

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 301  
3054653

BETWEEN

THOMAS EDWARDS  
Applicant

AND

RECREATIONAL SERVICES  
LIMITED  
Respondent

Member of Authority: Michael Loftus

Representatives: Peter Moore, counsel for the Applicant  
Garry Pollak, counsel for the Respondent

Investigation Meeting: 13 August 2019 at Christchurch

Date of Determination: 4 August 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Thomas Edwards, has raised a number of claims. He claims he was unjustifiably dismissed and also alleges he has been underpaid with respect to wages, holidays and kiwisaver subsidies. He also says the respondent, Recreational Services Limited (RSL),

failed to provide personal protective equipment and indemnify him for expenses actually and reasonably incurred.

[2] The holiday pay claim was later withdrawn.

[3] RSL denies the claims have validity and asserts it treated Mr Edwards fairly and reasonably at all times. In particular, and while accepting termination occurred, it claims that was in accordance with the employment agreement given Mr Edwards engagement as a casual employee. RSL says he is not entitled to the monies he claims for the same reason as the claims are based on a premise he was a fixed term employee with set hours.

### **Background**

[4] Mr Edwards applied for a job with RSL as a lawnmower operator. He claims he did so through WINZ but RSL says that simply cannot be correct as they do not use WINZ's services.

[5] Mr Edwards says the job for which he applied was for a fixed duration of one month and he was interviewed by two managers (one in charge of mowing and one controlling weed spraying) who joked about who would have him. He says he was ultimately offered the weed spraying role. He says he was told an employment agreement would be mailed to him but it never arrived.

[6] Mr Edwards reported for work on 26 September 2016 and was inducted with four others commencing the same day. He says it was at induction that he was given the employment agreement which he was told to take home, read, sign and return. Mr Edwards claims that at the end of the day his manager, Vera, told him there had been a mistake and the agreement had to be signed that day. Mr Edwards says he complied, albeit under pressure which meant he did not read it.

[7] A copy was then given and he says that when he read it he noticed he had signed a casual agreement and not a fixed term one as he understood he had been offered.

[8] Notwithstanding that he says he worked as if on a fixed term with set hours. He says *I had a run of 102 parks to look after. I started early each morning between 6:30 and 7:00 a.m. and finished mid-afternoon, normally between 3:30 and 4:00.*

[9] Mr Edwards also says he averaged around 44 hours worked over 6 days each week and *I was never called up and asked if I wanted to work the next day or the next week or the next month* given he was required to service a list of parks that would take four weeks to complete though the details were posted via a fortnightly roster. He says once complete he simply started the list again.

[10] RSL's witnesses take a different view. They say RSL recruits casuals as needed and in this instance a group of 5 were sourced with a view to working for a short period leading up to Christmas. This was due to the trialing of new spraying techniques which would require an alteration to permanent workforce levels and the fact the City Council which had to agree funding, and therefore staffing levels, was yet to do so. In the interim a full time role was being advertised and casuals were filling the gaps. Using the words of RSL's Operations Manager, Edward Hadfield, *we decided to take on a number of casuals, more than usual for a period of weeks given the many variables and uncertainty.*

[11] RSL's witnesses say the rules were simple – there was no compulsion but enough work for them to say that if a casual wanted to work s/he simply had to report by 7am and that was clearly explained during the induction process. RSL's witnesses also added they were well aware Mr Edwards wanted full time work and it was more likely than not he would come in – indeed it is accepted that for a couple of weeks there was an expectation he would work as it was busy, work was available, and after discussing it the manager and Mr Hadfield had agreed he would come in.

[12] As to a roster, it is RSL's evidence there isn't one and unsurprisingly neither party can provide one. As to Saturdays, it was said there was a one-off task involving remediation work on the banks of the Avon River which meant Saturday work was temporarily available for anyone who wanted it.

[13] Mr Edwards goes on to say that at some point (he cannot remember when) he was told by the area manager, John Jones, that work would remain available until June 2017 but, unbeknownst to him Mr Hadfield sent an email to a colleague on 30 November 2016 saying *I am unsure ... if we will progress him [Tom] past casual.*

[14] Mr Edwards says that on the morning of Wednesday, 7 December 2016 he was called to a meeting with Messrs Jones and Hadfield. He says:

Ed told me I was being dismissed. First he said it was because of a disagreement I had had with a co-worker earlier that morning. Then I was told that it was because I was a casual. He said he had already decided to let me go, and that my last day was going to be in 2 days, on Friday 9 December 2016 anyway. He said I had not been successful in my "application" to keep my job. The funny thing about that is I never applied for my job – and I was never given a chance to apply for my job. He said I was unsuccessful in the interview, but he never interviewed me! No one did.<sup>1</sup>

[15] Again Mr Hadfield has a contrary view. He says the employment of all casuals was coming to an end with a decision having been made to engage a full time employee who was to start on 12 December. There had also been talk of a fixed term role and an e-mail of 29 November lists Mr Edwards as a potential candidate. The evidence would lead me to conclude it is this role that Mr Edwards and Mr Jones discussed and which lead Mr Edwards to assert he had been offered work till the end of June. That said, I must conclude that didn't occur if only because it is Mr Edwards evidence his naming in the e-mail of 29 November was a mistake as he never applied. It is also Mr Hadfield's evidence he would have been unlikely to appoint Mr Edwards due to some other issues which, while canvassed during the investigation, need not be addressed.

[16] Returning to the end of Mr Edwards' employment. As already said Mr Hadfield asserts the employment of all casuals was coming to an end due to more permanent appointments being made and Mr Edwards casual employment simply ceased. He denies Mr Edwards was told he was dismissed. It is Mr Hadfield's view that on the Wednesday he told Mr Edwards the need for casuals had come to an end and while it was initially envisaged that would occur on the Friday inclement weather that day along with a negative forecast for the rest of the week meant there would be no further offers of work.

## **Discussion**

[17] 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 decided exceptional circumstances existed to allow a written determination of findings at a later date.

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<sup>1</sup> Brief of evidence at 1.17

[18] As Mr Moore submitted, the *fundamental* issue is whether or not Mr Edwards was engaged as a casual employee as the answer to that will determine the outcome of almost all of Mr Edwards claims. For the same reason Mr Pollak's submission focussed on the same issue.

[19] Normally the starting point in ascertaining the nature of the relationship is the relevant documentation. In this case the documentation supports RSL's view.

[20] First there is the documentary evidence and the first of those is the advertisement. Assuming Mr Edwards is correct and he obtained the work through WINZ he should be able to source a copy of their vacancy notice. He can't and WINZ has failed to reply to RSL's request they advise whether it could possibly have some veracity. On the other hand RSL can source a copy of the advertisement they say Mr Edwards responded to and it clearly identifies the position as casual.

[21] RSL can also provide Mr Edwards' application for employment which he accepts is the document he completed. Again it clearly identifies the position applied for as *Casual*. Indeed it is so identified by his having circled the description and I note he also replied to a question about other employment that might impact the role, he recorded *Looking for full time perm.*

[22] There is then the employment agreement. It is clearly headed *Casual Employment Agreement* and its content is consistent with the concept of casual employment. Here comment needs to be made about Mr Edwards' claim he was not given a proper opportunity to consider the agreement. While that claim was made in his written brief it was not supported by oral evidence with it becoming very apparent Mr Edwards has little or no recollection of what was discussed during either the interview or induction. Against that I have the evidence of RSL's witnesses who say the option to take the agreement home for consideration was given but Mr Edwards' desire to work meant he was willing to sign immediately. I also note he does not claim to have challenged the agreement when he discovered its casual nature which is again inconsistent with his claim.

[23] In addition there are other documents such as Mr Hadfield's file note recording he was to introduce himself to the new casual employees and notes establishing access to various

systems and for the obtaining of clothing, all of which clearly identify the employees as casual.

[24] As already said, the documentary evidence leads to a conclusion the employment was, at least initially, casual. To that I add the fact the oral evidence also supports a conclusion the employment was initially casual.

[25] There were inconsistencies in Mr Edwards' evidence. While he says he obtained a temporary, but not permanent, job he says there was little or no discussion regarding duration of tenure and hours actually required. That is inconsistent with his assertion the employment was for one month and does not fit well with the concept of a temporary engagement performing a fixed roster of tasks as he says occurred.

[26] Indeed it would be fair to say Mr Edwards' oral evidence exhibited uncertainty about key events and his own understanding of his status. One example was his assertion that on his final day he told Mr Hadfield *I'm permanent, or at least I should be*. That is totally contrary to his assertions, repeated more than once, that he was never a permanent employee but fixed term.

[27] There is also the fact holiday pay was added to each pay at the end of each pay period. This is again consistent with casual employment and it was the fact payment had been made which led to the withdrawal of the holiday pay claims.

[28] The conclusion Mr Edwards was employed as a casual is not, however, the end of the matter as it is well established employment arrangements can change.<sup>2</sup> The question is therefore whether or not that occurred here and the answer, I conclude, is no.

[29] The only evidence Mr Edwards' offers in respect of a possible change in his status is the conversation with Mr Jones though this evidence was sparse and again uncertain. Mr Edwards could not even hazard a guess as to when it occurred and gave no detail of what was said. Against that is clear evidence from RSL that it was highly likely a conversation about a fixed term role not only occurred, but that Mr Hadfield, though not a direct participant, got the second hand impression Mr Edwards was an applicant. The problem for Mr Edwards is his own assertion Mr Hadfield was mistaken as he never applied. Indeed his

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<sup>2</sup> For example, *Barnes (formerly Kissell) v Whangarei RSA (Inc.)* [1997] ERNZ 626 and, more recently, *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225

comment was he didn't like the salary. It follows his status could not have changed this way and there is no suggestion change occurred in any other way.

[30] Here I note the concession that for a brief period Mr Hadfield and his supervisor had agreed he would work each day. This, I conclude, did not change the nature of the employment due to the fact the evidence shows this was discussed, agreed and very temporary. In any event I note Mr Edwards did not rely on this and the evidence it occurred came from RSL.

[31] There is then evidence Mr Edwards raised the issue of non-payment for two public holidays – Labour Day and Canterbury Anniversary. He was told they would not be paid as his tenure was not yet long enough for RSL to conclude they would otherwise have been working days. He appears to have accepted this as he did not challenge that at the time but instead left it till after termination.

[32] Finally I note the summary of Mr Edwards' hours which, despite his willingness to work, show inconsistencies in both days worked and hours worked each day, which suggest casual employment as opposed to the rostered full time role Mr Edwards asserts he had. His one attempt to explain an absence failed with his putting it down to weather. After some tooting and froing that explanation fell flat with the discovery there was minimal rain that day and definitely not enough to have seen work cancelled.

[33] Having considered the evidence I conclude Mr Edwards was engaged as, and subsequently remained, a casual employee.

[34] That means that in the same way there was no obligation on Mr Edwards to report for work, there was no obligation on the employer to offer work. His cessation was, therefore, simply the ending of the agreement in accordance with its terms though I do note, in this regard, it was also in accordance with RSL's expectations which the evidence suggests was explained during induction. It follows there was no dismissal, let alone an unjustified one. That claim must fail and with it goes the wage claim which related to the non-payment of a reasonable notice period. A second part of that claim relates to what Mr Edwards says was his last day but the evidence is he could not have worked due to the weather.

[35] The conclusion Mr Edwards was casual also means his claim for unpaid statutory holidays also fails. As a casual there was no obligation to offer work and as at the date of the two holidays no pattern had emerged which suggests either would have been a working day but for the fact it was a public holiday.

[36] With respect to Kiwisaver I note Mr Edwards acceptance he completed no Kiwisaver forms and that he did not raise any issue during the employment. Given the payslips show no Kiwisaver deductions were being made, this means the employer was in breach of its obligations in respect to compulsory enrolment but does not mean money is owing. The employer contribution is to match the employees and in the absence of an employee contribution there was nothing to match and nothing owing. It would appear the breaches that have occurred are within the scope of issues administered by the Inland Revenue<sup>3</sup> and beyond the jurisdiction of the Authority.

[37] The claims regarding failure to provide PPE also fail with the evidence showing Mr Edwards was afforded exactly the same provision as all casuals. The claim in this regard relates to the non-provision of boots and a wet weather jacket. Furthermore the claim is simply as stated in the statement of problem and Mr Edwards offered no evidence in that regard. RSL's response is that while these are available Mr Edwards had both from a previous employer which he chose to continue wearing. Mr Edwards did not challenge that evidence and for that reason I accept it and dismiss the claim.

[38] The expense claim again relates to jacket and boots. It is allegedly supported with an invoice for same but that faces one crucial problem. The invoice is dated two and a half years after Mr Edwards employment with RSL ceased and there is no evidence the two can possibly be related.

### **Conclusion and Orders**

[39] For the above reasons I conclude Mr Edwards was employed as, and subsequently remained, a casual employee. As a result his unjustified dismissal, wage and holiday claims fail.

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<sup>3</sup> Section 224 of the Kiwisaver Act 2006

[40] His Kiwisaver claim fails for reasons outlined in [36] above and the PPE claims fail for the reasons expressed in [37] and [38].

[41] Costs are reserved.

Michael Loftus  
Member of the Employment Relations Authority