

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2024] NZERA 224
3213120

BETWEEN	JUSTIN FORD Applicant
AND	HAVEN FALLS FUNERAL HOME LIMITED Respondent

Member of Authority: Shane Kinley

Representatives: Tim Vogel, advocate for the Applicant
James Duckworth, counsel for the Respondent

Investigation Meeting: 24 January 2024 in Wellington

Submissions: 9 February 2024

Determination: 19 April 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Justin Ford was employed by Haven Falls Funeral Home Limited (Haven Falls) from January until February 2020. Mr Ford claims that he was employed on a permanent basis and that he was unjustifiably dismissed by Haven Falls.

[2] Haven Falls say that Mr Ford was employed on a casual basis and that it chose to not continue his training and employment, which it was entitled to do based on the casual nature of his employment.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged for Mr Ford by himself and Shelley Taylor, his partner, and for Haven Falls by Michelle

Pukepuke, a co-owner of Haven Falls with her husband Allen Pukepuke, and Olive Rudolph, a Senior Funeral Director at Haven Falls. Mr Ford, Ms Taylor, Mrs Pukepuke and Ms Rudolph answered questions, under oath or affirmation, from me and from the representatives for Mr Ford and Haven Falls. The representatives also provided written submissions following the investigation meeting.

[4] 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.

The issues

[5] The issues requiring investigation and determination were:

- (a) Was Mr Ford employed by Haven Falls on a casual or permanent basis?
- (b) Was Mr Ford unjustifiably dismissed from his employment by Haven Falls?
- (c) If Haven Fall's actions were not justified (as to dismissal), what remedies should be awarded, considering:
 - (i) Lost wages under s 123(1)(b) of the Act; and
 - (ii) Compensation under s 123(1)(c)(i) of the Act?
- (d) If an award of lost wages is made, should any order be made requiring the payment of interest?
- (e) If any remedies are awarded, should they be reduced (under s 124 of the Act) for any blameworthy conduct by Mr Ford that contributed to the situation giving rise to his grievance?
- (f) Should either party contribute to the costs of representation of the other party?

Context for matters to be determined

[6] Mr Ford and Haven Falls' evidence was consistent about a number of factual matters related to his employment relationship and the matters to be investigated. This included the fact that there was an interview process in Wellington following an advertisement by Haven Falls on TradeMe, that Mr Ford accepted the offer of employment which was labelled "Casual" and that Mr Ford was flown to Auckland by Haven Falls for a period of training in Auckland and Whangarei. After a couple of incidents in Auckland, some details of which are disputed, Mr Ford returned home to Whanganui and was there when Haven Falls ended his employment.

[7] It was also common ground that Mr Ford was returning to the workforce after a number of years out of work, having previously suffered a traumatic brain injury. Prior to that Mr Ford had been employed in a number of positions as a Funeral Director or providing embalming services, along with a range of other associated and unrelated jobs.

[8] The key differences between Mr Ford and Haven Falls' views of this matter relate to whether the real nature of Mr Ford's employment was casual or permanent and then what was required when Haven Falls had concerns about Mr Ford's performance and behaviour, which led to it ending his employment. There are also differences in evidence about whether issues were raised on behalf of Haven Falls during Mr Ford's employment and how he responded.

Was Mr Ford employed by Haven Falls on a casual or permanent basis?

What is the legal position?

[9] 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. 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.

[10] The Employment Court judgment in *Jinkinson v Oceania Gold (NZ) Ltd* set out a number of indicia for determining whether or not the nature of the employment was casual or permanent, which are:¹

- (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; and
- (f) whether the employee works to consistent starting and finishing times.

¹ *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at [47].

What did Mr Ford's employment agreement say?

[11] Copies of Mr Ford's employment agreement were provided by both parties. It was headed "Employment agreement – casual" and at clause 1.4 clearly set out the casual nature of the employment agreement as follows:

1.4 Type of employment agreement

The employee will work on a casual "as required" basis commencing **Monday 6th January 2020** 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. The terms of this agreement will apply to each new period of employment unless the employer and employee agree to any changes.

[Emphasis in original]

[12] This was reinforced in the hours of work, staff training and annual holiday pay clauses of the employment agreement, which provide:

2.2 Hours of work

Haven Falls Funeral Home is a 24 hour 7 day a week operation and as such requires a significant commitment to the roster as provided. While all team members are given stipulated hours at the commencement of employment it is the expectation of the employer that all employees will progress to a skill level whereby the [sic] can be placed within any position within the roster.

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 of 7.00am to 7.00pm Monday to Sunday. 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.

3.8 Staff Training / Development

For the initial 2 years of employment and ***whilst on casual agreement***, all training and development is internal.

4.2 Annual leave

The employee will get holiday pay at the same time as their regular pay instead of being paid during their holidays. This is known as pay-as-you-go leave and will be paid at a rate of 8% on top of the employee's gross earnings.

[Emphasis added]

[13] Submissions for Mr Ford were that other provisions in Mr Ford's employment agreement were not consistent with it truly being a casual employment relationship, with comparisons made to how similar factors were applied by the Court in *Jinkinson*. Reference was made to:

- (a) sick leave provisions where notice of absence was required (clause 4.3);

- (b) overtime (clause 3.3), on call arrangements (in the position description), working in multiple locations (clause 2.1) and performing general duties;
- (c) termination (part 7) including for redundancy (clause 7.2), by abandoning employment (clause 7.3), for cause (clause 7.4 related to serious misconduct), on medical grounds (clause 7.5), and with notice required (clause 7.9);
- (d) allocation of work through a roster (referred to in clause 2.2 above);
- (e) training and development for an initial two years (referred to in clause 3.8 above); and
- (f) the presence of restraint of trade provisions (clause 7.8).

[14] Submissions for Haven Falls focussed on Mrs Pukepuke's evidence that she prepared the employment agreement using:

the contract and guidance provided on the MBIE website for a casual employee and the options that were available. She followed the recommendations that were made in good faith.

... if was [sic] for there to be full-time employment, Haven Falls have standard contracts that it uses for this purpose. The contents would be different.

[15] I do not accept that all matters referred to in submissions for Mr Ford illustrate a permanent employment arrangement was expected, rather consider this is a situation where there is some ambiguity. Many of the clauses used could have been applied within a casual "as required" arrangement, for example sick leave can be available for casual employees and notice could be expected within an agreed engagement of work. Work under a casual "as required" arrangement could also have been agreed to occur in multiple locations and allocated through Haven Falls offering a roster, with Mr Ford free to accept or decline the offered work.

[16] In contrast with *Jinkinson* where the nature of the employment was found to have changed over a 19-month period², Mr Ford's employment with Haven Falls ended after approximately one month, although he did not complete the originally allocated roster of work or training period, for reasons that I return to later. I consider that the duration of Mr Ford's period of work for Haven Falls was insufficient to find that, if the real nature of employment was initially work under a casual "as required" arrangement that it had changed to be permanent. This is broadly consistent with submissions for Haven Falls, although those submissions also emphasised that Mr Ford

² Ibid at [67].

was “being trained to ensure he was able to fulfil the role he was being asked to perform in the future”.

[17] The strongest indication of a permanent employment arrangement are the provisions related to termination (part 7), particularly in relation to redundancy and termination for medical reasons. Submissions for Mr Ford pointed the comments in *Jinkinson* that:³

The agreement contained detailed and comprehensive provisions for termination for cause, on medical grounds, if qualifications were lost or in the event of redundancy. In each case, two weeks’ notice was required. A similar period also applied if Ms Jinkinson wished to terminate the agreement. If the parties intended this to be a casual employment arrangement under which they had no obligations to each other between periods of work, no such provisions were necessary and their presence suggests this was not what was intended.

[18] In relation to the other aspects of the provisions related to termination (part 7), I consider that they could have been appropriate for work under a casual “as required” arrangement, to the extent that they could have been applicable within an agreed engagement of work. Mrs Pukepuke said that she worked through the MBIE process and chose, with modifications, the clauses that were included in Mr Ford’s employment agreement.

[19] The exceptions to this are the redundancy and termination for medical reasons clauses. While I accept Mrs Pukepuke’s evidence of how she generated the employment agreement, those were clauses that were not part of the employment agreement generated by Mrs Pukepuke from the MBIE process. It was unclear why Mrs Pukepuke chose to add those clauses, which would be more appropriate for permanent employment.

[20] Notwithstanding the presence of those clauses, I consider that most of the evidence about and contents of Mr Ford’s employment agreement supports the real nature of his employment being under a casual “as required” arrangement, although this is not unequivocal due to the presence of some additional clauses. I do not consider however that the label on Mr Ford’s employment agreement is determinative of his employment status and have considered the other matters in the indicia outlined by the Employment Court.

³ Ibid at [57].

What were the hours worked, was work allocated in advance by a roster, was there a regular pattern of work, and did work involve consistent starting and finishing times?

[21] I have considered these indicia together, as the evidence provided for these indicia overlapped, largely due to the short duration of Mr Ford's employment.

[22] Rosters were provided in the evidence from both parties, which showed that Mr Ford was scheduled through the roster operated by Haven Falls to work the following time periods:

- (a) The week of Monday 6 January to Sunday 12 January 2020 in Auckland;
- (b) For two weeks from Monday 13 January to Sunday 26 January 2020 in Whangarei;
- (c) The week of Monday 27 January to Sunday 2 February 2020 in Auckland;
and
- (d) For four weeks from Monday 3 February to Sunday 1 March in Wellington.

[23] As matters unfolded Mr Ford worked only the first three weeks, before incidents occurred and he returned to his home in Whanganui (discussed at paragraphs [41], [55] and [58] below). He was also paid for the fourth week, with Haven Falls saying that was because of lack of notice of cancelling work in that period.

[24] Evidence was provided by Haven Falls that Mr Ford worked for 18 out of 19 days, for 55 hours in the first week, 46 hours in the second week and 41.5 hours in the third week. On 14 of the 19 worked days he started work at 8.30am or 9am and on 14 of the 19 worked days he ended his main work period at between 4.30pm and 5.30pm.

[25] Submissions for Mr Ford were that Haven Falls required Mr Ford to commit to this fulltime induction and training period, with flights paid for and accommodation provided. Those submissions said that "No reasonable employer is going to make such a financial commitment to a casual employee" and:

[Mr Ford's] work was regular, fulltime, there was a mutual expectation of continuity of employment, start and finish times were consistent, and the Applicant was required to give notice if absent or on leave. There was nothing casual about the employment relationship.

[26] Submissions for Haven Falls acknowledged that Mr Ford was engaged on an initial training arrangement on a roster and said pointed to the email with Mr Ford's employment agreement where that roster was agreed to. Those submissions said that:

As long as he was training, [Mr Ford] remained on the work roster given the need to involve others.

The position would remain until such time as he had spent time in Wellington and the Respondents were satisfied that he was able to work in a solo capacity.

[Mrs Pukepuke's] evidence explains very clearly where [Mr Ford] was based, the training he had, where changes needed to be made and how those were communicated to him.

[27] Mrs Pukepuke's evidence emphasised her view that the training stage for Mr Ford's employment was different to what arrangements may have been once training was complete. She repeatedly said that Mr Ford wasn't working he was being trained and also said that if he had successfully completed the training then he would have gone onto an "on-call" arrangement. Mrs Pukepuke said that due to a combination of the unavailability of one of Mr Ford's trainers and then Haven Falls' concerns with Mr Ford's behaviour and competency, the final five weeks of the training period did not occur. She was of the view that as the employment was casual, it was possible that Haven Falls could decide Mr Ford's employment should be ended without completing the full period of training. She also said acknowledged Haven Falls took into account the concerns about Mr Ford's behaviour and its view of the gap between his performance and Haven Falls' expectations, in reaching that view.

[28] I am satisfied that the evidence of both parties shows that for the three weeks Mr Ford worked for Haven Falls there was a regular pattern of work, set in advance by a roster, with some minor variability in actual hours worked that appeared to reflect the urgent needs of the funeral directing and embalming industry. On balance, I consider it more likely than not that there was a verbal agreement Mr Ford would not work for weeks three, four and five of the original roster. Whether there was agreement about changes to the remainder of the roster or training period is a matter I return to later.

[29] I find that Mr Ford's employment with Haven Falls was mutually intended to run for at least eight weeks based on the evidence about the hours Mr Ford worked, the use of a roster to allocate work by Haven Falls for all of its employees and the dates that Mr Ford was allocated work on that roster, and the consistency of Mr Ford's starting and finishing times during the time he worked for Haven Falls. I consider, however, at the early stage of employment, this evidence is neutral in relation to whether the real nature of the relationship was for casual "as required" employment with an initial engagement of that training period of eight weeks to be followed by "on-call" employment, or permanent employment including an initial training period of eight weeks.

Was there a mutual expectation of continuity of employment?

[30] The Employment Court in *Jinkinson* described this indicia in the following way:⁴

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.

[31] The parties provided evidence and submissions that starkly diverged about whether there were intended to be mutual obligations of continuity of employment, on what basis and for how long.

[32] Mr Ford said that the job was advertised as full-time, then at the interview stage while Mrs Pukepuke mentioned at the end that the agreement would say the offer was for casual work there were reassurances that there would be regular work and that he was told to “have faith in the employer”. Submissions for Mr Ford said that there was a mutual expectation of continuity of employment (as noted at paragraph [25] above) and:

[Haven Falls] is not able to show what [Mr Ford’s] assignment was in this matter or when his placement would run its course. This is because [Mr Ford] was a fulltime permanent employee.

[33] Submissions for Haven Falls stressed that while there was a commitment to a training period, following that “the nature of that work would be casual given the availability of work was uncertain. It was hoped that as the work developed, the role would change as it did in *Jinkinson*”. Those submissions went on to say that Mr Ford “was being trained to ensure he was able to fulfil the role he was being asked to perform in the future” and “It is regrettable [Haven Falls] did not feel able to continue [Mr Ford’s] training and his employment. That was a decision it took in good faith based on its observations and the issues it had observed”.

[34] Mrs Pukepuke accepted the role was advertised as permanent but gave evidence that the casual nature of the offer was clearly advised to Mr Ford prior to and at the interview, with no commitment to permanent work after a training period. Given Mr Ford had been out of the workforce for some time, Mrs Pukepuke said that an extended training period was appropriate to ensure that he had the right skills for embalming and that he was competent to operate without active supervision.

⁴ Ibid at [52].

[35] I consider that while there was a mutual expectation that Mr Ford would complete an extended period of training of eight weeks, there was no common understanding about whether Mr Ford would have continuity of employment after the training period or on what basis. While Haven Falls likely made representations that Mr Ford could become a permanent employee, it was not clear to me that had crystallised.

Did Haven Falls require notice before Mr Ford was absent or on leave?

[36] As noted at paragraphs [12] to [15] above Mr Ford's employment agreement contained sick leave provisions where notice of absence was required (clause 4.3), however, I consider that it is possible that notice could be expected within an agreed engagement of work.

[37] The annual leave provision provided for "pay-as-you-go" annual leave to be paid in Mr Ford's regular pay (clause 4.2). No entitlement to take annual holidays was provided with the consequence there was no reference to notice.

[38] I consider that this indicia supports the employment relationship being for casual "as required" employment rather than permanent employment.

Overall conclusion: Mr Ford was a casual employee with an initial engagement for an eight week training period

[39] For all of the above reasons I find that when Mr Ford's employment ended he was employed on a casual "as required" basis and he was not a permanent employee.

[40] That is not the end of the enquiry, however, as I consider that Haven Falls had committed to an initial engagement for an extended training period of eight weeks and Mr Ford was only three weeks into that training period when his employment ended. This gives rise to a question of whether the ending of Mr Ford's employment by Haven Falls was justified, which I turn to shortly.

[41] Before doing so, it is useful to consider further what the period of engagement was that Haven Falls had committed to. The evidence showed that Mr Ford had returned to Whanganui when his employment was terminated. While there is dispute over how incidents prior to his returning to Whanganui were handled, I consider that the evidence of Mrs Pukepuke and text messages from Mr Ford support a finding that Mr Ford had

agreed to return to Whanganui for a break and that Mr Ford had accepted that one of his trainers was unavailable for training that had been scheduled.

[42] Mrs Pukepuke's witness statement was clear on what she considered had been discussed, saying:

With all of us still on the Whangarei site I confirmed with Justin that week's 5-6 would not be going ahead due to Pierre confirming that he was not available. I also told him that we would need to revisit weeks 7 and 8 also as the day to brief with Olive as he would not have completed his training with Pierre and also, that we would revisit week 8 when Allen returned from overseas as it might be that we need to bring him to another site. I advised Justin that we would arrange his flight home for the end of week 4 (2nd February) and revisit his training upon our return from overseas on 22nd February.

[43] Mr Ford texted Mr Pukepuke to seek clarification of arrangements on 4 February 2020, which precipitated Haven Falls decision to dismiss Mr Ford, which Mrs Pukepuke said was initially communicated by Mr Pukepuke on 7 February 2020 and confirmed in a letter she sent Mr Ford on 10 February 2020.

[44] I find that this dismissal occurred during a period where Haven Falls had committed to a training engagement with Mr Ford, which had not yet concluded and Mr Ford was at that time employed by Haven Falls with mutual obligations of employment existing between the parties. While Mrs Pukepuke had indicated his training would be revisited, this was not sufficient to bring the commitment to complete the training period to an end, rather I consider there was agreement to revisit the timing of the training.

[45] I also note that Mr Ford's employment agreement provided:

5.4 Changes to this agreement

The employer and employee can agree to change the terms of this agreement at any time. Any changes must be in writing and agreed to by both employer and employee.

[46] While Mr Ford's inclusion on Haven Falls' roster was communicated in writing, including in the email offering him employment and providing the draft employment agreement, there was no evidence provided that changes to the roster were agreed in writing, particularly in relation to not completing the full eight-week training engagement.

Was Mr Ford unjustifiably dismissed from his employment by Haven Falls?

Relevant law

[47] The Employment Court in *Rush Security Services Ltd t/a Darien Rush Security v Samoa* clearly stated that dismissals of casual employees can occur during a period of engagement, saying:⁵

If Mr Samoa's employment with RSSL was as a casual employee, a failure or refusal by the employer to engage the employee for a further period of employment will not, without more, amount to a dismissal. **If, however, the employment is terminated in the course of a casual engagement, that will constitute a dismissal.** [emphasis added]

[48] The Court has also stated in *Surplus Brokers Ltd v Armstrong* that:⁶

Mr Armstrong was entitled during [a period when mutual obligations of employment existed between the parties] to all that employees are usually entitled to, including not to be dismissed without substantive and procedural justification.

[49] As I have found that Haven Falls had committed to an initial engagement for an extended training period of eight weeks and Mr Ford was only three weeks into that training period when his employment ended, I need to determine whether Haven Falls' actions were justified in terms of the test of justification under s 103A of the Act.

[50] The test of justification is whether Haven Falls' actions, and how Haven Falls acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[51] In reaching my conclusions about whether Haven Falls' actions were justified, I must consider:

- a. having regards to the resources available to it, did Haven Falls sufficiently investigate before taking action;
- b. did Haven Falls raise concerns that it had with Mr Ford before taking action;
- c. did Mr Ford have a reasonable opportunity to respond; and
- d. did Haven Falls genuinely consider Mr Ford's explanation or comments.

⁵ [2011] NZEmpC 76 at [3].

⁶ [2020] NZEmpC 131 at [20].

[52] I may also take into account any other factors I think are appropriate. I must not determine a dismissal to be unjustifiable where there were defects in Haven Falls' process that were minor and did not result in Mr Ford being treated unfairly.

Submissions of the parties

[53] Submissions for Mr Ford cited *Rush Security Services Ltd* and said that:

[Mr Ford's] employment relationship did not end because [Haven Falls] had no work for him to perform, or because his assignment/placement had run its course. ...

It is clear that [Mr Ford's] employment relationship came to an end because [Haven Falls] had performance and behaviour concerns with [Mr Ford]. ...

... [Mr Ford] was dismissed ... [and Haven Falls] did not follow due process and, in particular, did not follow those factors set out in ss 4(1A)(c) and 103A of [the Act] ... there is no documentary evidence that shows [Haven Falls] ever raised any issue with [Mr Ford] about his behaviour or performance before dismissing him. ...

... [Mr Ford] was given no opportunity to address them and, in any event. [Haven Fall's] concerns did not justify dismissal.

[54] Submissions for Haven Falls focussed on the casual nature of Mr Ford's employment relationship and said "If [Mr Ford] was a casual employee (and Counsel contends that he was) then that concludes matters and no further remedies are available to him".

[55] Those submissions also traversed the incidents that were said to have occurred in Auckland prior to Mr Ford returning to Whanganui, which preceded the ending of his employment and said:

[Mrs Pukepuke] also confirms that [Mr Ford's] actions became a cause for increasing concern. ...

In a meeting the following day, [Mr Ford] accepted the behaviour was being unacceptable and inappropriate. An agreement was reached that he would go home early, and arrangements were made.

The next steps were explained to him, and the further korero and training would begin on 22 February once [Mrs and Mr Pukepuke] had returned from overseas. ...

A decision was taken to terminate his employment on 7 February given the concerns that had appeared, and because progress had not been as expected. This was communicated by telephone and notified to him in writing. The letter confirmed ongoing training would not be proceeding.

Mr Ford was unjustifiably dismissed

[56] Haven Falls accepted, through the evidence of Mrs Pukepuke and reiterated in its submissions, that it ended Mr Ford's employment, claiming that the casual nature of

the employment relationship meant it was entitled to do so and there was no obligation to offer further work.

[57] Haven Falls' approach is inconsistent with the clear statement of the Court in *Rush Security Services Ltd* that "If, however, the employment is terminated in the course of a casual engagement, that will constitute a dismissal."

[58] I consider that it is more likely than not that Haven Falls raised concerns with Mr Ford about his progress informally, that some form of the incidents occurred leading to Haven Falls becoming concerned about Mr Ford's behaviour and that an agreement was reached that he would return to Whanganui.

[59] Haven Falls has however failed to justify its subsequent decision to end Mr Ford's employment. Its position was that because Mr Ford's employment was casual it could simply choose to offer no further engagements. This overlooks the fact that it had committed to a eight week training period and had said "the further korero and training would begin on 22 February once [Mrs and Mr Pukepuke] had returned from overseas".

[60] Haven Falls also said that it then made a decision to terminate Mr Ford's employment and communicated that decision to him. No evidence was presented that Haven Falls ever formally raised its concerns with Mr Ford, communicated a preliminary view that Mr Ford's performance and behaviour meant that his employment should be terminated or provided Mr Ford with any opportunity (let alone a reasonable opportunity) to respond. It follows that Haven Falls could not consider Mr Ford's explanation or comments, given he was provided with no opportunity to make any comment.

[61] I find that Haven Falls unjustifiably dismissed Mr Ford, due to the failure to engage in any meaningful process, as it considered it did not need to do so due to Mr Ford's casual employment status. Mrs Pukepuke frankly conceded at the investigation meeting that Haven Falls did not consider it needed to engage in any process due to Mr Ford's casual employment status. She also acknowledged that the reason for terminating Mr Ford's employment was due to a combination of his behaviours and capability concerns, and went so far as to say that she "would have let [Mr Ford] go under a trial period" but had not included one in his employment agreement, as she did not consider it was appropriate to put such a clause in a casual employment agreement.

[62] Haven Falls' belief that it could end Mr Ford's casual employment during a period of engagement without any process was mistaken and is fatal to Haven Falls ability to justify its decision to terminate Mr Ford's employment. The decision to dismiss Mr Ford, and how that decision was reached, were not what a fair and reasonable employer could have done in all the circumstances at the time.

[63] For completeness, I record that Mrs Pukepuke provided evidence that Haven Falls had access to legal and HR advice as and when needed on a retainer basis. I do not consider that the resources available to Haven Falls could excuse the shortcomings in the process that it followed, or that the defects in Haven Falls' process were minor or did not result in Mr Ford being treated unfairly.

[64] It follows that Mr Ford is entitled to remedies for his unjustified dismissal by Haven Falls.

Remedies

Relevant law

[65] Mr Ford sought remedies for lost wages for 12 months, relying on s 128(3) of the Act, which provides discretion to the Authority over the amount of lost wages that should be awarded, and interest on any award of lost wages. Section 128 provides:

128 Reimbursement

- (1) This section applies where the Authority or the Court determines, in respect of any employee,—
 - (a) that the employee has a personal grievance; and
 - (b) that the employee has lost remuneration as a result of the personal grievance.
- (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
- (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[66] In order to award lost wages, I must be satisfied there has been a loss under s 128(2). Section 128(3) provides that I may also exercise my discretion to order a greater amount than the minimum amount required by s 128(2).

[67] Mr Ford also sought compensation of \$30,000 under s 123(1)(c)(i) for humiliation, loss of dignity, and injury to the feelings.

Submissions of the parties

[68] Submissions for Mr Ford were that I should exercise my discretion under s 128(3) to award 12 months' lost wages as Mr Ford had not worked since he was dismissed, due to the effect of the dismissal on him, with reference also being made to the effects of COVID-19 lockdowns and the restraint of trade provisions in Mr Ford's employment agreement.

[69] In relation to compensation under s 123(1)(c)(i) submissions for Mr Ford were that his "dismissal had a profound effect on him. It made him feel depressed, angry, humiliated and suicidal". Submissions also said that Mr Ford "did not contribute to his dismissal in any manner".

[70] Submissions for Haven Falls were that Mr Ford "did not seek or obtain any further employment. ... he was not medically able to do so". Those submissions said there was no attempts to mitigate loss, questioned the lack of medical evidence about Mr Ford's situation and ability to obtain work and contended that, while there may have been some impacts from COVID-19 lockdowns, work continued to be available in the funeral industry.

[71] In relation to compensation under s 123(1)(c)(i) submissions said the amount sought was "completely excessive in the circumstances" while acknowledging:

... it is fair to say there was an impact caused to [Mr Ford] as a result of these events. However, in the absence of any report addressing the issue of causation, the problems he had all relate to the previous brain injury and the loss of memory that caused.

Finding

[72] I find that Mr Ford's proven loss of wages are limited to the remainder of the committed initial engagement for an extended training period of eight weeks, applying the approach of the Court of Appeal in *Telecom New Zealand Ltd v Nutter*⁷ that the employee's actual loss "sets an upper ceiling on any award and it is plainly a logical starting point for assessment". While Mr Ford was only three weeks into that training period when his employment ended, Haven Falls provided evidence that it paid him for

⁷ [2004] 1 ERNZ 315 at [81]. Affirmed in *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [26].

the following week, meaning that Mr Ford is entitled to a minimum of the remaining four weeks of wages.

[73] Given the concerns that Haven Falls had about Mr Ford's performance, I do not consider actual loss could have been more than that four-week period, as I consider it highly unlikely that Mr Ford's training period would have been extended even if Haven Falls had not have terminated his employment.

[74] I also decline to exercise my discretion under s 128(3) to increase the award for lost wages, following the approach of the Court in *Pyne v Invacare New Zealand Ltd*⁸, which said that "Mr Pyne's actual loss sets the upper limit that can be awarded in terms of s 128(3)". In this case I am not satisfied that further work would have been offered to Mr Ford by Haven Falls or that he would have been medically able to take up further offers of work, meaning there is no basis to go beyond the four weeks of actual loss that I have found Mr Ford is due.

[75] I order that Haven Falls calculate and pay Mr Ford lost wages in the amount of four weeks' pay, based on the hours that he was expected to perform work under the roster for the last four weeks of the committed initial engagement for an extended training period of eight weeks training. If the parties are unable to agree to the calculation of this amount, then they may revert to the Authority. This amount should also include annual holiday pay at a rate of 8% on top of the four weeks' pay.

[76] Given this payment would have been due in early 2020, I order that Haven Falls also calculate and pay Mr Ford interest on this amount in accordance with the Interest on Money Claims Act 2016 from 11 March 2020 (being the date four weeks after the last payment made by Haven Falls to Mr Ford) until the above amount has been paid in full, to be calculated using the civil debt calculator on the Ministry of Justice website.⁹

[77] In terms of compensation under s 123(1)(c)(i), the effects of Haven Falls' unjustified dismissal of Mr Ford were clear to me. While he was only employed for a short period of time, he provided evidence that he was "over the moon" at having gained employment with Haven Falls. He also said that he was "devastated [by his dismissal and his] world fell apart". I am satisfied, notwithstanding the lack of specific medical evidence that identified the impacts of Mr Ford's dismissal from other factors including

⁸ [2023] NZEmpC 179 at

⁹ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

the impacts of his prior traumatic brain injury, that the impacts of his dismissal were significant.

[78] Having considered Mr Ford's evidence, comparable awards made and the circumstances of Mr Ford's employment ending, I consider an appropriate compensatory amount under s 123(1)(c)(i) of the Act, to be \$20,000.00. I order that Haven Falls pay Mr Ford this amount.

Contribution

[79] Section 124 of the Act requires that I consider the extent to what, if any, Mr Ford's actions contributed to the situation that gave rise to his personal grievance and assess whether any remedies should be reduced.

[80] Given my finding that Haven Falls' actions were unjustified due to its mistaken belief that Mr Ford's casual employment status meant he could be dismissed without any meaningful process, he could not have contributed to the situation that gave rise to his personal grievance. While contribution may have been appropriate to consider in relation to Mr Ford's behaviour and capability to meet Haven Falls expectations, those factors are not connected to the procedural shortcomings in Haven Falls' dismissal process.

[81] In these circumstances, I do not consider there are any reasons to reduce the remedies awarded to Mr Ford.

Summary of outcome

[82] I have found:

- a. when Mr Ford's employment ended he was employed on a casual "as required" basis and he was not a permanent employee;
- b. Haven Falls had committed to an initial engagement of Mr Ford for an extended training period of eight weeks and he was only three weeks into that training period when his employment ended;
- c. Mr Ford was dismissed by Haven Falls during a period that he was employed by Haven Falls with mutual obligations of employment existing between the parties;
- d. Haven Falls unjustifiably dismissed Mr Ford, due to the failure to engage in any meaningful process, as it considered it did not need to do so due to Mr Ford's casual employment status;

- e. Mr Ford's lost wages claim under s 123(1)(b) is limited to the remainder of the initial engagement for the extended training period, which amounts to four weeks of lost wages, as it is not clear further engagements would have been offered to him. Annual holiday pay of 8% is to be added to this amount and interest is to be calculated until the total amount is paid;
- f. This is not a case where it is appropriate to exercise my discretion to increase the award for lost wages under s 128(3); and
- g. Mr Ford did not contribute to the situation that gave rise to his personal grievance and there is no reason to reduce under s 124 the remedies awarded to Mr Ford .

Orders

[83] For the above reasons I order Haven Falls Funeral Home Limited (Haven Falls) to:

- a. calculate and pay Justin Ford lost wages under s 123(1)(b) of the Employment Relations Act 2000 (the Act) in the amount of four weeks' pay, based on the hours that Mr Ford was expected to perform work under the roster for the last four weeks of the committed initial engagement for an extended training period of eight weeks, plus annual holiday pay at a rate of 8% on top of the four weeks' pay;
- b. calculate and pay Mr Ford interest on this amount in accordance with the Interest on Money Claims Act 2016 from 11 March 2020 (being the date four weeks after the last payment made by Haven Falls to Mr Ford) until the above amount has been paid in full, to be calculated using the civil debt calculator on the Ministry of Justice website;¹⁰ and
- c. pay Mr Ford compensation of \$20,000.00 under s 123(1)(c)(i) of the Act without deduction.

[84] The above amounts are to be paid by Haven Falls to Mr Ford within 28 days of the date of this determination.

¹⁰ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

Costs

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

[86] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Ford may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Haven Falls will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[87] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.¹¹

[88] As the investigation meeting for this matter finished late on the first day, my preliminary view is that the notional daily rate for one day is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority

¹¹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1