

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 120  
5568965

BETWEEN            CRAIG TULLOCH  
                                 Applicant

AND                    HAYS SPECIALIST  
                                 RECRUITMENT (AUSTRALIA)  
                                 PTY LIMITED  
                                 Respondent

Member of Authority:      Trish MacKinnon

Representatives:            Barbara Buckett, Counsel for Applicant  
                                 Miles Edwards, Counsel for Respondent

Investigation Meeting:      31 May 2016 at Wellington

Submissions and  
Information Received:      13, 26, and 31 May, 29 June and 5 July 2016, from  
                                 Applicant  
                                 24 May and 10 June 2016, from Respondent

Determination:              3 October 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Craig Tulloch claims to have been unjustifiably dismissed from his employment with Hays Specialist Recruitment (Australia) Pty Limited (Hays) on 22 April 2015. He says his dismissal was without process and without substantive justification. Mr Tulloch also claims Hays bargained unfairly with him in relation to his employment agreement and that it failed to act as a fair and reasonable employer towards him.

[2] Additionally, Mr Tulloch says Hays acted in breach of its obligations of good faith and of its duty to build a productive employment relationship with him. He says

Hays acted oppressively and abused its power in breach of its obligations to recognise the inherent power imbalance between them.

[3] Mr Tulloch seeks remedies including compensation for the hurt and humiliation he suffered as a result of his dismissal and compensation for the unfair bargaining by Hays. He asks that penalties be awarded against Hays for unfair bargaining and for breaches of its obligations of good faith under s. 4A of the Employment Relations Act 2000 (the Act).

[4] In response, Hays denies all claims made by Mr Tulloch. It says it is a labour hire company that arranged a temporary assignment for Mr Tulloch with its client DTZ. It says the assignment lasted approximately 11 weeks at which point DTZ instructed Hays Mr Tulloch's services would not be required further.

[5] Hays says this brought Mr Tulloch's temporary assignment with its client to an end. It advised Mr Tulloch of this and informed him it would begin sourcing other possible temporary assignments for him to consider. It says Mr Tulloch rejected Hays' offer to find alternative work for him.

### **The Authority's investigation**

[6] Due to the illness of the Member dealing with this matter, I took over the file the afternoon before the scheduled investigation meeting. I advised the parties at the commencement of the investigation meeting that some weeks earlier, before my involvement, I had been asked by the Authority Officer responsible for the administration of the file to check a brief of evidence and a document before they were put before the Member assigned to the matter. The purpose was to ensure there was no inappropriate material disclosed to that Member.

[7] After checking the brief of evidence in question I had advised the Authority Officer of a sentence, or sentences, at the beginning of the document that should be redacted. The Authority Officer made the redaction before the document was put before the Member.

[8] I informed the parties that, on reading through the briefs of evidence and documentation the afternoon before the investigation meeting, I had recalled having that involvement some weeks earlier. I also informed them I had no recollection of the content of the redacted sentence or sentences at the beginning of the document.

[9] I gave the parties the opportunity to accept or decline my hearing the matter and, following a short adjournment, was assured by the parties they had no issue with my continuing. A short time later, Ms Buckett asked for leave to reserve her right to raise an objection to the document in question should the matter go beyond the Authority level. I accordingly record her position.

### **Background facts**

[10] Mr Tulloch is a registered electrician with a background of working on industrial electrical projects. He has also undertaken office services and facilities work.

[11] On 8 January 2015 he responded to an advertisement placed by Hays for an electrician to work for DTZ on a KiwiRail project. He spoke by telephone with Stefan Smith, a Hays recruitment consultant, and expressed his interest in the position. After providing a copy of his curriculum vitae by email, Mr Tulloch met Mr Smith on 13 January 2015 to discuss the work opportunity.

[12] He signed an *Individual Agreement-Temporary Staff-New Zealand* (the Agreement) and completed various forms on 13 January. Following a referee check and his successful passing of a drug and alcohol test, Mr Tulloch was offered the DTZ assignment with DTZ which he commenced on 3 February 2015.

[13] He had intermittent contact with Mr Smith over the weeks of his assignment, either by telephone or email. On 22 April 2015, Mr Smith phoned Mr Tulloch and informed him he was no longer required in the DTZ role and that he should pack his tools and leave immediately. Mr Tulloch did so and raised a personal grievance with Hays by letter dated 7 May 2015.

### **Issues**

[14] The issues for determination are:

- a) the nature of the relationship between the parties;
- b) whether Hays bargained unfairly with Mr Tulloch in relation to the agreement he signed on 13 January 2015;
- c) whether Hays breached its duty of good faith to Mr Tulloch;

- d) whether Hays dismissed Mr Tulloch; and, if so,
- e) whether that dismissal was justifiable.

**What was the nature of the relationship between Mr Tulloch and Hays?**

[15] In his written evidence Mr Tulloch claims to have been employed by Hays as a full-time Electrician. Submissions made by Ms Buckett on his behalf claim he was employed as a permanent full-time employee, "*notwithstanding the provisions of the employment agreement he entered into*". In the alternative, it is submitted he was a fixed term employee.

[16] Ms Buckett also submits the essential terms of his employment agreement, both implied and express, included but were not limited to:

- *Permanent fulltime employment.*
- *Legitimate expectation of ongoing work.*
- *Hays would comply with the bundle of rights conferred on (Mr Tulloch) by employment law and contract.*

[17] In the alternative, Ms Buckett submits, the relationship was one of fixed term employment. In rejecting the notion of casual employment, she cites the series of indicia developed to determine whether or not an arrangement could be described as casual. These were referred to by the Employment Court in *Jinkinson v Oceana Gold (NZ) Limited*<sup>1</sup> in which Judge Couch found the employment arrangement Ms Jinkinson had with Oceana Gold had changed over the 19 months of her employment from the casual arrangement described in the employment agreement to one of ongoing employment.

[18] Hays submits Mr Tulloch accepted employment with it as a temporary worker who had the ability to accept or reject offers of assignments with Hays' clients. In signing the Agreement on 13 January 2015 he accepted employment on the basis that each assignment constituted a separate and distinct engagement with Hays. Through its counsel, Mr Edwards, it submits that Mr Tulloch also accepted, under the terms of the Agreement, that Hays did not guarantee the duration or length of any assignment.

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<sup>1</sup> [2009] ERNZ 225 at [47]

[19] Mr Edwards submits the evidence reveals Mr Tulloch to have been a casual employee of Hays. He was offered, and accepted, an assignment with a third party, namely a client of Hays, under the terms of his Agreement.

*The Individual Agreement-Temporary Staff- New Zealand (the Agreement)*

[20] The Agreement is an eight page document, including definitions of some key words, that comprehensively sets out how the relationship between Hays, Mr Tulloch, and the clients to which he may be offered assignments was to operate. During the periods in which he was not undertaking an assignment he would not be paid or accrue annual holidays.

[21] While on an assignment Hays would pay him the rate of pay he had been advised by his (Hays) consultant after deducting tax. Mr Tulloch was not obliged to accept any assignment offered to him. However, having accepted an assignment he was obliged to comply with the directions of Hays and the client in respect of the assignment. He would be advised his hours of work before an assignment began. Mr Tulloch was entitled to annual holidays and to public holidays in accordance with the Holidays Act 2003. He was also entitled to sick leave and bereavement leave.

[22] If Mr Tulloch was unable to complete an assignment he was to comply with specified notification provisions. Hays could instruct Mr Tulloch to cease working on an assignment without notice and without reason. Its only liability in such situations would be limited to any remuneration for time already worked on the assignment. He agreed to make no claim against Hays or the client other than in relation to remuneration for hours already worked.

[23] In the event of Hays being advised of the existence of an employment relationship problem it would, in the first instance, discuss and attempt to resolve the problem with Mr Tulloch. Mediation could be requested by either Hays or Mr Tulloch if discussion failed to resolve the problem.

[24] The Agreement included provisions regarding insurance, personal business, property belonging to Hays or a client, health and safety, confidentiality, intellectual property and indemnity amongst others. It provided that New Zealand law would govern the Agreement and that the Agreement was the entire agreement between the parties, superseding all prior agreements and understandings between them.

[25] The final section of the Agreement, before the parties' signatures, comprised declarations of Mr Tulloch regarding his understanding of its terms and conditions and his agreement to be bound by them on each and every assignment he undertook on behalf of Hays. It also recorded his understanding and agreement that, because of the nature of his employment, and the fact that assignments would vary and generally be on short notice, his employer may be unable to provide him with a written description of the work, hours, place of work and wages payable.

[26] The Court in *Jinkinson* stated that

The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.<sup>2</sup>

[27] Hays had no obligation under the terms of its Agreement with Mr Tulloch to offer him assignments and Mr Tulloch had no obligation to accept them. I do not find Mr Tulloch's claim to have been in a full-time, permanent employment relationship with Hays to be credible. This was not the first labour hire company through which he had been assigned work. Mr Tulloch confirmed this in the course of the investigation meeting and confirmed he had not considered himself to have permanent full-time employment with that company. He also confirmed he did not expect to be paid between assignments.

[28] I conclude the Agreement is that of a casual employment relationship in which Hays would offer Mr Tulloch assignments with its clients. If he accepted an assignment, he would carry it out as a casual employee of Hays, reporting to and under the supervision of the client. There was no obligation on Hays to offer, or Mr Tulloch to accept, any assignment. Mr Tulloch had no entitlement to wages or holiday pay between assignments.

[29] Mr Tulloch's case is distinguishable from *Jinkinson*. Ms Jinkinson was employed directly by Oceana Gold until her employment was terminated on grounds of redundancy. The terms of her written employment agreement provided for casual work on an "*as required*" basis to cover other staff or to perform work required only irregularly. In reality she worked regularly for 19 months and received performance

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<sup>2</sup> n1 at [41]

reviews, a promotion and pay rise, as well as bonuses from her employer. These were among the factors considered by the Court in concluding the nature of her relationship had changed over time to one of ongoing employment.

[30] Mr Tulloch worked for Hays for 11 weeks during which time he was on assignment to one client, DTZ, before that assignment was ended. By the terms of his Agreement with Hays he had no guarantee as to the length or duration of any assignment he accepted. Hays had the right under the Agreement to instruct him to cease working at any time during an assignment which it did, at the client's behest, on 22 April 2015.

[31] The relationship between Mr Tulloch and Hays had commenced on 13 January 2015 when the parties signed the Agreement. He had commenced his first (and only) assignment on 3 February 2015. I find there was no change in the relationship between the parties in that short time and it remained as the parties had agreed on 13 January.

[32] Hays has used the word "*temporary*" rather than "*casual*" to describe Mr Tulloch in the Agreement. While "*temporary*" can describe either casual or fixed term employment, in this instance I find it denotes a casual employment arrangement. The terms of the Agreement specify Hays did not guarantee the length or duration of an assignment, which could be ended at any time if the client so wished. That is more consistent with a casual than a fixed term employment arrangement under the Act.<sup>3</sup>

[33] By the terms of the arrangement between the parties, Mr Tulloch would be employed by Hays on a casual basis to work on assignments with Hays' clients. His work would be directed and supervised by the client while on assignment but he would be employed by Hays which would remain in contact with him throughout. At the conclusion of an assignment Hays would seek another assignment for him. It was not obliged to offer assignments and nor was he obliged to accept any assignment he was offered.

### **Did Hays bargain unfairly with Mr Tulloch?**

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<sup>3</sup> Section 66 of the Employment Relations Act 2000

[34] The Employment Relations Act 2000 (the Act) provides that when bargaining for an individual employment agreement, including a fixed term of employment, or individual terms and conditions in an employment agreement the employer must do at least the following:<sup>4</sup>

- a) provide to the employee a copy of the intended agreement under discussion; and
- b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
- c) give the employee a reasonable opportunity to seek that advice; and
- d) consider any issues that the employee raises and respond to them

[35] Mr Tulloch says he was not given the opportunity to take independent advice on the Agreement he signed on 13 January 2015 but was instructed to sign it on the spot. Nor was he given any opportunity to negotiate the terms and conditions of his employment. He says it was provided on a "*take it or leave it*" basis and he relied on the advice he was given by Hays to his detriment.

[36] Mr Smith's evidence is that when he met Mr Tulloch on 13 January 2015 they discussed the DTZ opportunity and he explained to Mr Tulloch that, if he was interested in registering for work with Hays, he would go onto the Hays' database and could apply for any vacancy Hays advertised.

[37] He told Mr Tulloch what the DTZ work would involve and that it could last for up to six months and possibly longer but that the length of any assignment was uncertain. This was because Hays' clients were free to manage the provision of temporary labour at their complete discretion from week to week.

[38] Mr Smith says Mr Tulloch expressed his interest in the assignment and he then gave him a copy of the Hays' Agreement to read, telling him to let him know if he had any questions. He could not recall if he told Mr Tulloch he was entitled to take independent advice on it. He also gave Mr Tulloch a copy of the Hays' *Information for Temps* document. This contained information, advice, expectations of conduct on assignment, what would happen between assignments and a list of frequently asked questions.

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<sup>4</sup> Section 63A Employment Relations Act 2000

[39] Mr Smith says he did not ask Mr Tulloch to sign the Agreement immediately and was happy to answer any questions Mr Tulloch may have and for him to take the Agreement away to read and/or to take advice on before signing.

[40] I accept Mr Smith's evidence that he did not instruct Mr Tulloch to sign the Agreement during the meeting. It was clear from Mr Tulloch's evidence he was keen to be considered for the DTZ assignment. I find it more likely than not his eagerness prompted him to sign the document on the spot on 13 January 2015 without taking it home to reflect, or take advice, on.

[41] In the circumstances I do not uphold Mr Tulloch's claim of unfair bargaining.

### **Did Hays breach its duty of good faith to Mr Tulloch?**

[42] This claim relates to Hays' obligation to engage with Mr Tulloch and build a productive employment relationship with him during his assignment with DTZ.

[43] Section 4 of the Act provides that parties to an employment relationship:

- (a) must deal with each other in good faith; and
- (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything –
  - (i) to mislead or deceive each other; or
  - (ii) that is likely to mislead or deceive each other.

[44] Section 4 (1A) requires the parties to an employment relationship to be:

active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative.

[45] Mr Tulloch's assignment with DTZ entailed working on a project DTZ was undertaking for KiwiRail that had started on 3 February 2015 which involved a refit of the Matangi units. Mr Tulloch says Hays had told him he would receive regular communication from Mr Smith throughout his assignment but that did not happen. He rarely spoke with Mr Smith during his employment and says he, not Mr Smith, had initiated all communication. Mr Smith did not ever visit him at the worksite.

[46] Mr Smith's evidence is that he was in contact with Mr Tulloch from 27 January 2015 the date on which he had telephoned Mr Tulloch to offer him the DTZ assignment. Between 13 and 27 January Mr Smith had undertaken reference checks

and Mr Tulloch had completed a drug and alcohol test. He says he was in regular contact with Mr Tulloch throughout the assignment. Mr Smith agrees he did not make any site visits and says Mr Tulloch worked for DTZ during the assignment and they, not he, supervised Mr Tulloch's work.

[47] Mr Smith provided evidence of the email and telephone contact he had with Mr Tulloch during the assignment with DTZ. This was in the form of a printout from Hays' OneTouch electronic system of the dates of the contacts, and the electronic journal notes he had made contemporaneously, which were also recorded on the OneTouch system. The evidence, which I accept, indicates Mr Smith telephoned Mr Tulloch six times, and emailed him once, between 3 February and 22 April 2015.

[48] Mr Smith says Mr Tulloch had indicated the assignment was going well until 9 April 2015. On that day Mr Smith made a journal note in the OneTouch system of his telephone call to Mr Tulloch that Mr Tulloch was "*Getting a bit grumpy. Still there.*" He explained Mr Tulloch had said (during the 9 April telephone call) he was not happy and was not enjoying the working conditions as he was having to work in small spaces and was working long hours.

[49] Mr Smith said Mr Tulloch had told him he intended to start looking for a different job and he had told Mr Tulloch he would be happy to source an alternative assignment for him. Mr Tulloch had said he was interested in facilities management work and Mr Smith had told him he was happy to refer him to a colleague at Hays who recruited and assigned temporary labour for that type of work. Mr Smith said Mr Tulloch had told him he did not want him to do that as he would seek the work he wanted himself without help from anyone else.

[50] Mr Tulloch denies having any contact with Mr Smith about work space and long hours and says he accepted regular overtime by choice. He notes the Journal entry on the OneTouch system does not record the detail of the conversation Mr Smith claims to have had with him on 9 April.

[51] I prefer Mr Smith's evidence to Mr Tulloch's on the basis that it was more consistent. Mr Tulloch asserted he had initiated all contacts with Mr Smith during his assignment with DTZ. However, I find the OneTouch evidence of telephone calls and an email from Mr Smith to Mr Tulloch to be compelling and to undermine Mr Tulloch's assertions.

[52] I find there was reasonable and regular contact from Mr Smith to Mr Tulloch throughout his assignment with DTZ. I find that contact satisfied the good faith obligations on Hays to establish and maintain a productive employment relationship and I find no basis to Mr Tulloch's assertion his employer breached those obligations.

**Did Hays dismiss Mr Tulloch?**

[53] It is Mr Tulloch's evidence he was dismissed when Mr Smith called him on 22 April and told him his employment had been terminated. He says no concerns had been raised with him about his performance and there was no process regarding the termination. He was not given the opportunity to respond to any alleged concerns or to present evidence.

[54] Mr Tulloch says Mr Smith telephoned him two hours before the completion of the working day, telling him to pack up his tools and leave immediately and that his job was finished. When he asked Mr Smith why he was being terminated he says Mr Smith told him he was lazy and confrontational. In answer to questioning about Mr Smith's telephone call of 22 April 2015, Mr Tulloch told me he "*naturally thought*" he had been dismissed.

[55] Mr Smith says he received a telephone call from the Supervisor of the project at DTZ on 22 April 2015 informing him DTZ wished to end Mr Tulloch's assignment. He then called Mr Tulloch to inform him of this. Mr Smith denies having told Mr Tulloch he was being terminated for being lazy and confrontational. He recalls Mr Smith asking him for the reason his assignment was ending and says he may have referred to an argument the Supervisor had told him about between Mr Tulloch and another employee. Mr Smith had the impression the Supervisor had spoken with both Mr Tulloch and the other employee about the argument.

[56] He says he immediately offered to source a new temporary assignment for Mr Tulloch or to introduce him to his colleague at Hays who dealt with facilities management assignments. Mr Smith says Mr Tulloch rejected the offer, saying he no longer wished to work for Hays. It was Mr Smith's evidence he did not hear from Mr Tulloch again and did not contact him with further offers of assignments because of his rejection of the offer he had made to source other assignments for him. Mr Tulloch denies the conversation about sourcing ongoing work with Hays took place.

[57] I have already made a finding about preferring Mr Smith's evidence over Mr Tulloch's relating to the contacts between them during Mr Tulloch's assignment with DTZ. That was based on the consistency of Mr Smith's evidence. I also prefer Mr Smith's evidence relating to the content of his telephone conversations with Mr Tulloch. I find it highly unlikely he informed Mr Tulloch he was being dismissed, or his employment was being terminated, on 22 April 2015, and far more likely he informed Mr Tulloch DTZ wished to bring his assignment to an end.

[58] I also accept Mr Smith's evidence of offering to source another assignment or introduce Mr Tulloch to his colleague who dealt with the facilities management work in which Mr Tulloch had previously expressed an interest.

[59] I find Mr Tulloch was not dismissed on 22 April 2015 by Hays. It had, through Mr Smith's telephone call of that day, notified Mr Tulloch of the ending of his assignment with DTZ. While Mr Tulloch was not consulted about the ending of his assignment, the terms of his Agreement with Hays did not require such consultation.

[60] Mr Smith had explained to Mr Tulloch, before he signed the Agreement on 13 January 2015, that the terms of Hays' relationship with its clients gave those clients the freedom to manage the provision of temporary labour at their complete discretion from week to week. The ending of the temporary assignment with DTZ did not, however, necessarily herald the end of Mr Tulloch's employment relationship with Hays. Had Mr Tulloch accepted Mr Smith's offer to source a new temporary assignment for him, or taken up the offer of an introduction to the colleague who dealt with temporary assignments for facilities management projects, Mr Tulloch may have moved seamlessly to a new assignment.

[61] The evidence of Jonathan Greening, a Business Director for Hays, was that Mr Tulloch remained on the Hays database and had the opportunity to apply for any position it advertised. In answer to questioning about Hays' process Mr Greening said it was usually up to temporary employees (such as Mr Tulloch) to contact Hays to express interest in assignments Hays advertised. He said this was because many of the temporary employees were also registered with other recruitment agencies.

[62] Mr Greenwood provided documentary evidence of nine electrician roles Hays had advertised between 24 April and 18 June 2015, as well as nine facilities management roles and a further twelve roles for which Mr Tulloch's skill set would

have made him eligible. He said Mr Tulloch did not indicate interest in any of those roles.

### **Determination**

[63] In summary, I find Mr Tulloch had a casual employment relationship with Hays. Under the terms of their agreement Hays would offer him temporary assignments with its clients when suitable opportunities were available. Mr Tulloch was free to accept or decline an assignment. Each assignment was discrete and Hays was not liable for the payment of wages between assignments.

[64] Hays did not bargain unfairly with Mr Tulloch in offering him the *Individual Agreement-Temporary Staff-New Zealand*. He was under no pressure to sign the Agreement when it was given to him and could have taken it away to consider and take advice on if he had wished.

[65] Hays did not breach its obligations of good faith to Mr Tulloch during his employment and nor did it dismiss him when it brought his temporary assignment with DTZ to an end.

### **Costs**

[66] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority