

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 99
5425691

BETWEEN JACOB WILLIAM HARRIS
Applicant

A N D WHITE CLIFFS FORESTS
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Gaylene Harris, Advocate for Applicant
William Sharpe, Advocate for Respondent

Investigation Meeting: 28 February 2014 at Whangarei

Date of Determination: 17 March 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Harris) alleges that he is owed wages being public holiday pay, sick pay and annual holiday pay as a consequence of his permanent, continuing employment with the respondent (White Cliffs).

[2] White Cliffs say in response that Mr Harris is a casual employee and that he has been paid all of his wage entitlements on a *pay as you go* basis. However, at the commencement of the Authority's investigation meeting with the parties, White Cliffs conceded that, while they maintained Mr Harris was employed on a casual basis at the commencement of the employment relationship, at some point into the employment relationship, they accepted that Mr Harris had become a permanent employee.

[3] Accordingly, the Authority's principal task was to establish just when that point was reached where Mr Harris ceased to be a casual employee and became a permanent employee. In anticipation of a resolution of that central issue, White Cliffs had furnished to Mr Harris a draft individual employee agreement.

[4] The Authority, of its own motion, undertook to deal with this matter as urgently as it was able, on the basis that this was a continuing employment relationship and the Authority discerned from the engagement with the parties that there was an absence of rancour in the relationship, that each thought well of the other and wanted to get the matter resolved.

[5] It is common ground that Mr Harris was initially employed as a casual labourer in November 2010 and that he remains employed by White Cliffs to this day. Also employed by White Cliffs is Mr Harris's father and on the evidence the Authority heard, those two are the only hands-on employees of White Cliffs with the only other employee being the Manager, Mr Taylor.

[6] Mr Harris gave evidence to the Authority that he was initially asked by his father if he would be interested in 2-3 months work for White Cliffs. His evidence is that he immediately agreed and that from that day forward, he worked for White Cliffs most working days. Mr Taylor, the manager of White Cliffs, told the Authority that he had never said there was two to three months work; he had always thought of the engagement as casual.

[7] Mr Harris told the Authority in his evidence that with two exceptions only he worked every day of the working week and has done so since the employment commenced. The exceptions to that general rule are first when it is raining, at which point there is no work available, and second when Mr Harris has taken leave, principally because of bereavements.

[8] In practical terms, Mr Harris told the Authority that he simply travelled to work with his father and that the pair of them attended at the workplace every day and then proceeded to do the work that was available unless of course it was raining in which case they were sent home.

[9] Mr Harris was adamant that there was never any contact with him by White Cliffs as to when and where he was required to work, the only exception to that being

the initial contact from his father on behalf of White Cliffs when he was asked if he was interested in 2-3 months work.

[10] Of course, the Authority observes that 2-3 months work has stretched into more than three years work and continues to this day without any apparent diminution.

[11] When the Authority spoke with Mr Taylor, White Cliffs' manager, he confirmed that he had made no particular requests of Mr Harris other than to have Mr Harris's father inquire as to whether Mr Harris was interested in casual work. Mr Taylor confirmed to Authority that he did not contact Mr Harris himself during the employment and simply expected that he would turn up with his father each working day.

[12] It is apparent to the Authority that because of the concession made by White Cliffs at the beginning of the investigation meeting, it is accepted by both parties that the employment relationship is now a permanent employment relationship while it is equally apparent that both parties believed it was a casual employment relationship at its commencement. That latter point is borne out by the evidence for White Cliffs, who say their intention was to engage Mr Harris on a casual basis, and by Mr Harris's own evidence where he told the Authority that his conviction was that he was a casual employee for the initial 2-3 months of his employment, but having passed that period, had become a permanent full-time employee.

[13] It follows that the tipping point for all of the other consequences to flow, is a decision about when the employment relationship became a permanent employment relationship.

Determination

[14] On the face of the evidence, both parties accept that Mr Harris turned up for work with the only other outside employee, that he worked whatever hours the employer had available that day (subject to weather) and that unless he was physically away from the workplace for proper purposes (such as bereavement leave) he attended at work, provided work, and was paid for work.

[15] Indeed, the analysis provided to the Authority of the hours worked by Mr Harris and paid for by White Cliffs discloses a very regular pattern over the three

and a bit years of the employment. Looked at in the round, in the first and third years of the employment, Mr Harris worked in excess of 80% of the available 40 hours per week and in the second year of the employment he worked an average of two-thirds of the 40 hours per week available. Certainly, the evidence does not support a judgement that the employment was full time, but the question to be asked is whether the evidence supports permanent employment or casual employment.

[16] While the number of hours worked by an employee does not determine whether the employment is casual or not, it is fair to say that the greater the number of hours regularly worked in a week, the less likely it is that the employee is casually engaged.

[17] When that fact is married to the complete absence, in this case, of any request of the employer for Mr Harris to attend on particular days or perform particular tasks, it looks more and more likely that, by default as much as anything, the parties have entered into a permanent employment relationship, albeit not on a 40 hour week basis.

[18] In the Employment Court decision in *Jinkinson v. Oceana Gold (NZ) Ltd* [2009] ERNZ 225, His Honour Judge Couch indicated the proper approach to the determination of whether an employment was casual or not was to *look at the obligations assumed by the parties and then decide the nature of the relationship created*: para.[29].

[19] Later, His Honour had this to say about the difference between casual and ongoing employment: *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. (My emphasis). 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*: para.[40].

[20] Then in para.[41] Judge Couch says this: *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. ... Whether such obligations exist and their extent will largely be questions of fact.*

[21] In the particular case that the Employment Court was concerned with, the fact that Ms Jkinson *worked extensively and consistently, worked every week*, and that her work pattern *was consistent and highly predictable* meant that Ms Jkinson was entitled to have a *legitimate expectation of continuing employment*, so there was a corresponding obligation on the employer to continue to provide Ms Jkinson with ongoing work.

[22] It seems to the Authority plain on the facts that Mr Harris's situation with White Cliffs is in most respects analogous to Ms Jkinson's work Oceana Gold. The only significant differences between the factual matrix in the two cases is that Ms Jkinson was subject to a written employment agreement which described her as a casual employee and she worked on a roster. Neither of those aspects apply in the present case but notwithstanding that, the Authority is satisfied that in the present case, Mr Harris had a reasonable and legitimate expectation of continuing employment after that initial period and there was a corresponding obligation on White Cliffs to continue to provide that work.

[23] The Authority is satisfied that, after the initial period, Mr Harris became entitled to expect continuity of employment and a corresponding obligation rested on White Cliffs to provide that continuity of employment.

[24] It seems there has been a continuing intention on the part of both parties to persevere with the employment such that each week of work is followed by a succeeding week of work, in circumstances where it is difficult to see how either party could maintain the employment ceased at the end of one week and recommenced at the start of the next.

[25] Only at the very beginning of the relationship could it be contended that there was a prospect that the employment might not continue week on week. That is why the Authority is attracted by Mr Harris's contention that the casual nature of the employment ceased at the end of the initial 3 month period.

[26] Mr Harris seeks a range of remedies, not all of which he is entitled to. Certainly he is entitled to reimbursement of wages due and owing as a consequence of the change in his employment status but his claim for costs in bringing this claim must await discussion with White Cliffs before the Authority can consider it.

Moreover, the claim for compensation is not able to be considered; this is a wages claim and no personal grievance has been notified or argued.

[27] The Authority is satisfied on the evidence it heard that Mr Harris became a full time employee after three month's work at White Cliffs, that is on and from 17 February 2011. It follows that he is entitled to be paid the wage payments that would have applied from that date, as if he were permanently employed. Mr Harris has done a calculation that he is entitled to the sum of \$5636 in this regard. I prefer not to award that sum but to leave it to the parties to resolve matters by agreement. If agreement proves impossible leave is reserved for the parties, or one of them, to revert to the Authority for a decision to be made.

[28] In addition, the parties are to resolve and agree the terms of an individual employment agreement and to discuss whether White Cliffs are prepared to make any contribution to the costs of the proceeding, in particular the costs of Mrs Harris preparing material for her son's hearing. The parties will also need to arrange the reinstatement of Mr Harris's Kiwisaver account.

[29] The Authority observes that the parties may perhaps have confused themselves by debating whether Mr Harris was a full time employee or not, when the real question was whether he was a permanent employee or not. On the facts, the Authority is satisfied Mr Harris was not full time but equally satisfied that Mr Harris was permanently employed.

Costs

[30] If costs, or any other matter within the Authority's jurisdiction, remain unresolved after the discussions between the parties, leave is reserved for either party to apply to the Authority for further orders.

James Crichton
Member of the Employment Relations Authority