

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 106
5439194

BETWEEN PHILLIP HOLLAND
 Applicant

AND BOSCH IRRIGATION LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Phillip Holland in person
 Jeff van den Bosch and Gerard van den Bosch,
 representatives for the Respondent

Investigation Meeting: 24 June 2014 in Ashburton

Determination: 22 July 2014

DETERMINATION OF THE AUTHORITY

Phillip Holland's claim of unjustified dismissal is dismissed because he was a casual employee of Bosch Irrigation Limited at the time he was informed that the company would not offer him any further work.

Employment relationship problem

[1] Phillip Holland was employed by Bosch Irrigation Limited (Bosch) on 9 July 2013 and was dismissed on 26 November 2012.

[2] Mr Holland claims that he was unjustifiably dismissed and by way of remedy claims a year's loss of earnings, an apology and compensation for humiliation and embarrassment.

[3] Jeff van den Bosch, the assistant project manager, says Mr Holland was a casual employee and as such Bosch was able to let him go without facing a personal grievance of unjustified dismissal.

The issue

[4] The Authority needs to determine whether or not Mr Holland was a casual employee. If Mr Holland was a casual employee then Bosch was entitled to stop providing work to him in the way that it did and his claim of unjustified dismissal cannot be investigated and determined by the Authority.

The investigation meeting

[5] I heard sworn or affirmed evidence from Mr Holland, Jeff van den Bosch and Gerard van den Bosch. As permitted under s 174 of the Employment Relations Act 2000 (the Act) I have not set out all evidence and submissions received but state my findings of facts and law and conclusions on the matters requiring determination.

[6] When I refer to Mr van den Bosch below I am referring to Jeff van den Bosch whose evidence was the most relevant. Where there was a conflict in Mr Holland and Mr van den Bosch's evidence I prefer Mr van den Bosch's evidence for its consistency and clarity of recollection. Mr van den Bosch also readily made concessions, some of them against Bosch's interest, in response to my questions. Whereas Mr Holland's answers to my questions were at times evasive.

Factual background

[7] Mr Holland began work on a project managed by Bosch when he was engaged as a digger driver by a man who contracted to Bosch. On Mr Holland's second day at work he was told by that contractor that he would be paid by Bosch. Mr van den Bosch's evidence is that the contractor asked him if Bosch could take over employing Mr Holland. Mr van den Bosch was told Mr Holland was a casual employee who was expected to work three days a week.

[8] Mr van den Bosch agreed with the contractor that Bosch would take over Mr Holland's employment. However, he did not talk directly to Mr Holland about

that and did not give him a written employment agreement. There was no discussion about what the nature of the employment would be or how many hours a day or days of the week would be worked. Bosch accepted that Mr Holland's hourly rate would remain the same as the contractor had agreed to pay him.

[9] After a short time of Mr Holland driving the digger Mr Van den Bosch asked him if he wanted to learn how to weld plastic pipes and sent him on a one day course to learn to do so. After that Mr Holland worked laying and welding pipes. There was work available for Mr Holland most weeks for six days; being Monday to Saturday.

[10] Throughout the period of Mr Holland's engagement if Mr Holland did not wish to be available for work he would simply tell Mr van den Bosch that and also tell him when he expected to be available for work again. For most at that time Mr van den Bosch accepted that Mr Holland could make himself available for work as he saw fit.

[11] After three weeks of working 6 days Mr Holland made himself unavailable for one whole week and then the following week was not available on Wednesday and Saturday. The week after that he made himself unavailable for work the whole week and on the following Monday, although he worked the rest of that week. He worked between 4 and 6 days a week for the next 7 weeks.

[12] The next week he worked on Monday and Tuesday and made himself unavailable for the rest of the week and from Monday through to Thursday the following week. He then worked for three full weeks and then from Monday to Thursday, 19 to 22 November 2012, before taking time off to attend his brother-in-law's headstone unveiling in the North Island.

[13] Mr van den Bosch and Mr Holland disagree about whether Mr Holland told Mr van den Bosch he would return to work for the full day on Monday, 26 November 2012. I accept Mr van den Bosch's evidence that based on what Mr Holland told him he expected Mr Holland to begin work at the usual starting time of 7.30am. Mr Holland did not go to work at 7.30am.

[14] The parties agree that Mr van den Bosch rang Mr Holland later that morning (around 10.30am) to ask him to come and see him as soon as he could at the office. Mr Holland answered the phone and told Mr van den Bosch that he was driving

between Christchurch airport and the work site having flown in to Christchurch that morning.

[15] Mr Holland went to Mr van den Bosch's office at about 11.15 am. Mr Holland and Mr van den Bosch have different recollections of what was discussed but both agree that Mr van den Bosch told Mr Holland that Bosch would not offer him any more work. Mr van den Bosch says that he told Mr Holland that he was not going to offer him any more work because Bosch believed that he had been falsifying his timesheets by stating that he started work 30 minutes earlier than he actually started¹ and that he did not think Mr Holland's "heart was in it".

[16] Mr Holland left after the meeting and was paid for the last days that he had worked. Mr Holland has only had casual or short-term work since 26 November 2012. However, Mr Holland says that until recently he has not sought any ongoing work and any work he has done had been offered to him.

Was Mr Holland a casual employee?

[17] I need to decide what Mr Holland's employment status was at the time Mr van den Bosch told him Bosch no longer wished to engage him. It may be that his employment status changed over the period he was engaged by Bosch. The law distinguishes casual employment from ongoing employment by asking if there:

... was sufficient mutuality of obligation between the parties at that time. ...Whatever the nature of the employment relationship, the parties will have mutual obligations during periods of actual work or engagement. 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.²

¹ Mr van den Bosch said that this was the main reason that Mr Holland was let go. I make no finding on whether Bosch's view of Mr Holland's behaviour was justified or not. I note that Mr Holland offered Mr van den Bosch the explanation of being told he could claim 30 minutes travel time when he first filled in a Bosch timesheet.

² *Jinkinson v Oceana Gold (NZ) Limited*, [2009] ERNZ 225 at paragraphs [39] to [41]

[18] Mr Holland says that when he became aware that Bosch would be paying him he asked the Bosch foreman at the time for a written employment agreement but that he was never provided with one.³ Because he was not provided with a written employment agreement he decided that he was able to take or leave work as it suited him and so he could tell Bosch when he would not be available for work. However, Mr Holland says that once he was dismissed he obtained legal advice to the effect that he should have been provided with a written employment agreement and that he was not a casual employee and so Bosch could not legally dismiss him as it had done.

[19] Mr Holland says that his expectation was that there would be work available for him when he wanted it for the duration of the project, which ended in October 2013. Both parties agree that they never discussed with each other what the nature of Mr Holland's engagement with Bosch was.

[20] Mr van den Bosch says that during Mr Holland's employment he believed Mr Holland was a casual employee. He initially reached that view because he was told by the contractor that first engaged Mr Holland that he was a casual worker. He says that at times when Mr Holland told him he would be unavailable for work he made no objection as he believed Mr Holland had the right to decide what days he worked because he was a casual employee.

[21] There was no roster of work and generally it was decided the day beforehand whether there was sufficient work for Mr Holland the following day, which there usually was.

[22] Mr van den Bosch says that at times Mr Holland did not return from to work after his time away when he said he would and if Mr van den Bosch asked him why Mr Holland would respond something like "I can come back when I like because I'm a casual". Mr van den Bosch also says that when he asked Mr Holland why he did not turn up for work on Monday 26 November 2012 at 7.30am Mr Holland said "I am on higher ground because I am a casual".

³ Mr van den Bosch said he was not aware that Mr Holland had asked for a written employment agreement but that Bosch was now aware of its obligation to provide written employment agreements to all employees, whether they are casual employees or not.

[23] Mr van den Bosch says that because Bosch considered Mr Holland a casual employee throughout his employment it paid him 8% holiday pay with each weekly pay. That is borne out by the pay slips supplied to the Authority.

[24] Mr Holland says that at times during a work day it might become obvious that there was not enough work for all the workers who had begun work that day and he would say *I'll go home if you want me to* and would leave the work site. Mr van den Bosch agreed that Mr Holland sometimes worked shorter days than the Bosch employees on the project.

Determination

[25] For the following reasons I consider that there was not sufficient *mutuality of obligation* to amount to an on-going employment relationship or a fixed-term employment relationship between Mr Holland and Bosch:

- Bosch was able to offer work regularly and Mr Holland was free to accept that offer of work or not. Bosch did offer work regularly and could have done so for the period of the project. However, Mr Holland was not obliged to accept the work and on a reasonably frequent basis did not accept it. Bosch was not obliged to offer the work to Mr Holland, a fact which he accepted when he would offer to leave work if there was not enough work for all workers on the project on a particular day.
- Bosch did not require any specific period of notice from Mr Holland if he was not going to work on the project, although he usually told Mr van den Bosch in advance when he planned not to work.
- Mr Holland demonstrated that he did not consider himself bound to accept all the work Bosch could offer him by telling Mr van den Bosch on more than one occasion that he was entitled to not come to work when he said he would because he was a casual employee.
- While Mr van den Bosch enquired why Mr Holland had not worked on days that he said he would be at work, or start at the time he was expected to do so, he accepted that Mr Holland, as a casual employee, could choose not to work.

- Although the nature of an employment relationship can change from casual to on-going over time because of the behaviour of the parties and the regularity and frequency of work I do not consider that it did so in this case. Mr Holland and Mr van den Bosch each viewed the relationship as casual at all times and behaved accordingly.

[26] Mr Holland did not have an obligation to Bosch outside of his periods of work for it. He was not bound to accept work from Bosch. He was a casual employee. Therefore, at the time Bosch decided not to continue to offer Mr Holland work it was entitled to do so without Mr Holland being entitled to bring a personal grievance claim for unjustified dismissal. Mr Holland's claim is dismissed.

Christine Hickey
Member of the Employment Relations Authority