IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2022] NZERA 506
3134980

	BETWEEN	JULES DEWAR Applicant
	AND	THE WELLINGTON FREE AMBULANCE SERVICE INCORPORATED Respondent

Member of Authority:	Claire English
Representatives:	Dave Cain, advocate for the Applicant Paul McBride, counsel for the Respondent
Investigation Meeting:	8 and 9 September 2022 at Wellington
Submissions received:	9 September 2022 from Applicant 9 September 2022 from Respondent
Determination:	5 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant worked for the respondent as an ambulance officer. In July 2019, the applicant resigned her full-time permanent position with the respondent to become a casual staff member. As a casual staff member, she then continued working in excess of 42 hours per week, for several weeks until she was involved in a car accident. Following this accident, the applicant did not resume working for the respondent again, and her employment was terminated in October 2020.

[2] The applicant claims that she has been unjustifiably dismissed, and is owed lost remuneration, and compensation for hurt and humiliation accordingly.

[3] The respondent's position is that the applicant was a casual employee, and therefore as a matter of law, was not dismissed and the respondent was entitled to cease offering her work. In the alternative, the respondent says that any dismissal was fair in all the circumstances, and the applicant is not entitled to compensation for a variety of reasons.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from the applicant, her partner Mr Nathan Thompson, Mr Scott Elliot, and Mr Steve Marshall. For the respondent, witness statements were lodged from Ms Kate Worthington, Mr Chris Wright, and Mr Chris Matthews. All witnesses answered questions under affirmation from me and the parties' representatives, with the exception of Mr Chris Matthews, whose written statement was admitted by consent. The representatives also gave closing submissions.

[5] 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

[6] The issues requiring investigation and determination were:

(a) Was Ms Dewar a "casual" employee, or was she a permanent part time employee?

(b) If Ms Dewar was a permanent part time employee, was the termination of her employment unjustified?

(c) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:

- Lost wages; and
- Compensation under s123(1)(c)(i) of the Act

(d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct that contributed to the situation giving rise to the grievance?

(e) Should either party contribute to the costs of representation of the other party.

Background

[7] The applicant, Ms Dewar, commenced working for the respondent (WFA) in 2005 as an intensive care paramedic on a permanent full time basis. She worked rostered shifts, which were in cycles of 2 day shifts followed by 2 night shifts, averaging a minimum of 42 hours work per week.

[8] Ms Dewar gave evidence that she and her partner, Mr Thompson, started their own events business in the Hawkes Bay in 2017. Ms Dewar's goal was to grow her own business, so that she could reduce her hours working for WFA, and she was open with her manager about this.

[9] In June 2019, Ms Dewar resigned her permanent full time role with WFA, so she could focus more on her own business. Her permanent employment ended on 19 July 2019, which was also the same date that she started work in accordance with a new casual employment agreement with WFA. By this time, Ms Dewar had moved to live in the Hawkes Bay area.

[10] Ms Dewar explained to me at the investigation meeting that she had thought carefully about this decision, and this was the best decision for her. She explained that the attraction of signing a casual employment agreement was flexibility. By doing so, she would obtain the flexibility to work more in her own business including on the weekends rather than being tied to a roster. She would also have the flexibility to choose which shifts she would work. Ms Dewar explained that she wanted to work day shifts only, not night shifts, and there were some shifts which were better paid and/or with better conditions (particularly what were described to me as patient transfer work, which was essentially planned non-emergency work).

[11] Ms Dewar said that she was confident that the casual employment arrangement would enable her to pick up the shifts she wanted, at the times she wanted, and when her events business was busy in the summer months, she would be free to simply "not pick up" shifts, and then when the events business was less busy in the winter months, she could pick up more work with WFA. Ms Dewar said that there had always been casual work available at WFA, and she expected this to continue into the future.

[12] Initially this occurred. In the first 6 weeks of her casual contract, Ms Dewar was working at least 42 hours per week. The process was straightforward. Each week, Ms Dewar (and other staff, both casual and permanent) would be sent an email setting out the casual shifts available for the upcoming week. Anyone who wanted to work a listed shift would reply to that email. Work was generally assigned on a "first come, first served" basis. WFA retained the discretion to decline any application for work. This was done from time to time, with the most common reason being the need to maintain a suitable mix of skills and experience within each ambulance crew on any given shift.

[13] In these first 6 weeks of her casual employment, Ms Dewar worked solely on day shifts, on a Monday to Friday basis. This included working multiple patient transfer shifts, even though these could (or would normally) have been performed by someone with a lower qualification level.

[14] Ms Dewar explained that she had been approved to work for all, or pretty much all, the shifts she had applied for. She was happy with this outcome.

[15] In mid-August 2019, Ms Dewar had a car accident. This was not work-related. As a result, Ms Dewar spent some time not working, and receiving ACC payments[1].

[16] During this time she was off work, Ms Dewar continued to receive the weekly emails setting out the casual shifts available for the upcoming week. Ms Dewar's evidence was that she simply chose not to respond to them, as she did not want to pick up any of the work offered. This was acceptable to WFA, as the practice was simply that if you did not want to work an offered shift, you did not need to respond to the email.

[17] In November 2019, Ms Dewar was cleared to return to work by her doctor. She reached out to her manager, and asked if she could perform some unpaid shifts to "get her hand back in". He agreed, and on 20 November and 21 November, Ms Dewar did 2 unpaid day shifts. On 22 November 2019, Ms Dewar performed a paid shift, although this was a (day time) patient transfer service.

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[1] These ACC payments were made to her by WFA. WFA explains that this was not because of any legal liability for the accident itself, (given that the accident was not work-related) but rather it paid Ms Dewar because it is an accredited ACC provider.

[18] After this, Ms Dewar did not work for WFA for some weeks. She explained that, although she continued to receive the weekly emails setting out casual work available, she did not respond to them or apply to WFA for work, because she was instead focusing on working in her own business during the busy summer season.

[19] On 4 January 2020, Ms Dewar arranged to work a particular shift. From 4 January 2020 onwards, Ms Dewar continued to receive the weekly emails, but she did not apply for any casual shift work, because she continued to focus on working in her own business in the summer season.

[20] On 23 March 2020, New Zealand went into Level 3 lockdown, followed by Level 4. On 23 March 2020, Ms Dewar spoke with her manager by telephone, as she was in the Hawkes Bay. She recalls that her manager said it would be best if she did not travel out of area (noting that for Ms Dewar to perform work in Wellington, this would have involved crossing regional boundaries).

[21] Ms Dewar recalls that she continued to receive the weekly emails, but did not apply for any work. On 21 May and 22 May, she applied for, and worked, two unpaid shifts. On 23 May 2020, she worked a shift on/with the emergency helicopter.

[22] On 2 June 2020, Ms Dewar was advised by her manager that WFA had or was in the process of, hiring more permanent staff, and there was very little casual or overtime work available for her.

[23] Ms Dewar gives evidence that, at about this time, she began responding to the weekly emails applying for casual work, but the work was not approved. At the end of June 2020, emails show that Ms Dewar expressed interest in working on what were called the "winter vehicles", but she was not granted this work.

[24] On 7 August 2020, Ms Dewar was advised by Ms Worthington that WFA was conducting a "review" of its use of casual staff, and there was no utilising of casual staff while that review was in progress.

[25] Ms Dewar queried how she was to keep her clinical hours up in order to maintain her qualifications. Ms Worthington replied by email on 14 August 2020, confirming WFA was only using casual staff "as a last resort".

[26] Ms Worthington gave evidence at the investigation meeting. She explained that there had been two separate changes to the way WFA operated starting from June or July 2020 onwards. The first was that WFA had been granted additional government funding to hire more permanent staff, precisely to reduce its reliance on casual labour. As a result, WFA had hired more permanent staff, and was continuing to increase its permanent staffing numbers. This has significantly reduced the amount of casual work available compared to the recent past. Secondly, WFA was in the process of performing a "legal review" of its casual contracts. Ms Worthington advised that it was identified that WFA had a relatively large number of casual staff on its payroll, some 24 as of around 1 July 2020.

[27] Once this had been identified, Ms Worthington explained that she looked at the amount of "engagement" each casual staff member had. Shift managers were asked to call the casual staff associated with their shift, and inquire as to their circumstances.

[28] Ms Worthington gives evidence that 16 casual staff members advised that they had effectively "moved on", and resigned. Ms Worthington was aware of two or three more casual staff members who then successfully applied for permanent positions.

[29] There is no evidence that Ms Dewar's manager reached out to her in such a way, with the exception of the advice he had given her on 2 June that I have already referred to that there was not much overtime work available for casual staff as a result of new hirings.

[30] On 24 September 2020, Ms Dewar emailed Ms Worthington again, asking about the review. Ms Worthington was on leave and did not respond.

[31] On 8 October 2020, Ms Dewar's manager asked her if she would like him to forward her query to the chief executive. She said yes.

[32] On 15 October 2020, the chief executive wrote to Ms Dewar, stating that WFA was "bringing your casual employment…to an end", and that "your termination of employment will take effect on 16th November 2020". The grounds for termination were said to be that, since July 2019, Ms Dewar had worked "a total of 24 hours (2 shifts)" and attended a single training session on 27 August 2020.

[33] Ms Dewar gave evidence that she was stunned and devastated to receive this letter of termination. She said she simply did not expect to receive it, and had no idea it was coming (although she knew something was up as she had not been getting casual work). She was particularly upset as she explained that she had worked a total of 21 shifts[2] (not 2) since becoming a casual, and had completed additional training, including the training session referred to in the 15 October 2020 letter, which was actually on 14 August not 27 August as stated.

[34] On 27 October 2020, Ms Dewar emailed the chief executive, explaining that she had worked at least 21 paid shifts, had performed additional training, and had applied for casual work but had not been granted it because the casual contracts were being reviewed.

[35] On 29 October 2020, two days later, the chief executive wrote back, confirming "our position to terminate your agreement as a casual ICP".

[36] Ms Dewar gives evidence that the impact on her was severe. She explains that she sought support from a psychologist (although a letter from her psychologist confirms that she sought support in July 2020 for a variety of issues). She says that she did not start seeking other work for at least 6 months after the termination. She was unable to explain exactly how she obtained her subsequent job, and was vague as to whether she applied for it, or if she was contacted by her now employer instead.

[37] Ms Dewar says she cannot understand why WFA terminated her employment. She maintains that she expected the level of casual work that was first available to her in July 2019 to have continued into the future. She says that she has "heard" that other casual staff received work when she did not, although she is unable to provide details of who these staff members are or what work or type of work they were provided.

Findings

[38] I must first determine if Ms Dewar was, as WFA contends, a "casual" staff member, with no expectation of on-going work, or if she was in fact a permanent part-time employee.

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[2] Ms Dewar's evidence is that she worked a total of 21 paid casual shifts prior to her car accident in August 2019. After this, she worked 2 paid casual shifts, one partial paid shift, and 5 unpaid shifts from November 2019 through to October 2020.

[39] It is well established that there is no statutory definition of "casual" employment. However, casual employment has been defined in case law as follows :

> 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[3].

[40] This definition is directly relevant to an assessment of the nature of the employment relationship between WFA and Ms Dewar. I find that the key factors are as follows:

a. Ms Dewar was a permanent employee of WFA, with a significant length of service and understanding of WFA's business, and the benefits and obligations of being a permanent employee of WFA.

b. Ms Dewar voluntarily resigned her permanent employment with WFA to become a casual staff member. She did so to pursue certain personal goals that she could not achieve while remaining a permanent employee of WFA, namely, to have the freedom, flexibility, and control of her time she deemed necessary to allow her to run her own business; and to be able to choose her preferred shifts and hours.

c. Ms Dewar understood that she could pick up casual shifts with WFA as suited her, and that if and when she did not want to work any of the offered shifts, she was free to not apply for shifts. She exercised this ability to work when it suited her, and also exercised her right to not apply when it did not suit her to work for WFA, explaining that she could have performed shifts for WFA over the summer months, but that she chose instead to work in her own business during these months.

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

d. Ms Dewar also exercised her ability to pick up the types of shifts she deemed most favourable or suitable to her, by choosing to work only day shifts and by working a relatively large proportion of non-urgent "patient transfer" shifts.

e. Ms Dewar did not have to account to WFA for her absences or her choice of shifts.

f. WFA did not make any promises to Ms Dewar about the type or level of casual shifts it would offer to her. This changed from week to week, as shown by the weekly emails. In addition, Ms Dewar understood that, even if she wanted to work a particular casual shift on any given week, this was not guaranteed, as she would need to reply to the relevant weekly email promptly and then await WFA's confirmation she had been assigned to work that shift. She might be refused work for a number of reasons, including a desire by WFA to maintain a certain balance of qualified staff working at any given time, obligations WFA might have had to other employees, and that casual shifts were assigned on a "first in, first served" basis.

[41] Taken overall, these factors point towards a casual employment arrangement. They show that there was no mutuality of obligations. Ms Dewar was free to work as and when she liked. She did so. WFA was not obliged to offer Ms Dewar any particular type or amount of work. Ms Dewar's own evidence is that WFA exercised its rights also, by occasionally declining to provide her with a shift she desired[4].

[42] In addition, the employment agreement between the parties explicitly records a casual employment arrangement. Clause 3 of the "Offer of Employment – Casual" signed by Ms Dewar states: "Your casual hours of work will depend on our work requirements. There is no obligation on us to offer you casual work or on you to accept casual work we offer. Our offer to provide you with casual work, and yours to perform it, is limited to the terms of any offer made and accepted."

[4] I note that the Employment Court has previously found an ambulance officer employed as "casual", and working in a similar fashion, to be a causal employee, see: *Baker v St John Central Regional Trust Board*, [2013] ERNZ 449.

[43] Clause 7 of the employment agreement states: "The hours worked will be as determined by WFA….There is no guarantee either given or implied as to the amount of work, or duration of work that may be offered."

[44] This is consistent with how the parties operated their employment relationship in practice.

[45] Finally, I make a note about Ms Dewar's hours of work. In the first six weeks of her casual employment, Ms Dewar was working 42 hours per week, sometimes more. This might be seen as indicative of a permanent working arrangement. However, this did not continue. Ms Dewar's ability and desire to work for WFA was interrupted by her car accident, and the need for her to take time to recover from her injury. This also is not indicative of the status of her employment overall. Rather, what is indicative is Ms Dewar's statements that she was fit to return to work (and had received doctor's approval to return to full duties) by mid to late November 2019, but although she continued to receive weekly emails offering her causal shift work, she chose not accept this work, because she preferred instead to put her time into her own business. It was only after the "summer season" ended that she desired to work more outside her own business, and it was only then that she sought more work from WFA, around May or June.

[46] If Ms Dewar had desired the security of permanent full-time work, she need only to have continued in her existing permanent position. However, she changed her status to that of a causal employee, and proceeded to act accordingly. She received the benefit of flexibility and choice consistent with this status.

[47] I find that Ms Dewar was a "casual" employee rather than a permanent employee. She had no on-going employment obligations towards WFA, outside any weekly agreement to work a particular shift or shifts. Likewise, WFA had no obligations to offer her any particular type or amount of work, at any given point in time.

Conclusions

[48] Having reached this conclusion about Ms Dewar's employment status, I now consider the impact on her personal grievance claim of unjustified dismissal. Ms Dewar

claims that she was unjustifiably dismissed, when WFA terminated her employment by way of letter dated 15 October 2020.

[49] WFA's position is that it was entitled to cease engaging Ms Dewar on a casual basis, because it did not have any obligations to Ms Dewar to provide her with on-going work. WFA further says that, as a matter of law, when Ms Dewar was not engaged to perform a specific shift, there was no subsisting employment relationship. This is a position that has been approved by the Court of Appeal, which stated in respect to similar practices of assigning work on a short term basis by the company Drake Personnel:

> It is clear that once an assignment has been completed, Drake has no obligation to offer any further assignments, and the employee has no obligation to accept any further assignments. In such a situation it cannot be said that there is a continuing contractual relationship of employment. The Chief Judge was clearly correct in his conclusion that each assignment was a separate engagement….Once an assignment is completed without any further assignment having been agreed, however, the employment relationship has terminated[5].

[50] The above also describes the true nature of the employment relationship between Ms Dewar and WFA. As WFA was not obliged to provide Ms Dewar with any minimum or guaranteed amount of work, it can logically have no liability for not providing her work. In addition, at the time Ms Dewar was advised that WFA would not be providing her with any future casual work, she was not an employee of WFA, and therefore WFA's actions did not (and as a matter of law, cannot) amount to a dismissal.

[51] Ms Dewar explained at the investigation meeting when questioned by me, that she had expected the level of casual work she was able to achieve in July 2019 to continue indefinitely into the future. That expectation was not created by any action on the part of WFA, but was a hopeful assumption on Ms Dewar's part. In the event, WFA hired more staff, and therefore had less casual work to offer. This is an action that WFA was entitled to take.

[52] Accordingly, it must follow that Ms Dewar's claims are dismissed.

[53] In reaching this conclusion, I also note that WFA's communication with Ms Dewar was poor, and did not enable to her to effectively understand what was occurring.

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[5] *Drake Personnel (New Zealand) Ltd v Taylor*, [1996] 1 ERNZ 342, at 326.

In addition, the letter ending Ms Dewar's casual employment written by the then Chief Executive (who did not attend the investigation meeting to explain his decision), contained incorrect information. Under these circumstances, it is not surprising that Ms Dewar became concerned that this decision was motivated by misunderstandings, or was personal. I find this was not the case, but it remains that WFA chose not to communicate effectively with Ms Dewar about the hiring of new permanent staff and what this would mean for the availability of casual work going forward, which has contributed to Ms Dewar's decision to bring these proceedings.

Costs

[54] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[55] If they are not able to do so and an Authority determination on costs is needed [party name] may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum [other party name] would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[56] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[6]

Claire English
Member of the Employment Relations Authority

[6] Please note the Authority's Practice Note on costs, effective from 2 May, available at https://www.era.govt.nz/assets/Uploads/practice-note-2