IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2024] NZERA 115
3166281

	BETWEEN	NICK VAN LOOY Applicant
	AND	CONTRACT RESOURCES (NEW ZEALAND) LIMITED Respondent
Member of Authority:	Geoff O'Sullivan	
Representatives:	Bill Simpson, advocate for the Applicant Sean Maskill, counsel for the Respondent	
Investigation Meeting:	22 November 2022 in New Plymouth	
Submissions and further information received:	At the investigation meeting	
Determination:	27 February 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 21 March 2022, Mr Nick 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. The claim was based on various allegations which included claiming a living away from home allowance (LAHA). Contract Resources NZ Limited (CR) argued that Mr Van Looy was out of time in respect of his grievances.

[2] On 4 August 2022, the Authority ruled:[1]

(a) Mr Van Looy cannot pursue any action in respect of his claim that he was short paid a living away from home allowance; and

[1] [2022] NZERA 362.

(b) Mr Van Looy can pursue his claim that he was unjustifiably dismissed (constructively or otherwise) on 3 May 2019.

[3] This determination therefore deals with Mr Van Looy's claim that on 3 May 2019, he was unjustifiably dismissed by CR.

[4] CR denies it ever dismissed Mr Van Looy and says at all relevant times, Mr Van Looy was employed by CR on a casual basis and that arrangement ended. CR says it wished to negotiate a further casual employment agreement for Mr Van Looy, but he wanted to make changes it would not agree to. Because of this, it terminated negotiations on 3 May 2019.

[5] This determination, as permitted by s 174E of the Employment Relations Act 2000 (the Act), 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.

[6] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4), the Chief of the Authority has decided exceptional circumstances existed, allowing a written determination of findings at a later date.

The Authority's investigation

[7] At the investigation meeting, I heard evidence from Mr Van Looy and for CR from Stephen Iremonger. The witnesses gave evidence on affirmation or on oath. The issues for determination are:

(a) What was the true nature of the relationship between the parties?

(b) Did that relationship change during the course of employment?

(c) What was the relationship immediately prior to 3 May 2019?

(d) If the relationship was one of permanent employment, was Mr Van Looy unjustifiably dismissed?

(e) If so, what remedies would flow?

Background

[8] Mr Van Looy commenced work with CR in 1995, when he worked for CR through a subcontract. In 1998, Mr Van Looy started working directly for CR on an as-needed basis. This arrangement was not an employment arrangement and Mr Van Looy would invoice CR through his own company.

[9] In 2001, CR restructured with the Singaporean and Asian business partnering from the New Zealand and Australian business. Mr Van Looy continued working for CR in New Zealand and Australia and other overseas locations when required.

[10] Sometime later, Mr Van Looy was asked to change his status and become an employee. This resulted in him signing an employment agreement with CR in February 2013. The agreement was styled as a casual employment agreement and the clear intention of the parties at that stage was that the employment relationship was casual. The agreement made it clear that Mr Van Looy had no guaranteed hours or days of work and worked when required by CR when casual work was available and when Mr Van Looy was available and willing to work. The agreement further provided that it would apply to any casual employment assignments which Mr Van Looy undertook for the company.

[11] CR is an industrial service company that provides services to clients predominantly in the oil and gas sector. Approximately 60 percent of CR's work is reactive in response to problems with clients' plant. The work is generally urgent, although CR also works in matters related to planned plant outages and shutdowns. In such cases they receive settlement's notice of planned shutdowns.

[12] CR's workforce includes both casual and permanent employees. The evidence before the Authority was that approximately 60 percent of CR's workforce were casual employees. Mr Van Looy contends that as at 3 May 2019, he was not a casual employee.

Casual or employment – the legal tests

[13] In order to resolve the matter, the Authority must determine first, what obligations are assumed by Mr Van Looy and CR at the outset of the employment relationship, and then secondly, what was the nature of the relationship at the time the employment relationship problem arose on 3 May 2019.

[14] In *Vector Gas Limited v Bay of Plenty Energy Limited*, Tipping J noted that the ultimate objective is to establish the meaning that the parties intended their words to bear.[2]

[15] As Corkill J noted in *David Savage v Capital and Coast District Health Board,*[3]

> … because the nature of relationships can change over time, it is then necessary to assess the nature of the relationship at the appropriate time … did the relationship change over time? …

[16] In this present case, the appropriate time is 3 May 2019 as it is at that time Mr Van Looy contends CR terminated his employment unjustifiably.

[17] *Jinkinson v Oceania Gold (NZ)*[4] held that the question of whether an agreement is casual or not may well turn on whether there was a "sufficient mutuality of obligation between the parties" at the relevant time.[5] Judge Couch stated:

> 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 existed 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.

[18] Judge Couch went on to say:[6]

> 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.

[19] Judge Couch noted that there was a range of indicia which might assist in the assessment of the real nature of the relationship. He considered:

(a) The number of hours worked each week;

(b) Whether work is allocated in advance by a roster;

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[2] *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] NZSC 5, [2010] 2 NZLR 444.

[3] *David Savage v Capital and Coast District Health Board* [2016] NZEmpC 83 at [28].

[4] *Jinkinson v Oceania Gold (NZ)* [2009] ERNZ 225 (EmpC) at [37].

[5] At [39].

[6] At [41].

(c) Whether there is a regular pattern of work;

(d) Whether there is a mutual expectation of continuity of employment;

(e) Whether the employer requires notice before an employee is absent or on leave; and

(f) Whether the employee works to consistent starting and finishing times.

What did the parties agree at the outset?

[20] The employment agreement the parties signed in February 2013, was titled a "Casual Agreement". On page 1 of the agreement the employment classification was listed as "casual".

[21] Paragraph 2(1) of the employment agreement provided:

> Your employment status is that of a casual employee, meaning that you have no guaranteed hours or days of work and you work as and when required by us when casual work is available; and only when you are available and willing to work. This employment agreement shall apply to any casual employment assignments which you undertake for us but shall not of itself imply an offer of any such assignment.
>
> Due to the nature of casual work, sometimes with very short notices of offers of new assignments or projects, and often with varying lengths of employment, you are free to decline such offers if the timing of these does not suit your personal circumstances. The position offered and your current responsibilities, are set out in Schedule 2 (your position description). We may need to amend or alter these responsibilities from time to time to reflect changing requirements, but we will consult you before doing so.
>
> In addition, you will be required to carry out responsibilities not specified in your position description, but not inconsistent with your role and the needs of our business.

[22] The agreement also provided that, if there were to be changes to the agreement, they would need to be done in writing, except in respect of any remuneration review and additional employment benefits related to a performance review.

[23] Schedule 1 of the agreement also contained the provision under the heading of "Hours of Work," "Hours per week: On an 'as needed' basis, Monday to Sunday, as required by the nature of your position"—and, further, under the heading of "Termination Notice Period" the agreement provided "Two weeks. Each assignment concludes when your work in relation to that project is complete, as determined by your manager."

[24] Mr Van Looy also completed a payroll detail which required him to tick either yes or no to a statement that he was a casual employee—and, further, to tick yes or no to a statement he was a permanent employee. Mr Van Looy ticked "yes" to casual employment and "no" to permanent employment.

[25] All documentation signed by Mr Van Looy at the outset of his employment relationship, stipulated he would be a casual employee.

[26] There is no doubt that from an objective standpoint, Mr Van Looy and CR entered into an agreement in 2013 which provided that Mr Van Looy would be a casual employee.

What was the nature of the relationship as at 3 May 2019?

[27] Mr Van Looy says that the way the agreement was administered, led him to the conclusion he was not a casual employee but a permanent employee. In saying this, he pointed to the servicing of the Marsden Point hydrogen manufacturing unit reformer. He says he was engaged in the servicing of this unit since 1998, and on a similar but smaller unit, at Ballance Kapuni from 1998 until May 2019. He also points to the fact that he serviced the dense loading of the CHD reactor from its first commissioning and approximately every two or three years, until 3 May 2019.

[28] The difficulty with that evidence is that it shows that prior to 2013, when Mr Van Looy accepts he was not an employee but a contractor, he was carrying out the same work which he then carried out as an employee. It is work he can carry out as a casual employee as well.

[29] Mr Van Looy also says that there was an expectation that staff would be available for projects. He says that he had been asked to move other commitments to allow work on other projects. He says this would be way of a telephone conversation, and in some cases he was able to do this, even resulting in loss of other work. Unfortunately this reinforces the position held by CR, namely that Mr Van Looy was free to decline offers of work if the timing did not suit his personal circumstances. Mr Van Looy's response to this was that he would be available for the majority of New Zealand based work, provided he was given reasonable notice. Again, Mr Van Looy's evidence on this point shows he was free to decline work when he wished.

[30] A number of other offers of work were declined by Mr Van Looy. These included:

(a) HYDY to Perth BP Kwinana, Australia:

Mr Van Looy says this job offer wasn't relevant to New Zealand, as the offer of employment was with Contract Resources Australia and a different work contract, and he declined it because it was both his son's 18th birthday and his 10-year wedding anniversary. He says that the job would have been planned months in advance —and, if he had been given sufficient notice, he may have done it.

(b) Evonic rescue work, Morrinsville:

Mr Van Looy declined this offer of work because he said the notice was too short, and he already had commitments that week for his son's birthday and was then leaving for his wedding anniversary break. Further, he said he was not a regular for this type of work, only being asked when no one else was available.

(c) RNZ chloride treater:

Mr Van Looy said he declined this offer because he was already booked to travel overseas for another company, for a month's work. Additionally, he believed that CR was already aware he was going to be doing overseas work.

[31] Further, Mr Van Looy owned and operated a company called Pipe Vision Limited. This company provided services as a qualified trainer. Mr Van Looy retained clients throughout the world, including New Zealand, Australia, Taiwan, and the United States.

[32] The evidence before the Authority shows that Mr Van Looy may well have considered himself more than a casual employee. This can be inferred because on 13 May 2018, Mr Van Looy made it clear he felt he was entitled to paid bereavement leave and raised a query whether he was entitled for paid public holidays which fell during the period when he was employed by CR. CR's response was consistent with its view that Mr Van Looy was a casual employee.

[33] It is obvious that Mr Van Looy was dissatisfied with CR's response. CR engaged a human resource consultant based in Sydney to liaise with Mr Van Looy in respect of the issues he had raised. The parties were keen to resolve the issues between them, and to that end Mr Iremonger met with Mr Van Looy and his representative, Mr Simpson, to discuss his concerns. The parties agreed that Mr Van Looy would be paid bereavement leave, and CR believed that the agreement was they would also provide Mr Van Looy with a new draft casual employment agreement incorporating this along with any other agreed terms.

[34] On 11 April a draft casual employment agreement was sent to Mr Van Looy by CR. A meeting with him and Mr Simpson occurred on 16 April 2019 to discuss this.

[35] On 26 April 2019, Mr Van Looy provided further comments on the agreement and requested a further meeting.

[36] It was this last action which caused Mr Iremonger to write to Mr Van Looy on 3 May 2019, stating amongst other things:

> 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 you would need to pick this up at that point.

[37] Mr Van Looy had not worked with CR since 9 March 2019.

[38] There was evidence that CR, believing it still had a casual arrangement with Mr Van Looy, offered him further work following the 3 May letter, but as Mr Van Looy said in his evidence, because it was son's birthday, he could not undertake the work. Mr Van Looy says that his evidence regarding his son's birthday was wrong, as his son's birthday was 5 April. It seems, however, the difficulty is that Mr Van Looy's evidence as written, is a combination of evidence and submission. It became clear at the investigation meeting that a number of the statements contained in Mr Van Looy's written brief, are in fact statements from his representative. It seems to me unlikely that CR contacted Mr Van Looy regarding extra work after the 3 May letter, however, if it did the work was declined. Obviously it was not declined because it was his son's birthday. On the balance of probabilities, there is no compelling evidence that CR offered further work following the 3 May letter.

[39] The meeting notes of 15 April 2019 showed that the parties had not reached agreement on a number of clauses. The parties were still discussing matters such as whether an offer should have a number of days set aside for any engagement. Mr Van Looy thought the Holidays Act 2003 had not been interpreted correctly and he wanted contract rates to be clarified. There was also an issue regarding intellectual property, with Mr Van Looy recorded as saying, "Anything I invent is mine. How do you interpret this clause?" Mr Van Looy also wished to discuss terms i.e. casual agreement as opposed to permanent part-time—and, further, Mr Van Looy advised in respect of a clause: "I agree if casual but may have doubts if it is permanent part-time or otherwise."

[40] I accept that the parties were talking about redrafting the agreement. I would also accept that Mr Van Looy was angling for something more than a casual arrangement. However, it seems that CR were consistent in their approach, namely that they saw the employment relationship as casual in nature and did not wish to change that. There was no meeting of the minds regarding the changes. Accordingly, whatever the arrangement that was in place immediately prior to 3 May 2019, remained the arrangement.

Conclusion

[41] From an objective standpoint, CR and Mr Van Looy entered into an agreement whereby Mr Van Looy would be a casual employee. The evidence I heard confirms that indeed that was what the parties intended.

[42] Mr Van Looy agreed with CR that the busiest period was between 1 January 2018 and March 2019. During that period Mr Van Looy worked five weeks when the hours were less than 10. He also worked a further five weeks where the hours were between 50 and 60, and he worked four weeks where the hours were in excess of that. However, there was no regular pattern of work.

[43] As mentioned above, if indeed the arrangement ended at 3 May 2019, I needed to consider the nature of the employment relationship at that time. As described above, there is nothing to indicate that the nature of the employment relationship changed. Mr Van Looy throughout the course of the employment relationship, turned down work when it was inconvenient. I accept, as Mr Van Looy explained in his evidence, he always had reasons to turn work down. These included his wedding anniversary, his

son's birthday, lack of notice of a new job, and even a time when he was overseas working on his own projects through his company. If he were a permanent employee, he would have had none of those options. Just because the casual employment arrangement continued for a number of years, does not change it to a different form of relationship on the facts that were before the Authority. Even the pattern of work was varied enough to indicate a casual arrangement.

[44] In the preliminary determination of the Authority issued on 4 August 2022, I said it was open to Mr Van Looy to pursue his claim that he was unjustifiably dismissed (constructively or otherwise) on 3 May 2019. This is because it seems after that date, Mr Van Looy was given no further work. If indeed Mr Van Looy had been a permanent or part-time employee of CR, then the letter of 3 May 2019 could certainly have been seen as advising Mr Van Looy of his dismissal. However, in the circumstances of this case, the 3 May letter was, in essence, CR's advice to Mr Van Looy that, as the parties could not agree on the provisions that would go into a new agreement, it would no longer negotiate changes at that time. Consistent with CR's view that the arrangement was a casual one, CR noted that if Mr Van Looy was offered any further work, the parties would need to revisit the form of the arrangement.

Finding

[45] Nick Van Looy was employed by Contract Resources (New Zealand) Limited under a casual employment agreement, entered into in February 2013. The nature of Mr Van Looy's employment status did not change at any time between 2013 and May 2019. The parties attempted to negotiate changes to their employment arrangement but there was no meeting of the minds and no new agreement was entered into. Mr Van Looy was therefore not dismissed unjustifiably or otherwise by Contract Resources (New Zealand) Limited and his claim in that regard is not made out. It follows therefore that he is not entitled to any remedies.

Costs

[46] Costs are reserved with the parties encouraged to resolve any issues of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Contract Resources (New Zealand) Limited may, as the successful party, lodge and then 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, Mr Van Looy will have 14 days to lodge any reply memorandum.

[47] 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 and uplift or downward adjustment of that tariff. [7]

Geoff O'Sullivan
Member of the Employment Relations Authority

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[7] For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1