

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5091222
AA 3/08

BETWEEN JIM YUKICH
 Applicant

AND ALLIED WORK FORCE FAR
 NORTH LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Georgina Burness and David Feist, advocates for
 Applicant
 Margaret Matthew, counsel for Respondent

Investigation Meeting: 8 October 2007

Determination: 11 January 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority has investigated a personal grievance raised by Mr Jim Yukich with his former employer Allied Work Force Far North Ltd (“Allied”).

[2] Mr Yukich claims that he was unjustifiably dismissed by Allied. That company has responded to the claim by contending that the nature of the employment relationship it had with Mr Yukich was casual and that the duration of the employment was determined by the length of time it took to complete the particular work he was assigned to. Allied claims that Mr Yukich was not dismissed, as he had no contractual entitlement to ongoing employment after completion of the assigned work.

[3] Mediation undertaken between the parties did not resolve the employment relationship problem.

[4] There is no dispute that at material times Mr Yukich performed manual work at a sawmill operated by Juken New Zealand Limited (“Juken”). There is also no dispute that he commenced work at the sawmill near Kaitaia at the beginning of February 2006 and finished at the beginning of September 2006. In between those months the wage records produced by Allied show that he worked in each week, or in effect continuously. Although in some weeks he worked only 3 or 4 days, in many others he worked 5 or 6. His hours of work as recorded were usually no less than 8 each day, and quite often they were 11.

[5] At material times Mr Yukich received his pay weekly, direct from Juken, paid at an hourly rate.

[6] There is no dispute that Mr Yukich was not at any time an employee of Juken the mill operator for whom he performed the work. It is not disputed that he was an employee and Allied has accepted that it was his employer at material times.

[7] To support its claim that Mr Yukich was a casual employee, Allied produced several documents as evidence of the agreement governing their employment relationship and the nature of the employment.

[8] The first document was signed by Mr Yukich and Ms Elizabeth Morris on behalf of Allied on 11 November 2005, over two months before Mr Yukich began work at the sawmill. The document is a standard Allied form which is headed “Casual Labourer (individual contract).” The form records the usual employee details such as name, address and pay-rate, and it includes several references to the employment being casual. In respect of pay rate it states that “All casual workers are paid Holiday entitlement on an ‘as you earn’ basis.” Under the heading “Declaration of Employment” are the words, “I accept and understand that my employment is casual as described in the contract.” Mr Yukich signed the form underneath this acknowledgement.

[9] The second document is also under the Allied logo and is headed “Individual Employment Agreement (Casual Staff).” The document records that Allied is the party referred to in it as the “employer” and that the other contacting person is referred to as the “employee.”

[10] Materially, the agreement provides the following:

1 APPLICATION

1.1 *The terms and conditions of this individual agreement of employment shall be as prescribed herein.*

1.2 *Allied Work Force is a Labour Hire Company which employs me as a casual employee to work on Assignments (“Assignments”) for third parties (“Clients”).*

1.2.1 *The period of employment shall be determined by the requirements of Allied Work Force and shall be advised as and when work will be required to be performed. Such period of engagement shall be as determined by each individual Assignment and ongoing work is not an entitlement.*

1.2.2 *I understand that I may be employed for the length of the job or for the day, which ever comes first. Nothing contained in this agreement either express or implied shall mean that any obligation exists for any employment beyond the period of each individual Assignment.*

1.2.3

1.2.4 *The terms and conditions contained herein override and supersede any terms and conditions of employment that may have applied prior to the date of application of this agreement.*

1.3

1.4

1.5 *The period of engagement shall be the length of Assignment or the day whichever comes first. You may be asked to re engage the next day.*

2 ASSIGNMENTS

2.1

2.2 ***Obligations towards Allied Work Force:***

2.2.1 *I am not obliged to accept any Assignment.*

2.2.2 *I accept that Allied Work Force is not obliged to offer me any Assignment work.*

2.2.3 *On acceptance of an Assignment I agree:*

(a) *to report to work at the hours stipulated by Allied Work Force; and*

(b) *to undertake any work as directed by Allied Work Force Ltd and in all respects shall*

comply with the directions, responsibilities and policies given and made by Allied Work Force and shall diligently and faithfully serve Allied Work Force and its interests to the best of my ability.

2.2.4

2.25 *Due to the nature of my employment, I understand that the length of any Assignment may be reduced without notice.*

2.3 ***Obligations towards the Client:***

2.3.1

2.3.2 *I undertake to meet the operational needs of the Clients including the timing of breaks.*

2.3.3

2.3.4

2.3.5

3 **HOURS OF WORK**

3.1 *I agree to undertake casual work on an as and when required basis in a variety of businesses.*

3.1.1 *Where practicable, hours and days of work shall be advised in advance by Allied Work Force, but there is no guarantee either expressed or implied that such hours will be available for work.*

3.1.2 *Where such work is not available I agree to be stood down without payment until if and when other work is undertaken.*

3.1.3 *Where I accept an Assignment I agree to be available to work such hours as may be required by the employer for each individual Assignment.*

[11] The individual casual employment agreement also provides that wages are to be payable at an hourly rate for each hour worked while on “an Assignment” and that wages are to be paid weekly.

[12] The third document produced by Allied is not a contract or agreement but contains explanatory or introductory information about Allied and is clearly intended to be read in conjunction with the casual agreement. It explains that Allied is a labour hire company that supplies people to cover temporary work its clients have. The document explains that workers are supplied for whatever job a client may want done

which may be, “anything from 4 hours (which is the minimum) up to several days (or weeks).” The document then explains:

The important thing for you to know is that there is no guarantee of how long they will need you and, therefore, we won't be giving you any guarantees about how much work we will be able to find for you at any time.

[13] In relation to the individual employment agreement the explanatory document gives the following information:

2. The Agreement

Your agreement is an individual one which is for a fixed term. The length of that term is for the period that our customer requires you for. This can be from 4 hours onward. If and when we get another Assignment which best suits your particular skills, you will then be employed again on the same basis.

[14] As to this particular information, within both the ordinary meaning of “fixed” or “to fix” and the statutory meaning of “fixed term” under s 66 of the Employment Relations Act 2000, the length of the term must be specified. That may be with reference to a period of time or to the occurrence of a particular event.

[15] I consider there is nothing “fixed” about an employment the continuation of which is dependent solely on the will or pleasure of the employer or customer of the employer. It is implicit from this introductory information that the length of the term a customer requires the casual labour for, will be determined and made known at the beginning of the assignment. There may of course be multiple consecutive assignments, either of the same or different lengths.

[16] Returning to the individual casual employment agreement, this key document states that the terms and conditions of employment prescribe that under clause 1.2.1 the period of employment is to be advised to the employee. This advice is to be given “as and when the work is required to be performed” by him or her. The agreement prescribes that under clause 1.2.2 the duration of the employment will either be the “length of the job or for the day, whichever comes first”. This is repeated at Clause 1.5, with some clarity provided by the statement, “You may be asked to re engage the next day.”

[17] Under clause 2.2.5 Allied has the ability to reduce the length of any assignment without notice. Employment advised under clause 1.2.1 initially to be

for a day, later on during that day could be reduced without notice to less than a day, presumably where an assignment takes less time to complete than had initially been reckoned on.

[18] The necessary implication from clause 2.2.5 is that for it to operate the length of the assignment must be known to begin with (and under clause 1.2.1 must be advised to the employee). The length must be certain or finite, before it will become possible to know that any change is by reduction rather than increase.

[19] I find that employment labelled “casual” under Allied’s standard form of agreement is intended at the most to be on a day to day, or day by day, basis. It may be for a lesser period whenever an assignment is completed before the end of a day. At the end of any day there may be successive daily re-engagements for an unlimited number of times.

[20] The circumstances in which Mr Yukich performed work at the Juken sawmill for about 7 months on an apparently continuous basis, are a significant departure from what is contemplated in Allied’s individual employment agreement for casual staff.

[21] I find that the employment performed by Mr Yukich at the Juken Sawmill was not as contemplated by the Individual Employment Agreement for Casual Staff. I find that Mr Yukich was not told what the period of his employment would be at the sawmill or in respect of any particular assignment at the sawmill. The contract required that he was to be advised of this as and when the work was required to be performed.

[22] Further, I find that Mr Yukich was not employed on a day to day basis, where he was offered re-engagement on each successive day of work. I accept his evidence that he was not contacted on a day to day basis and offered an assignment for each day that he worked at the sawmill. He simply reported to work each day as if he was a permanent employee. As Ms Morris for Allied put it in her evidence, the appearance was that he worked the shifts as a weekly worker.

[23] Mr Yukich was clearly content while he was able to perform work regularly and be paid for it, and he did not concern himself with the fine print of the contract documents. While Mr Yukich remained happy with the arrangements Allied may not have felt the need either to be too concerned with the administration of the contract according to its strict letter.

[24] I find that in the way this employment was carried out for a long period as a departure from the contract terms and conditions, Allied gave Mr Yukich a reasonable expectation that his employment was continuous rather than casual.

[25] From his reaction when he was told there was no further work for him at Juken, it is clear that he had thought he had been there on a permanent or ongoing basis. He immediately complained and took steps to contest what he described as his sacking.

[26] Ms Matthews, counsel for Allied referred in her submissions to the decision of the Authority in *Cotes v PR Driving Services Ltd*, unreported, 15 May 2006, AA172/06. I find that case is distinguishable, particularly in relation to the terms of the applicable employment agreement governing the parties' relationship. One of the provisions of the "Individual Employment Agreement – Casual Driver" that applied to the engagement of the applicant in that case stipulated that the hours of work and days to be worked were to be agreed between the employer and the employee from time to time. It appears from the Authority's decision that this provision was complied with by the parties, who therefore performed the employment in accordance with their agreement.

[27] I find that in Mr Yukich's case the circumstances are quite different. The employment has not been performed in accordance with the written agreement. I find that by its conduct, Allied has departed from what was originally intended and has led Mr Yukich to reasonably expect permanent or ongoing employment at the Juken New Zealand Sawmill. A different agreement was formed by the conduct of the parties. The principle applied by the Employment Court in *Barnes v Whangarei RSA* [1997] I ERNZ 626, at page 626, lines 6 and 7, is applicable in this case. By conduct, the original terms of the agreement were varied by Allied.

[28] This was not a situation where employment of a casual nature has been performed in breach of a term of the agreement, so that the appropriate remedy is a penalty. If that was the situation then damages might also be an appropriate remedy, to be fixed according to the loss or harm suffered by Mr Yukich. I find that Allied, in the way it terminated the employment of Mr Yukich, breached terms of employment that were different to those of the casual agreement. The personal grievance remedy is more appropriate than a penalty and/or damages.

[29] The finding of the Authority is that the employment did not end because contractually it was casual in nature. I find it was not casual but was continuous, although not necessarily permanent. Since Mr Yukich did not resign his employment but had it terminated, I find that he was dismissed by Allied from his employment.

[30] There can be no doubt that in the circumstances the dismissal was unjustified, as Allied has not sought to justify it on any grounds.

[31] It seems that during the employment Juken had some issues with the performance of Mr Yukich at the sawmill. However these were not brought to Mr Yukich's attention. If any were, they were not taken up as disciplinary matters and he was simply shifted to a different part of the factory to see if he could perform better doing different work. He was given no warnings about his performance, as Mr Alan Roberts of Allied management confirmed .

[32] Although it seems a situation in the nature of redundancy developed in part of the Juken sawmill operation, Mr Yukich was not consulted about that. It seems that although alternative work was available, he was not considered suitable for it because of earlier performance concerns. Allied simply acted under the belief that because the Juken was ending the assignment, as a consequence the employment of Mr Yukich would end at the same time. No consideration was given to Mr Yukich as a worker engaged under an on-going relationship.

[33] I am satisfied that this was not in any sense a fixed term employment. Simply declaring the ending of an assignment is too vague or arbitrary a way to specify when or how an assignment will end, and the employment must be fixed at the beginning of it, not at the end.

[34] As well a finding that the dismissal of Mr Yukich was unjustified, I also find that he did not contribute to the situation that gave rise to his personal grievance. The employer has not attempted to justify the dismissal by reliance on poor performance, misconduct or other blameworthy action or behaviour. Allied has always claimed that the employment ended because of its casual nature. I find that without having been warned of any performance problems, it cannot be said that the conduct of Mr Yukich was blameworthy or that this factor was causally connected to his dismissal, particularly when the employer had not purported to dismiss.

[35] Mr Yukich's personal grievance claim succeeds. In awarding remedies I take into account that Allied was well meaning towards Mr Yukich and there is no suggestion of any attempt being made by Allied or Juken to take advantage of him. However the written agreement was the work of Allied (which in law as an employer occupied a superior bargaining position to employees) and Allied had been able to perform the agreement according to its terms if it wished. Allied cannot blame Mr Yukich for its departure from the agreement.

[36] I take into account as an indication of good will or good faith the offer made by Allied to find Mr Yukich new assignments, but it is not correct that Mr Yukich remains employed by Allied. Even under the casual agreement (Allied's agreement) it is clear from clause 1.5 that employment/engagement and assignment are coextensive in time. When an assignment ends the employment/engagement ends with it.

[37] I find that Mr Yukich is entitled to recover three month's wages for the post dismissal period when, I am satisfied from the evidence, he had no work. Any accountability for benefits he may have received will be to the Work and Income providing agency, not to Allied.

[38] I accept the figure of \$3,281 gross as being the total sum to be reimbursed to Mr Yukich for loss of wages.

[39] As compensation for hurt feelings and distress, I award \$3,500. Mr Yukich presented as an uncomplicated and stoic individual but the evidence of his partner as well as his own showed that his peace with life was broken by the dismissal, especially after having worked continuously for many months and gaining an expectation, as he said, of being permanent. He suffered some domestic upheaval and left the Far North to live in Auckland city as a consequence of what happened.

Determination

[40] In summary, Mr Yukich was unjustifiably dismissed. As remedies I order that the respondent Allied Work Force Far North Limited is to pay to Mr Jim Yukich \$3,281 in reimbursement of lost wages and \$3,500 as compensation. This money is to be paid directly to Mr Yukich.

Costs

[41] Costs are reserved. The parties' representatives are to confer with a view to reaching agreement about costs. In the event that an application for costs becomes necessary, directions will be given as to information required by the Authority.

A Dumbleton
Member of the Employment Relations Authority