IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 212
5623492

	BETWEEN	MARIA SPILLMAN Applicant
	A N D	TANDEM SKYDIVING 2002 LIMITED t/a TAUPO TANDEM SKYDIVING Respondent
Member of Authority:	T G Tetitaha	
Representatives:	Applicant in person D McKinnon, Counsel for Respondent	
Investigation Meeting:	25-26 January 2017 at Taupo	
Submissions Received:	26 January and 3,8 and 23 May 2017 from Applicant 26 January and 4 May 2017 from Respondent	
Date of Determination:	20 July 2017	

DETERMINATION OF THE AUTHORITY

A. Maria Spillman was a casual employee of Tandem Skydiving 2002 Limited t/a Taupo Tandem Skydiving.

B. Maria Spillman was not unjustifiably dismissed.

C. The breach of good faith action is dismissed.

D. The failure to keep accurate records action is dismissed.

E. Costs are reserved.

Employment relationship problem

[1] Maria Spillman alleges Tandem Skydiving 2002 Limited t/a Taupo Tandem Skydiving (TTS) constructively and unjustifiably dismissed her on 10 November

2016 by refusing to offer her ongoing work. She alleges she was a permanent employee.

[2] TTS denies Ms Spillman was dismissed. She was a casual employee. It was therefore entitled to not offer any further work. Even if she was a permanent employee TTS denies it unjustifiably dismissed her.

Relevant facts

[3] TTS is a tandem skydiving business based at Taupo Airport. It is accepted the operation of its business is reliant upon weather conditions and tourist demand.

[4] In 2010 Ms Spillman immigrated to New Zealand. She travelled to Taupo and obtained employment with TTS as a video editor and ground salesperson. She later transferred to the role of parachute packer. Her work was rostered and she was paid a piece rate. She was also required to undertaken certain ancillary duties such as setting up the drop zone, catching parachutes, cleaning the premises and grounds and gearing and de-gearing. Ms Spillman reported to Hamish Funnell, respondent director and Operations Manager.

Employment Agreement

[5] During her employment she signed three employment agreements. Her first employment agreement[1] described her employment as being "*an on call/casual basis"* due to intermittent work, customer numbers, weather and flight conditions:

> 3. **TERMS OF EMPLOYMENT**
> The following terms and conditions of employment together with express stipulations as set out below will apply to this employment agreement.
>
> 3.1 Your engagement under the terms and conditions of this agreement will be on an on call/casual basis.
>
> 3.2 You are engaged on a daily basis, but only as and when required. Work undertaken is intermittent, dependent upon customer numbers and favourable weather and flight conditions, compliance with Civil Aviation Authority ("CAA") standards. If weather and flight conditions are adverse (as determined by the Chief Safety Officer in compliance with CAA/NZPIA standards) and/or customer numbers do not justify operating, Employees may not be offered work and are not required to work for that period.

[1] Individual employment agreement commencing 22 October 2010 signed December 2010.

> 3.3 While the Employee acknowledges the Employer cannot guarantee regular work, the hours of work will vary from week-to-week. Over the term of period of employment, the Employee can expect to work, on average, at least 30 hours per week. Work is seasonal and weather dependent with shorter hours over the "off season" and considerably longer hours over the height of the "on season".
>
> 3.4 The parties acknowledge that work undertaken by the Employee is measured by "task completion" (e.g. number of tandem jumps completed) rather than on an hourly basis. Notwithstanding this, the Employee is expected, as a matter of good faith to report to work and remain working during the time period reasonably requested of the Employee by the Employer.
>
> 3.5 If the Employee is offered further engagements, then the offer will be on these terms and conditions.
>
> 3.6 Nothing in this agreement, either expressly or implied, requires the Employer to offer any employment to the Employee notwithstanding that the Employee may be included on any list maintained by the Employer to assist in obtaining any casual staff.

[6] The agreement also contained a description of how the work was to be undertaken:

> **WORK REQUIRED TO BE UNDERTAKEN**
>
> 6.1 Any work to be undertaken will be as and when required by the Employer, who shall give consideration to weather and flight factors and customer numbers referred to in clause 3.2 herein.
>
> 6.2 The Employer shall advise employees when they are required to work, where possibly on a daily basis.
>
> 6.3 Offers of work may vary from time to time depending on the Employer's operational needs. These needs may require the Employee to fill in for employees who are unavailable to attend their shifts. If the Employee has been offered work and accepted that work, and is subsequently unable to work the dates and hours involved then the Employee is required to give the Employer at least 48 hours' notice to that effect.
>
> 6.4 Offers of work may be accepted or declined at the time the work is offered.

Second Employment Agreement

[7] On 8 July 2014 Ms Spillman signed a further employment agreement. This contained identical terms to the previous employment agreement except it described her job as a parachute packer & parachute technician (rigger).

Hours and offers of work

[8] Ms Spillman made enquiries about payment for hours spent at work when no work was available due to bad weather. She had been keeping a record of her hours spent at the worksite including when no loads were being taken up. Mr Funnell believed no payment was due and sought advice.

[9] An email to staff on 25 August 2015 advised of the new payroll system that automatically recorded their hours of work.

[10] Mr Funnell sent a further email about the expected hours of work for packers on 31 August 2015. Although they paid piece rates, TTS still needed to record staff hours of work.

[11] The email went on to discuss work allocation. Confirmation of work available would occur by text or phone to those on the roster. Employees could decline work by text or phone and if possible 30 minutes prior to the period of work. It also noted "*each load was a separate offer of work*."

[12] Those accepting work were allocated time 15 minutes before the first load departs to allow for setting up the packing area. Employees were considered to remain "on the clock" until 45 minutes after the load has landed or when they have finished the allocated pack jobs.

[13] On 26 September 2014 Mr Funnell sent a memorandum *"to clarify the hours of work we require from a member of the [parachute] packing team"*. The Memorandum stated, amongst other things:

> As per the casual nature of the engagements, the company is under no obligation to provide the employee with a set number of pack jobs or hours of work and the employee is under no obligation to accept any offer of work.
>
> An employee can reject work on any load at any point in a day in order to release themselves from work for any purpose …

Third Employment Agreement

[14] At times during her employment, TTS supported her applications for VISAs. Ms Spillman sought a meeting with Mr Funnell in October 2014 to discuss her application for residency and minimum working hours. She raised concerns about her actual hours of work and whether this complied with the minimum wage requirements. She sought an amended employment agreement that guaranteed 30 hours work per week at minimum rates ($22,000 per annum) or a daily rate for packers. Mr Funnell outlined the difficulties given the seasonal, irregular and unpredictable nature of the business in guaranteeing any hours per week.

[15] The parties then signed a third employment agreement on 30 October 2014. The variations are highlighted in italics below:

> 3. **NATURE OF EMPLOYMENT**
> ***[deleted]***
> 3.1 Your engagement under the terms and conditions of this agreement will be on a casual basis.
>
> 3.2 You are engaged on a daily basis, but only as and when required. Work ***will be offered on a load by load basis and*** will be intermittent, dependent upon customer numbers, favourable weather and flight conditions, aircraft availability and compliance with Civil Aviation Authority ("CAA") standards. If weather and flight conditions are adverse (as determined by the Chief Safety Officer in compliance with CAA/NZPIA standards) and/or customer numbers do not justify operating, Employees may not be offered work.
>
> 3.3 The Employee acknowledges the Employer cannot guarantee ***minimum***, regular ***or continuous*** work, and the hours of work offered will vary ***from day-to-day, and*** from week to week. ***Despite this, over a 12 month period of employment, provided the Employee makes themselves available***, the Employee can expect to be offered, on average, at least 30 hours per week ***and that the Employee's remuneration will at least meet the minimum wage requirements***. Work is seasonal and weather dependent with shorter hours over the "off season" and considerably longer work hours over the height of the "on season".
>
> 3.4 The parties acknowledge that work undertaken by the Employee is measured by "task completion" (e.g. number of tandem jumps completed) rather than on an hourly basis. Notwithstanding this, the Employee is expected, as a matter of good faith to report to work and remain working during the time period reasonably requested of the Employee by the Employer.
>
> 3.5 If the Employee is offered further engagements, then the offer will be on these terms and conditions.
>
> 3.6 Nothing in this agreement, either express or implied, requires the Employer to offer any employment to the Employee notwithstanding that the

Employee may be included on any list maintained by the Employer to assist in obtaining any casual staff. ***The Employee's inclusion on any roster is merely an indication of the Employee's availability to receive offers of work. The Employee is under no obligation to accept any offers of work.***

…

3.8 This agreement supersedes all previous terms and conditions of any previous agreement between the Employee and the Employer.

…

6. **OFFERS OF WORK**

6.1 Any work to be undertaken will be as and when ***offered by the Employer, on a load by load basis.*** In deciding whether to offer work the Employer shall give consideration to weather, flight factors, operational requirements and customer numbers referred to in clause 3.2 herein.

…

[16] Ms Spillman was subsequently granted residency.

Performance issues

[17] Between December 2014 and January 2015 performance concerns were raised with Ms Spillman. She was issued a verbal warning on 22 January 2015.

[18] On 30 October 2015 Mr Funnell wrote a letter asking to meet with Ms Spillman on 4 November 2015 about further performance concerns that she was incompatible with other packers, inconsistent work ethic, inadequate notice of unavailability, leaving without prior warning, late attendance to avoid setting up duties and the impression she did not wish to be there.

[19] On the day of the meeting Ms Spillman emailed stating she would get back to TTS about a meeting and stated "*I am wanting to notify you that I will be raising a personal grievance for unjustified actions, harassment and disadvantages in the workplace*." No other detail about the personal grievances or harassment was given. She later emailed on 5 November apologising stating it was taking longer and she would have a response.

[20] Having not heard anything further, Mr Funnell emailed again seeking a response to his letter on 9 November 2015. He raised concerns about her ability to do her job in absence of any detail and given her allegations she was being harmed in the workplace. The same day Ms Spillman assured Mr Funnell she was capable of doing her job and she had arranged mediation.

[21] Mr Funnell then advised on 10 November until an opportunity to discuss matters occurred, no further offers of work would be made. The same day Ms Spillman sought a meeting on 12 November 2015. She alleged procedural unfairness "an unjustified warning in the past" and "unjustified actions". No further detail was given about her concerns.

[22] Instead of meeting Ms Spillman arranged for her solicitor, RM to raise a personal grievance for unjustified disadvantage of "unresolved harassment and bullying" and unjustified dismissal due to the withdrawal of offers of work. Ms Spillman denied she was a casual employee. She stated she was a permanent employee. She stated the company had been advertising her job prior to raising performance issues on 30 October 2015, was procedurally unfair in a meeting about performance issues in January 2015, and had engaged in workplace bullying, harassment and migrant exploitation.

[23] The same day Rebecca Manders, TTS solicitor, emailed confirming receipt of the above letter. She asked if Ms Spillman intended meeting with TTS. She also noted TTS concerns about the number of vague allegations, need for further investigation and repeated requests for more details.

[24] RM cryptically stated she agreed "*with [TTS] view that to proceed with a meeting today is inappropriate.*" She further sought from TTS an invitation to an investigation meeting setting out the specific allegations made by other staff members, together with supporting information. She also sought mediation.

[25] Ms Manders replied that TTS did not have enough information from Ms Spillman on the detail of her allegations and so have had no opportunity to respond or resolve them. TTS also had no opportunity to discuss with Ms Spillman the concerns raised by other staff members.

[26] By 13 November 2015 Ms Manders prepared a specific response to the allegations as raised. In short it stated TTS required details of the alleged issues, Ms Spillman was a casual employee and they had made efforts to meet with her. It denied payment below the minimum wage. No reply to their correspondence was received.

[27] On 27 April 2017 Ms Spillman filed a statement of problem seeking a determination about her employment was permanent not casual, that she was

constructively dismissed and raising various unjustified disadvantage claims and breaches of "the code of good faith" by the same actions.

[28] The parties were referred to mediation but were unable to resolve matters. It now requires determination.

Issues

[29] At a teleconference on 10 October 2016 the issues for hearing were determined. By oral determination I dismissed all of the unjustified disadvantage grievances arising from bullying, harassment and the verbal warning.[2]

[30] The issues for hearing are now as follows:

a) Was the applicant permanently employed or a casual employee?

b) Was the applicant unjustifiably dismissed by the respondent or was her employment terminated by frustration?

c) Were there breaches of good faith?

d) Was there a failure to keep or produce wage records?

Permanent or casual employee?

[31] Ms Spillman submits she was permanently employed because there was an expectation of continued employment, work was allocated in advance by roster, requirement to apply for leave and have it signed off by management, expectations she work on average 30 hours per week, her essentials skills VISA required she work an average of 30 hours per week, TTS was her sole source of income, as a migrant she was vulnerable because her VISA tied her to TTS, length of time she was employed (5 years) and TTS acquisition of 2 year VISA's for migrant workers. She refers to several cases in support of her case.

The Law

[32] One of the cases Ms Spillman referred to described casual employment verses permanent employment in this way: [3]

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2 *Spillman v Tandem Skydiving 2002 Limited t/a Taupo Tandem Skydiving* [2017] NZERA 5

3 *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [40]-[41].

> The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.
>
> 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.

[33] The Court went on to identify indicators of permanent employment such as the number of hours worked each week; work allocated in advance by a roster; whether there is a regular pattern of work; whether there is a mutual expectation of continuity of employment; whether the employer requires notice before an employee is absent or on leave and whether the employee works to consistent starting and finishing times.

[34] Although the Courts have continued to endorse the above principles, more recently it has noted these cases on casual employment are of limited assistance. That is because "*cases turn on their infinitely variable facts*."[4]

Employment agreements

[35] The starting point for the analysis of Ms Spillman's employment must be her employment agreements. All of her employment agreements expressly set out that her employment was on a casual basis. There is an explanation for the casual nature of this employment. The work was intermittent, dependent upon customer numbers, weather, flight conditions and aircraft.

[36] Her intended casual employment status was explicitly spelt out in the agreements she signed. More particular it was remained unchanged and reconfirmed in the varied agreements she signed from December 2010 until 30 October 2014.

[37] Clause 3.3 of the first agreement referred to an expectation an employee could be offered "on average, at least 30 hours per week."[5] It is arguable this may have on its own created some expectation of ongoing work between engagements. However

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4 *Bay of Plenty District Health Board v Rahiri* [2016] NZEmpC 67 at [46].

5 See above paragraph [5] clause 3.3 First employment agreement commencing 22 October 2010 signed December 2010.

when the agreements are looked at as a whole, it is clear the parties were not guaranteeing work at all.

[38] The final iteration of clause 3.3 in the third employment agreement[6] contains an acknowledgement from the employee there was no guaranteed "minimum, regular or continuous work" and that the hours of work will vary "from day-to-day and from week to week."

[39] Although the status of an employee may change over time, all of the agreements including in particular the third employment agreement signed on 30 October 2014 indicates she was intended to be a casual employee throughout.

Roster

[40] It was accepted this workplace utilised a roster to identify workers available and willing to accept work. Ms Spillman submits this created a mutual obligation to be available between periods of work.

[41] Clause 3.6 of her employment agreements expressly referred to the rostering system. The final iteration of clause 3.6 in her third agreement noted inclusion on any roster *"is merely an indication of the Employee's availability to receive offers of work. The Employee is under no obligation to accept any offers of work."* This expressly negated the creation of any obligation by use of the roster.

[42] Ms Spillman was the only employee whom made herself available on the roster to accept work 12 days each fortnight throughout her employment. Every other employee opted on and off the roster. Her continued availability did not create any obligation for the respondent to offer work given the contents of her employment agreements and how this workplace operated.

[43] Employees were still able and did refuse work despite being rostered as available. This included Ms Spillman in the last 6 months. The roster was only a tool for the employer to manage the availability of employees and ensure it had sufficient numbers to meet its operational requirements.

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[6] See above paragraph [15] clause 3.3 Third employment agreement signed 30 November 2014.

Offer of work

[44] Workers were text messaged the night prior to confirm if there was sufficient demand to offer work the following day. It was accepted that work may be cancelled on the day if there were unfavourable weather or flight conditions or insufficient customer numbers.

[45] From the evidence the offer of work occurred when a load of tandem parachutists were taken up into the air (load). It finished when the 'load' returned to the drop zone. No further work could be offered until another load was able to be taken up into the air.

[46] Work would be offered to those employees present and available to accept work that day. This often resulted in workers such as Ms Spillman waiting at the worksite for loads to be taken up.

[47] It was accepted employees including Ms Spillman sometimes refused offers of work despite her allegation there were negative consequences. I expect workers whom made themselves regularly available to work and showed up would be offered work in preference to those whom did not. That did not create any continuous obligation between the parties.

Private work

[48] During the time she was at the worksite, Ms Spillman accepted private work for non-TTS clientele. When she accepted private work she would have been unavailable to accept TTS offers of work. She could not have therefore been available to TTS all of the time she was at the worksite. This arrangement for her to accept private work supports her casual employment status.

Leave

[49] I do not accept there was any requirement to apply for leave and have it signed off by management. Ms Spillman's leave form was used once in July 2015. From the evidence at hearing it did not appear to be a process any other employee used. At best it was used to inform management to take the person out of the roster for a period of time they were away.

Hours of work

[50] A Memorandum and an email were sent out in August and October 2015 clarifying the hours of work. The hours of work described therein did not equate to any mutual obligations between offers of work. The correspondence also confirmed Ms Spillmans casual employment status remained unchanged.

[51] Her payslips produced for the period 2012 to 2014 showed her fortnightly income varied from $114.96 and $1,805.79. It was clear Ms Spillman did not expect to be reimbursed for the entire time she attended the worksite.

Immigration

[52] Ms Spillman referred to TTS' support and correspondence and her VISA requirements as indicating the parties intentions she be employed for 30 hours per week.

[53] There were statements made by the parties to Immigration New Zealand guaranteeing income and referring to expectation Ms Spillman would work on average up to 30 hours per week. However at no time did TTS mislead Immigration about Ms Spillman being a permanent worker or having guaranteed hours of work. It provided copies of her employment agreements that clearly showed she was a casual employee.

[54] Even when Ms Spillman raised with TTS the possibility of her being hired as a permanent worker in October 2015 due to her residency requirements, no such written offer was made. TTS offered a further employment agreement on the basically the same terms – casual employment.

[55] Considering the evidence above, Ms Spillman was a casual employee of TTS.

Unjustifiably dismissed?

[56] Even if she was a casual employee, an employer must justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2) of the Act). Ms Spillman alleges she was unjustifiably dismissed by the refusal of any further work offers in November 2015. TTS submits if casually employed Ms Spillman was not dismissed. Her employment ended at the conclusion of each offer of work.

[57] The evidence supports a finding work was offered on a "load by load" basis. This meant as each load was confirmed, work would be offered that Ms Spillman was free to accept or reject. In my view it was reasonable to assume her employment ended once her "load" packing work finished.

[58] I also take the view TTS' refusal to offer her further work was fair and reasonable in the circumstances. Ms Spillman alleged she was being bullied but refused to give any details. Parachute packers work in a health and safety sensitive area. Employers need to be certain there are no distractions in their employees immediate workplace such as harassment or bullying. It was reasonable for TTS to refuse to make any further offers of work until she detailed her concerns for it to deal with.

[59] Ms Spillman's refusal to detail the concerns or to meet with the employer effectively ended her employment. She had in fact found alternative employment elsewhere by 22nd of December 2015. There is no basis to allege the employer dismissed Ms Spillman. Rather the contract was frustrated by Ms Spillman's actions. The application for personal grievance is dismissed.

Breaches of good faith

[60] Breaches of good faith were raised in the statement of problem by the actions of Mr Funnell "making it obvious that the intent was there to have [Ms Spillman] constructively dismissed for a prolonged period of time". The evidence of breach was a mirror of Ms Spillman's complaints about the process leading to dismissal. I have dismissed that personal grievance. I cannot on the evidence I have heard find any foundation for a breach of good faith.

[61] Even if I had found a breach, the remedy is a penalty under s135 Employment Relations Act 2000. This imposes a 12 month timeframe from the date the cause of action arose to file an application for penalty. Any action that breached good faith should have been known by November 2015. This application was filed in April 2017. This is outside the 12 month time limitation. There is no basis shown to grant leave to extend the time limitation.

[62] Again even if this action was filed within time, there is little evidence Mr Funnel's actions meets the tests for a remedy to be granted under s4A of the

Employment Relations Act 2000 (the Act). For the above reasons the breach of good faith action is dismissed.

Failures to keep or produce wage records

[63] The statement of problem sought a determination about the "full extent of the work hours and that Taupo Tandem Skydiving has failed to maintain time records up until late 2014 and that the current kept time records are inaccurate."

[64] Ms Spillman's submission dated 6 May 2017 added to the above alleging there was at the time of dismissal a failure to "record all days and hours at work, as per evidence given in the hearing." As such Ms Spillman referred to s132 of the Act "which essentially provides that where an employer has failed to maintain accurate records, the claim of the employee is valid." She submits this can be proven "beyond any doubt" because "the hours worked were full time hours, on a permanent and ongoing basis."

[65] Section 132 pertains to wage arrears claims. This is not a wage arrears claim. It is a personal grievance of unjustified dismissal. This section does not require me to prefer Ms Spillman's evidence about the dismissal.

[66] The section also states where there has been a failure to keep or produce wage records I may accept as proved all claims made by an employee "unless the defendant proves that those claims are incorrect".

[67] There was evidence from TTS that it kept compliant wage records. The respondent changed its wage and time recording to include hours of work in August 2015.[7] At that time, it was only required to record hours of work and days of work "where necessary for the purpose of calculating the employees pay."[8] This changed on 1 April 2016 making it mandatory from thereon to record "the number of hours worked each day in a pay period and the pay for those hours."[9]

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7 Bundle of Documents (BOD) Document 17 Memorandum to staff dated 25 August 2015.

8 Section 130(1)(g) Employment Relations Act 2000 historic version October 2000-31 March 2016.

9 Section 130(1)(g) Employment Relations Act 2000 as amended 1April 2016.

[68] The applicant was paid a piece rate on a load by load basis. The record of her hours and days of work would not have been required for the purposes of calculating her pay in 2015. There can be no failure to keep accurate wage records as a result.

[69] Given I have found Ms Spillman was a casual not permanent employee there is no basis to submit those records inaccurately recorded her hours worked. The failure to keep accurate records action is dismissed.

Costs

[70] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

[71] Ms Spillman has indicated she has financial constraints. She will need to file evidence about that if she seeks reduction of costs or payments by instalments.

T G Tetitaha
Member of the Employment Relations Authority