

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 665
3246659

BETWEEN KEITH WARDS
 Applicant

AND FOREST GLEN LIMITED
 PARTNERSHIP
 Respondent

Member of Authority: Alex Leulu

Representatives: Simon Greening and Andrea de Stadler, counsel for the
 Applicant
 Brendon Coghlan, for the Respondent

Investigation Meeting: 5 June and 21 June 2024 in Auckland

Submissions received: 5 July and 8 August 2024 from the Applicant
 6 August 2024 from the Respondent

Determination: 8 November 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Keith Wards was employed by Forest Glen Limited Partnership (FGLP) as a labourer. On 20 September 2022 FGLP summarily dismissed Mr Wards from his employment. FGLP claimed it dismissed Mr Wards because of its concerns about his deteriorating health and his ability to safely carry out his work.

[2] Mr Wards claimed his dismissal by FGLP was unjustified. He also claimed he was unjustifiably disadvantaged and discriminated by FGLP during his employment. FGLP opposed Mr Wards' claims and said it appropriately ended Mr Wards' employment because he was employed by FGLP on a casual basis.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Mr Wards, Greg Cassidy and FGLP director, Brendan Coghlan. An investigation meeting for this matter was initially held on 5 June 2024 where both Mr Wards and Mr Coghlan attended. The matter was adjourned and resumed on 21 June 2024 by audio-visual link where Mr Cassidy also attended and gave evidence.

[4] During both days of the investigation meeting, all three witnesses answered questions under oath or affirmation from me and the parties' representatives. Each party also lodged written closing submissions.

[5] It should be noted, Mr Wards' statement of problem initially identified a different entity as the respondent for this matter. During the investigation meeting on 5 June 2024, both Mr Wards' representative and Mr Coghlan confirmed FGLP as the appropriate respondent for this matter.

[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.

The issues

[7] The issues requiring investigation and determination were:

- (a) Did FGLP breach s 64 and 65 of the Act? If so, was Mr Wards unjustifiably disadvantaged by FGLP because of the breach?
- (b) Was Mr Wards unjustifiably dismissed by FGLP?
- (c) Was Mr Wards discriminated by FGLP because of his perceived disability?
- (d) If Mr Wards is found to have either been unjustifiably disadvantaged and/or unjustifiably dismissed and/or discriminated against by FGLP, was Mr Wards entitled to a remedy of:
 - (i) reimbursement for lost wages under s 123(1)(b) of the Act; and
 - (ii) compensation under s 123(1)(c)(i) of the Act?

- (e) Was Mr Wards owed any wage arrears for his employment for FGLP?
- (f) Should either party pay the costs of representation to the other party?

Context

Mr Wards' initial employment

[8] In early May 2022 Mr Wards met with Mr Coghlan about working for FGLP. During the meeting, FGLP agreed to employ Mr Wards as a labourer. Mr Wards did not receive a written employment agreement from FGLP. Both parties disagree on whether Mr Wards was employed on a permanent or a casual basis.

[9] Mr Wards started working for FGLP on 9 May 2022 and worked at a construction facility situated in Orewa (the worksite). Upon starting his work for FGLP he participated in a health and safety induction along with other site workers.

[10] Mr Wards' day to day duties involved several tasks including checking machinery fuel levels and clearing material from around the worksite. Mr Wards also reported to both the worksite manager and a safety manager. On occasion he also interacted with the construction worksite manager Mr Cassidy. Mr Wards also completed a daily timesheet which was submitted to FGLP at the end of each day.

[11] On 2 August 2022 Mr Wards met with both Mr Coghlan and Mr Cassidy (2 August meeting). During this meeting Mr Wards said he told Mr Coghlan that he might have multiple sclerosis. He also provided Mr Coghlan and Mr Cassidy documents explaining general information about multiple sclerosis. Mr Wards also explained he was also having issues with his eyesight. As a result of the meeting Mr Wards and FGLP agreed for him to work on light duties and for his work hours to be reduced.

Termination of employment

[12] On 20 September 2024 Mr Wards arrived at the worksite. Although the parties disagree whether Mr Wards had an initial conversation with Mr Cassidy upon arriving, he eventually met with Mr Coghlan who arrived later in the morning. Upon meeting Mr Wards on the worksite, Mr Coghlan told Mr Wards he was dismissed from his employment with FGLP. Mr Coghlan told him the reason for his dismissal was due to his deteriorating health which presented risks to himself and others in the workplace.

Unjustified disadvantage

Did FGLP breach s 64 and 65 of the Act?

[13] Mr Wards' unjustified disadvantage claim relied on establishing whether FGLP breached its obligation under the Act to provide Mr Wards with a written individual employment agreement.¹

[14] FGLP acknowledged it failed to provide Mr Wards with a written employment agreement during his employment. It also acknowledged it was in breach of its requirements under the Act. Accordingly, Mr Wards established his claim against FGLP for breaching s 64 and 65 of the Act by not providing him with a written employment agreement.

Mr Wards' unjustified disadvantage claim.

[15] Mr Wards' claimed he was disadvantaged by FGLP's breach because without an employment agreement, he:

- (a) was unable to ensure FGLP was following a fair and reasonable process in relation to his dismissal; and
- (b) was unaware of what his notice period entitlements were.

[16] Mr Wards' allegations in respect of his unjustified disadvantage claim were directly related to circumstances leading to his dismissal by FGLP. For these reasons, it was more appropriate to assess all Mr Wards' grievance claims under his claim for unjustified dismissal.

Unjustified dismissal

True nature of the employment relationship

[17] The first key issue to determine in respect of Mr Wards' unjustified dismissal claim was whether he was employed by FGLP on either a casual or a permanent basis. Because there was no written employment agreement between the parties, the Authority may consider various factors to determine what the true nature of the employment relationship was. These factors include assessing Mr Wards' work hours and the regularity of his work for FGLP.² Mr Wards' timesheet and payslip records were

¹ Employment Relations Act 2000, s 64 & 65.

² *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [37].

provided to the Authority as evidence. There was no dispute between the parties as to what was documented in these records.

[18] Mr Wards argued he was engaged in permanent employment and worked each week of his employment on relatively regular work hours. Mr Wards acknowledged there were days where he did not work a full day. He said this was due to medical appointments which FGLP were aware of and allowed him to take time off to attend.

[19] Mr Wards' records also showed he accumulated annual leave during his employment. The accumulation of annual leave supported the possibility of Mr Wards being employed either long term or on a permanent basis. This was because he could work long enough to accumulate at least four weeks of annual leave after a year of work.³ This was different to the common practice for true casual employment arrangements where annual leave is calculated and paid together with an employee's regular pay.⁴

[20] FGLP disagreed with Mr Wards and said he was employed on a casual basis. It said it agreed to this arrangement so Mr Wards could attend work whenever he wanted to. FGLP said it allowed this arrangement out of sympathy for Mr Wards' limited physical ability and how he was reaching the end of his working career.

[21] FGLP acknowledged the regularity of Mr Wards' work hours as expressed in the time sheets. Although it questioned the quality of the work Mr Wards carried out during those work hours, there was no documentary evidence to show it had formally questioned the quality of Mr Wards' work.

[22] Casual employment is not defined under the Act. Casual employment arrangements are generally accepted and understood as a type of work arrangement where a person works on an irregular basis with no expectation of ongoing employment. In Mr Wards' case, apart from his timesheets and payslips, there was little other documentary evidence to help clarify whether he was employed as a casual employee. The regularity of his work and the accumulation of his annual leave supported Mr Wards' argument of being employed by FGLP on a permanent basis. The Authority accepts Mr Wards was employed by FGLP on such a basis.

³ Holidays Act 2003, s 16.

⁴ Holidays Act 2003, s 28(1)(a)(ii).

Termination of employment

[23] In support of his claim for unjustified dismissal, Mr Wards said FGLP failed to:

- (a) sufficiently raise and investigate its concerns about his health before dismissing him; and
- (b) allow him a reasonable opportunity to respond (and consider a response) to its concerns.

[24] FGLP's opposition to Mr Wards' unjustified dismissal claims essentially relied on its arguments in respect of Mr Wards being employed on a casual basis.

[25] Apart from the 2 August meeting, Mr Wards and Mr Coghlan disputed whether Mr Wards and FGLP had previous discussions in respect of Mr Wards' health. Mr Wards said there were no other discussions in relation to his health. Mr Coghlan disagreed and said because of the 2 August meeting, they agreed to monitor Mr Wards' health. This led to what Mr Coghlan described as informal discussions on the worksite with Mr Wards about his health and his ability to carry out his tasks safely. Mr Coghlan also said he observed Mr Wards' deteriorating health which included Mr Wards showing signs of back pain and failing eyesight.

[26] Both parties accept there was a discussion during the 2 August meeting about Mr Wards' health and both agree his work was relegated to light duties. There was likely at least one further discussion after the meeting between FGLP and Mr Wards about his difficulties in trying to carry out his tasks.

[27] However, there is little evidence to show FGLP carried out a reasonably extensive inquiry as to Mr Wards' ability to continue to carry out his work in the future. There was also no evidence to show FGLP had previously spoken to Mr Wards about his employment being in jeopardy because of his difficulties in completing his tasks.

[28] Ultimately Mr Wards was informed about the end of his employment during what appeared to be a relatively short conversation with Mr Coghlan on 20 September 2022. It is accepted Mr Wards met Mr Coghlan and was dismissed in a way where Mr Wards was limited in his ability to appropriately respond to FGLP's decision. The absence of an employment agreement would have also made it difficult for Mr Wards to understand any rights he had to address his dismissal including details about his notice period. Taking these factors into account and considering there was no evidence

of any reasonably considered FGLP inquiry and process into dismissing Mr Wards, FGLP's actions were not the actions of a reasonable employer. For these reasons Mr Wards was unjustifiably dismissed by FGLP.

Discrimination claim

[29] Mr Wards also claimed he was discriminated by FGLP because of his alleged multiple sclerosis diagnosis. FGLP disagreed with Mr Wards' claims and said its actions leading to Mr Wards' dismissal were only in respect to its observations of Mr Wards' physical ability to safely carry out his work. Its main concern was for the safety of both Mr Wards and other FGLP workers.

[30] In considering Mr Wards' discrimination claim the Authority must consider whether Mr Wards perceived disability was the main factor behind FGLP's decision to dismiss him from his employment.⁵

[31] Based on the available evidence, the worksite appeared to present the usual hazards associated with a construction site. This included hazards associated with working from height. As already established earlier in this determination, there was some concern about Mr Wards' health, and this led to the arrangement for him to work light duties.

[32] I accept FGLP had a legitimate concern about Mr Wards' physical ability to carry out his tasks. This was likely based on its observations as to how Mr Wards was carrying out his work and what led to Mr Wards being assigned light duties.

[33] There was insufficient evidence to show FGLP terminated Mr Wards' employment simply because he may have had multiple sclerosis. If that was the case, it doesn't explain why Mr Wards was allowed to continue work after he disclosed his potential multiple sclerosis diagnosis. For this reason, Mr Wards' discrimination claim was not made out.

Remedies

[34] Mr Wards is entitled to an award of remedies and an assessment of his entitlement to remedies is appropriate. Although Mr Wards made submissions in

⁵⁵ *McAlister v Air New Zealand Ltd* [2009] NZSC 78 at [49].

respect of remedies, FGLP did not make any remedy submissions to clarify its position in response to Mr Wards' claims.

Lost wages

[35] Mr Wards sought an award for lost wages of \$14,300 which is calculated at an amount of \$1,100 multiplied by 13 weeks.

[36] Although Mr Wards knew he was paid \$25 an hour, the absence of an employment agreement meant he did not know what his agreed hours of work were. Based on his pay records he calculated his average weekly hours for his 18 weeks of employment at around 44 hours which led to a weekly gross amount of \$1,100.

[37] After being dismissed by FGLP, Mr Wards was unable to obtain further employment and was either receiving the unemployment benefit or carrying out general gardening related tasks for a friend. Mr Wards tried to mitigate his loss by making a reasonable attempt to secure employment after his resignation. For these reasons, Mr Wards' claim of 18 weeks is a suitable starting point for considering reimbursement of lost wages.

[38] An important factor in this case was Mr Wards' deteriorating health and the possible effect it had on him continuing his work for FGLP. Based on the available evidence, it was unlikely Mr Wards was able to continue work for a further 13 weeks from the time of his dismissal. In assessing Mr Wards' health at the time, it is reasonable to award Mr Wards reimbursement for six weeks at \$1,100 for each week. Accordingly, FGLP is ordered to pay Mr Wards lost wages calculated to an amount of \$6,600.

Compensation for humiliation, loss of dignity and injury to feelings

[39] Mr Wards sought an order for payment of compensation for \$20,000. As a result of his dismissal, he was unable to find work and felt disappointed about losing a job he thought would continue to his retirement in September 2023. He also explained his disappointment in moving out of his previous Orewa accommodation to Buckland Beach which he said was because he had no income and could not afford to live in his preferred accommodation in Orewa.

[40] I accept Mr Wards suffered some form of distress because of FGLP's actions. Considering the evidence of his distress and the range of awards in similar cases, the sum of \$15,000 is an appropriate award of compensation.

[41] There was no evidence to show Mr Wards contributed to the situation giving rise to his grievance requiring a reduction of his remedies.

Mr Wards' wage arrears claim

[42] Because of his dismissal, Mr Wards also claimed for payment of his notice period. Although he did not have a written employment agreement, he claimed he was entitled to payment for what would have been his notice period. Mr Wards described this claim as his wage arrears claim. FGLP did not provide any views in response to Mr Wards' wage arrears claims.

[43] Because Mr Wards did not have an employment agreement specifying a notice period for termination, the Authority must consider what a reasonable notice FGLP was obliged to give to Mr Wards at the time of his termination.⁶ Determining what is reasonable depends on the nature of Mr Wards' employment and his own personal circumstances at the time of his dismissal.

[44] Mr Wards worked 18 weeks as a labourer and was paid weekly by FGLP. As previously mentioned, Mr Wards was anticipating retiring and was relatively close to the end of his working life. Taking these factors into account, a reasonable notice period in this case would have been one week. Accordingly, FGLP is ordered to pay Mr Wards one weeks' notice of \$1,100 gross.

Summary of orders

[45] As set out in this determination, the following orders are made:

- (a) FGLP must pay Mr Wards lost wages of \$6,600 (under s 123(1)(b) of the Act) and compensation of \$15,000 for humiliation, loss of dignity and injury to his feelings (under s 123(1)(c)(i) of the Act).
- (b) FGLP must pay Mr Wards \$1,100 gross as arrears of wages.

⁶ *Ogilvy & Mather (New Zealand) Ltd v Turner*, CA16/95, 19 December 1995.

- (c) All payments referred to in these orders must be made within 28 days of the date of this determination.

Costs

Costs principles

[46] Mr Wards also sought an order of costs of representation in respect of his claims. Clause 15 of Schedule 2 of the Act gives the Authority discretion to order any party to a matter to pay to another party such costs and expenses as the Authority thinks reasonable. The unsuccessful party will usually have to contribute to the costs of the successful party, as well as meeting their own costs.

[47] A daily tariff applied by the Authority sets a starting point from which relevant factors and principles may guide an upward or downward adjustment of the amount of costs awarded.⁷ The current tariff for costs is \$4,500 for the first day of any matter and \$3,500 for any proceeding days.

[48] Relevant principles governing costs in the Authority include consideration of whether the conduct of the parties increased costs unnecessarily, warranting an adjustment up or down, without compromising the Authority's otherwise modest approach to costs.⁸ Costs should not be used to punish a party or express disapproval of an unsuccessful party's conduct.

Should costs be awarded?

[49] The Authority's investigation into Mr Wards' claims traversed over two days. The first was held in person and concluded around mid-afternoon on the same day. The second day was held via audio-visual link and was around an hour long.

[50] Mr Wards sought an award of costs against FGLP of \$4,500 which reflected a first full hearing day in line with the tariff. FGLP did not provide any views in respect of costs in response to Mr Wards' claims.

[51] In this case, there is no reason to diverge away from the amounts set out in the tariff. I accept the days equated to a full first day of an investigation meeting. Accordingly, the appropriate order for an award is for FGLP to pay a contribution of

⁷ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁸ See www.era.govt.nz/determinations/awarding-costs-remedies.

costs to Mr Wards of \$4,500. FGLP is also ordered to reimburse Mr Wards the cost of the Authority filing fee of \$71.56. Both amounts are to be paid within 28 days of the date of this determination.

Alex Leulu
Member of the Employment Relations Authority