**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

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

[2022] NZERA 362
3166281

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| | BETWEEN | NICK VAN LOOY<br>Applicant |
| | AND | CONTRACT RESOURCES (NEW ZEALAND) LIMITED<br>Respondent |

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| Member of Authority: | Geoff O'Sullivan |
| Representatives: | William Simpson, advocate for the Applicant<br>Sean Maskill, counsel for the Respondent |
| Investigation Meeting: | On the papers |
| Submissions Received: | 14 July 2022 and 1 August 2022 from the Applicant<br>28 July 2022 from the Respondent |
| Date of Determination: | 4 August 2022 |

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] On the 21 March 2022, Mr Van Looy filed a statement of problem with the Authority claiming three months loss of income together with compensation for humiliation, injury to feelings and loss of dignity. It seems the claim is based on allegations that the Respondent, Contract Resources (New Zealand) Limited (CR) is guilty of various breaches of good faith in that:

(a) it has not been active and constructive in establishing and maintaining a productive employment relationship;

(b) it has failed to ensure access to information relevant to the continuation of employment together with an opportunity to comment on the information;

(c) CR has not dealt with Mr Van Looy in good faith and has been misleading;

(d) has failed to maintain safe working conditions as required by law; and

(e) as a result of this, has foreseeably contributed to stress levels suffered by Mr Van Looy.

[2] Under his claim of "breach of good faith" it is clear that Mr Van Looy is alleging that he has been unjustifiably dismissed. CR's response in its statement of problem is that Mr Van Looy was at all relevant times, employed on a casual basis and was not dismissed (constructively or otherwise) by CR. It also pointed out concerns regarding limitation periods noting that Mr Van Looy was:

(a) Claiming a living away from home allowance (LAHA);

(b) Claiming a constructive dismissal grievance;

(c) In essence applying to the Authority asking it to vary the terms and conditions of his employment; and

(d) Disputing public holiday pay.

[3] CR noted that in respect of the LAHA allowance the action related to events that occurred in 2013 and 2014 and accordingly was out of time because the events the claim is based on, are more than six years old. CR further states that to the extent there is an employment relationship problem which is not a personal grievance, such claims are limited to causes of action which arose on or after 21 March 2016 (s 142 of the Employment Relations Act 2000) (the Act).

[4] In respect of the constructive dismissal grievance, CR says that the only correspondence capable of constituting the submission of a personal grievance was the Applicant's letter dated 6 June 2019 but received by CR on 12 July 2019.

[5] At a case management conference held on 21 June 2022 and recorded in a direction of the Authority dated 30 June 2022, it was agreed that the preliminary issue regarding matters which may be out of time, would be dealt with on the papers after submissions, and a preliminary determination would be issued dealing with this matter. This determination therefore deals solely with claims which may or may not be out of time.

**Background**

[6] Both parties were asked to file submissions, and submissions and documentation were received on behalf of Mr Van Looy on 14 July 2022 and 1 August 2022. CR filed its submissions on 28 July 2022.

*LAHA allowance claim*

[7] Subject to what may transpire at the substantive investigation, it is reasonably clear from the statement of problem from Mr Van Looy's LAHA allowance claimed is based on an understanding he was to be paid at a rate of $60 per day and that he eventually noticed that the rate had been cut by $10 per day. He raised his complaint and says he received no reply. It is clear that until the filing of his statement of problem, no formal claim had been lodged in respect of the LAHA. However the issue was raised with CR on 8 April 2014. The statement of problem was filed in the Authority on 22 March 2022. Any action in respect of the LAHA allowance is therefore time barred by s 142 of the Act which provides:

> No action may be commenced in the Authority or the Court in relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose.

[8] That is not to say however that Mr Van Looy cannot reference the non-payment as some part of the factual matrix, however a claim per se cannot proceed because it is statute barred.

*Personal grievance for unjustified dismissal (constructive or otherwise)*

[9] Mr Van Looy and CR have approached this issue from completely different perspectives. CR acknowledges that Mr Van Looy believes that CR's letter to him of 3 May 2019 constituted a dismissal, and that he raised a personal grievance about that dismissal on 12 July 2019. In its submissions, CR in paragraph 15 sets out the background as it sees it. CR says it was intending to negotiate a draft casual employment agreement that it did not wish to make changes requested by Mr Van Looy and accordingly simply said that the changes would not occur and any ongoing relationship between the parties would remain as it was before, namely a casual employment relationship. It says there was therefore no dismissal and indeed no resignation. It says the 6 June letter received on 12 July 2019 did not raise a personal grievance.

[10] From Mr Van Looy's perspective however this was not what he says occurred. The parties were discussing changes to a draft employment agreement but Mr Van Looy saw himself as already an employee and wanted an agreement which reflected his understanding as

to the relationship between the parties. His correspondence around that time, including his email of 3 April 2019, makes it clear that he was awaiting a new individual employment agreement. I accept that what he is saying, is that he did not consider himself a casual employee and accordingly was not waiting for the provision of a final individual employment agreement for casual employment. It is noted he also raised a number of other concerns he had regarding the draft agreement.

[11] Discussions regarding the draft employment agreement came to an end on 3 May 2019 when CR wrote, stopping the negotiation for a new employment agreement stating amongst other things:

> We have considered your feedback including the discussions we had with you and your support person, Bill Simpson, at the meeting held on 16 April 2019. After taking advice on your proposed changes, we have decided not to make such changes, as the agreement has complied with the NZ law for a casual employment agreement.
>
> We are also of the view that we do not need to reach agreement about this as you are a casual employee and you are not currently working for us.
>
> We do appreciate that should we offer you casual work in the future, then we would need to pick this up at that point.
>
> ….

[12] If Mr Van Looy thought the relationship was anything other than a casual employment relationship, then he would be entitled to take the 3 May 2019 advice as termination of his employment. This is because it makes it clear that from CR's perspective the arrangement is casual, there is no current employment relationship, and if they do wish to offer casual work in the future to Mr Van Looy then his feedback would need to be considered at that stage.

[13] The 6 June 2019 letter from Mr Simpson received by CR on 12 July 2019, does make it clear that Mr Van Looy did not consider himself a casual employee. It also makes it clear that the 3 May advice was seen by Mr Simpson as advice as to the termination of employment. The 6 June letter follows up by referencing matters being done in bad faith, and also refers to cases in the employment jurisdiction dealing with behaviours that fall short of what an employer must do. The letter also sets out claims for loss of income and compensation for hurt and humiliation under s 123 of the Act.

[14] Whether or not Mr Van Looy's claim for unjustified dismissal, (constructive or otherwise) is ultimately successful, is not the point at this interim stage. What is clear, is that Mr Van Looy considered himself something more than a casual employee and his 6 June letter

satisfies me that he has raised a personal grievance for an unjustified dismissal. He is entitled to rely on the 3 May 2019 advice as notice of the termination of any employment relationship which may have existed between the parties. Accordingly he has raised his personal grievance well within the 90-day period. He is entitled to have his claims investigated by the Authority.

*Asking the Authority to vary the terms and conditions of employment*

[15] Mr Simpson has clarified CR's view that he is asking the Authority to vary the terms and conditions of employment confirming that that was not the intention. Accordingly the substantive investigation meeting will not be dealing with any application to vary the terms and conditions of employment nor indeed would the Authority have had jurisdiction to do that.

*Public holidays, sick leave and bereavement leave*

[16] This matter has been resolved between the parties, and accordingly no longer forms part of the claim.

**Conclusion**

A. Mr Van Looy cannot pursue any action in respect of his claim he was short paid a living away from home allowance.

B. Mr Van Looy can pursue his claim that he was unjustifiably dismissed (constructively or otherwise) on 3 May 2019. Contract Resources (New Zealand) Limited's letter of 3 May 2019 stated unequivocally that any employment relationship between the parties was casual and had ended. Indeed the 3 May2019 advice made it clear that if any relationship was to recommence in the future, casual or otherwise, then there would need to be further discussions.

**Costs**

[17] Costs are reserved and will be dealt with at the conclusion of the substantive investigation meeting.

**Geoff O'Sullivan**
**Member of the Employment Relations Authority**