ending of his employment with EVC which he believed to have been the start of a career in electrical services.

[73] Considering the range of awards in cases of this kind I consider an award of compensation of \$8,000.00 to be appropriate.

[74] **EVC is ordered to pay Mr Fothergill the sum of \$8,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.**

Contribution

[75] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[76] There is some agreed evidence that performance issues were raised verbally with Mr Fothergill, but these were not considered sufficiently serious to merit a disciplinary process. Moreover, I observe that Mr Fothergill was a new employee who was provided with minimal training and supervision.

[77] Accordingly, I make no reduction to the remedies ordered on the basis of contributing conduct by Mr Fothergill.

Costs

[78] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[79] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[80] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[81] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴

Eleanor Robinson
Member of the Employment Relations Authority

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].