IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 296/10
5165109

	BETWEEN	WAYNE HOLMES Applicant
	AND	NEW ZEALAND INDUSTRIAL ABSEILERS LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Rose Alchin for Applicant Roger Clark for Respondent
Investigation Meeting:	3 March 2010 at Hamilton
Submissions Received:	26 March and 8 April 2010 from Applicant 26 March and 1 April from Respondent
Determination:	23 June 2010

DETERMINATION OF THE AUTHORITY

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[1] Mr Wayne Holmes was employed by New Zealand Industrial Abseilers Limited ("NZIAL") in March 2008. Mr Holmes' employment was subject to a written employment agreement. Mr Holmes makes the following claims:

- That his employment was of an ongoing nature and not casual;
- That his employment was affected to his disadvantage by unjustifiable actions of NZIAL;
- That he was unjustifiably dismissed on 4 May;
- That he is entitled to recover one weeks annual leave wrongly used as payment for the first week of an ACC related injury;
- That NZIAL has breached the Wages Protection Act by making unauthorised deductions from his final pay.

[2] NZIAL denies the claims. With respect to the claim that Mr Holmes' employment was ongoing, NZIAL says Mr Holmes was employed as a casual employee as it could not guarantee long term work because it did not have any long term work contracts in place.

Nature of the employment relationship

[3] The first question that needs to be determined is the nature of the employment relationship. NZIAL says it was casual and that when the work ran out it had no obligation to offer more work. Mr Holmes says it was permanent ongoing employment.

[4] The parties signed a written employment agreement on 3 March 2008. Mr Holmes had worked as a permanent employee for NZIAL previously in about 2005 and had left of his own volition. It was common ground that in March 2008 he approached Mr Wayne Weatherly, a Director and Shareholder of NZIAL and enquired as to whether Mr Weatherly had any work available for him.

[5] I have concluded that this initial approach was made on or around 1 March 2008 as this is the date Mr Holmes has dated his completed Application for Employment Form.

[6] The agreement signed by the parties states:

> This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The parties to this agreement agree that the nature of the relationship is a casual "as required" employment relationship. The Employer agrees to provide reasonable notice to the Employee regarding when they will be requested to perform duties and the Employee agrees to take reasonable steps to be available for work during **as required.** The duration of this casual agreement is as follows:
>
> (i) This casual agreement shall continue in force until such time as it is terminated by either party pursuant to the termination clause in this agreement**.**

[7] Mr Holmes says that he signed the agreement the day he started work. He says it was never pointed out to him that the agreement was for "casual" employment and that when he received a copy of the agreement he was shocked when he saw that it was a casual employment agreement.

[8] In this regard I have preferred the evidence of Mr and Mrs Weatherly that they specifically discussed with Mr Holmes that the employment would be casual as work could not be guaranteed. Mr Holmes himself has initialled the clause which refers to

the employment agreement as being a "casual" agreement which tends to support Mrs Weatherly's evidence that the specific nature of the employment was discussed and agreed by Mr Holmes.

[9] In coming to conclusions as to the real nature of the employment relationship the Authority must take into account all relevant matters and the parties' description of their relationship is not to be treated as determinative.[1]

[10] The fact that the parties have described Mr Holmes employment as "casual" is one of the relevant matters to be taken into account but the more important enquiry must be into the true nature of the relationship. If the result of that enquiry is at odds with the label given to it by the parties substance should prevail over form.[2]

[11] It is not uncommon for employment relationships to alter over time and in submissions made on behalf of Mr Holmes there is reference to a number of decisions of the Employment Court and Court of Appeal where arrangements as to the nature of the employment relationship changed through the course of the relationship as a result of actions by the employer and the way in which the employment relationship operated on a daily basis.

[12] In *Jinkinson* the Court considered the distinction between casual, and ongoing employment and 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 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.
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> 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.[3]

[13] The employment agreement has clear indications that the intention of the employment arrangement was to be casual. However, there are also clauses within the

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[1] Employment Relations Act 2000, section 6.
[2] *Jinkinson v Oceana Gold (NZ) Ltd*, [2009] ERNZ 225.
[3] Ibid at [40].

agreement which indicate that the relationship was intended to be ongoing. For example the agreement provides for annual performance reviews and the setting of annual performance objectives.

[14] The agreement also requires Mr Holmes to take reasonable steps to be available when required. This is not consistent with a casual relationship which places no obligation on an employee to be available for work.

[15] The Holidays and Leave entitlement clause in the agreement provides for an 8% "pay as you go" arrangement. However, in answer to questions at the investigation meeting Mrs Weatherly explained that the employment agreement was one they had developed based on the Department of Labour Agreement Builder and that she had included the clause but never acted on it believing it was optional.

[16] Other clauses which are inconsistent with a casual employment arrangement include a restraint of trade provision which extends for 2 years beyond the employment relationship, redundancy provisions, a requirement to provide 2 weeks notice of termination of the relationship and a clause dealing with abandonment of employment. A number of these provisions imply that if the obligations within the clauses are not met, Mr Holmes could not decline the work offered to him.

[17] The employment agreement imposes ongoing mutual obligations on the parties. However, it also specifically provides no guarantee of hours of work. I find the obligations set out in the agreement while not determinative of the employment relationship, does include obligations which are inconsistent with a causal employment relationship.

[18] It was argued for Mr Holmes that the fact that he signed himself off as a Supervisor was a strong indicator that Mr Weatherly considered him more than a casual employee. It was common ground that the way in which the company operated the Team Leaders and Supervisor structure that Supervisors had full authority on the job site and were involved with the client ensuring matters were running smoothly. Team Leaders however, had no authority and would constantly be in contact with Mr Weatherly to discuss and resolve any issues.

[19] Mr Weatherly says he discussed with Mr Holmes at the time of his employment that he could not take Mr Holmes on as a supervisor as he could only offer Mr Holmes

a casual contract but that depending on work availability there could be opportunities for Mr Holmes to be a Team Leader on small projects.

[20] I am satisfied that where Mr Holmes has signed himself off as a "Supervisor" in his log book, he was indeed acting as a Team Leader with no authority. When Mr Holmes was working on site in Australia it was accepted that he did make some decisions daily to avoid the necessity to call Mr Weatherly. It was common ground however, that Mr Weatherly was on site in Australia during the commencement of the project to get the project up and running and had made arrangements for full use of the telephone so that Mr Holmes could contact him as often as necessary. Besides which, it was common ground that the project was relatively straightforward so it follows that Mr Holmes would not need to make much contact with Mr Weatherly.

[21] With regard to the frequency of work I accept Mr Weatherly's evidence that at the time of Mr Holmes's engagement his tenders for a number of projects were successful. For Mr Holmes this meant that at the end of one project he was able to be employed straight away on the next project which gave him the sense that his work was ongoing.

[22] Supporting his claim that his employment was more than casual Mr Holmes says annual leave had to be applied for in advance. There was a dispute between the parties as to whether Mr Holmes had indicated previously to Mr Weatherly that he would be taking time off in the first week in March 2009. I have preferred the evidence of the Respondent that Mr Holmes had advised Mr Weatherly he was intending to take time off in the first week in March.

[23] On 27 February Mr Weatherly had inspected Mr Holmes' kit bag and discovered he had left it in an unclean and untidy state. Believing Mr Holmes was embarking on a period of leave he contacted Mr Holmes to discuss the state of his kit bag. That evidence seems more logical than Mr Holmes evidence that he was rung by Mr Weatherly and told to take leave the following week.

[24] Also indicative of an ongoing relationship is the evidence that during a two week period when not a lot of work was available at which time Mr Holmes approached Mr Weatherly and advised him that financially he had to receive at least $500 each week. Even though business was suffering from a downturn and Mr Holmes was not required to work the hours, Mr Weatherly agreed to pay him at least

$500 each week. There was no contractual or other obligation on Mr Weatherly to pay this money to Mr Holmes.

[25] Further, Mr Holmes had an obligation to undergo training, the cost of which was initially met by the employer. However, the documents provided to the Authority show that if Mr Holmes left within 12 months of completing the training there was an obligation on him to refund NZIAL the costs of the training. Mr Weatherly acknowledged at the investigation meeting that a deduction for the costs of the training courses attended by Mr Holmes, was made from Mr Holmes' final pay because he left his employment within 12 months of completing the training courses. I have concluded that this action by Mr Weatherly indicates that he was treating Mr Holmes as if he there was an obligation of ongoing employment by Mr Holmes.

[26] Finally, in March 2009 Mr Holmes was hospitalised and did not return to work until 6 April 2009. During this time Mr Holmes was in receipt of ACC payments plus payment of holiday pay for the first week. Mr Weatherly made a number of enquiries of ACC as to the correct handling of Mr Holmes pay for the absence and in particular for the first week.

[27] This action by NZIAL is strongly indicative of an acceptance by Mr Weatherly that it needed to treat Mr Holmes employment as ongoing. In a true casual situation, Mr Weatherly would have simply accepted that Mr Holmes was no longer available for work and done nothing further. The time off related to a previous non- work related accident and NZIAL had no obligations to make any payments of any kind.

[28] I find Mr Holmes was offered and accepted a casual employment arrangement on a project by project basis and as work was available. However, I find that this arrangement altered during the course of Mr Holmes' employment and that at the time this employment relationship ended Mr Holmes employment relationship was ongoing.

Unjustified disadvantage

[29] Mr Holmes claims he suffered disadvantage in his employment as a result of two written warnings, which he says were unjustifiable, and by unauthorised deductions from his final pay.

[30] I am required to examine NZIAL's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[31] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether NZIAL's actions disadvantaged Mr Holmes in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.[4]

[32] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If NZIAL can establish justification for a disadvantageous action, there is no grievance.[5]

[33] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.[6]

Written warnings

[34] The issuing of a warning, if unjustified, constitutes an action affecting a worker to their disadvantage.[7] The issuing of a warning must be accompanied by a fair and reasonable process.

[35] Mr Holmes received two written warnings the first dated 2 March 2009 and the second dated 14 April 2009. Both written warnings relate to breaches of NZIAL's policy with regard to kit bags.

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[4] *Mason v Health Waikato* [1998] 1 ERNZ 84
[5] *McCosh v National Bank*, unreported, AC49/04, 13 September 2004
[6] *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000
[7] *Alliance Freezing Co (Southland) NZ v NZ Amalgamated Engineering etc IUOW* [1991] NZLR 533 (CA); *Clegg v NZ Sugar Company Limited*, unreported, 19 October 1998, Auckland Employment Court 3/98, Colgan, J.

[36] The bags have a value of $5,000 and contain equipment and tools which assist employees to undertake their work safely. NZIAL requires the equipment contained in the kit bag to be kept in a clean and tidy condition at all times.

[37] On 27 January, and 13 February 2009 at staff meetings all employees were reminded that if they did not adhere to keeping their kit bags clean and tidy, written warnings would be issued. The correct maintenance and operation of the equipment and tools in the kit bags are essential to ensure Mr Holmes could undertake his work safely.

[38] There was evidence to show that Mr Weatherly did not follow any process in issuing the warnings. Therefore, I am satisfied the warnings were issued in the absence of any notion of procedural fairness and as that is not how an employer acting fairly and reasonably would have acted the warnings are unjustifiable.

[39] Mr Holmes has been successful in this aspect of his claim for unjustified disadvantage and is entitled to a consideration of remedies.

Unauthorised deductions

[40] In August 2008 deductions amounting to $101.75 were made from Mr Holmes wages for the purpose of reimbursing Mr Weatherly for a communications radio he had dropped and broken. The radio ought to have been tied off to Mr Holmes but was not.

[41] Mr Holmes evidence on this point was equivocal. Initially he denied agreeing to any payments being made for the radio, however, after closer questioning he accepted that he had discussed the issue with Mr Weatherly and had agreed to reimburse NZIAL for the cost of the communications radio and requested that the amount be deducted from his wages in two consecutive weeks. The employment agreement between the parties allowed for such requests and subsequent deductions.

[42] I find the deduction from Mr Holmes final pay amounting to $101.75 was lawful and did not amount to an unjustified action by NZIAL.

Unjustifiable dismissal

[43] On 4 May Mr Holmes was given two weeks notice that his services were no longer required. Mr Weatherly advised Mr Holmes that he would not have to work out the notice period and would be paid in lieu.

[44] NZIAL relies on its understanding that Mr Holmes was employed on the basis of a casual employment agreement to support its contention that it was justified in terminating Mr Holmes employment. Mr Weatherly says that the work had started to drop off and he no longer required Mr Holmes to be available for work. For the reasons already set out in this determination I have found that the employment relationship was an ongoing relationship and not casual.

[45] The evidence shows that Mr Holmes' employment was terminated for a variety reasons. These reasons include his failure to maintain his kit bag to the standard required of him by NZIAL, the way he responded to Mr Weatherly when told his bag would be inspected again the following Monday and the fact that he had charged NZIAL for time spent cleaning his kit bag over the weekend.

[46] On Friday 1 May, Mr Weatherly spoke to Mr Holmes about purchasing new boots, and inspecting his kit bag on Monday 4 May. Given those instructions it seems that on the Friday there was no intention to terminate Mr Holmes employment. I have therefore concluded that work would have continued the following week.

[47] However, on Monday, 4 May Mr Weatherly met with Mr Holmes and advised him that his employment would be ending due to the fact that the Grafton project, on which Mr Holmes' was working, was coming to an end.

[48] Irrespective of the true reason for the ending of the employment relationship I find it was carried out in the absence of any notion of procedural fairness or consultation. I find the way NZIAL acted and its actions in terminating Mr Holmes' employment were not how an employer acting fairly and reasonably would have acted in all the circumstances. The dismissal is therefore unjustifiable and Mr Holmes is entitled to a consideration of remedies.

Arrears of wages

[49] Mr Holmes seeks to recover one week's annual leave he says was wrongly used as payment for the first week of an ACC related injury. Mr Weatherly says Mr

Holmes had previously arranged to take one week's holiday from 2 – 6 March 2009, something Mr Holmes disputes.

[50] On the Friday before the week of his leave and as a result of injuries suffered in a non-work accident two weeks earlier, Mr Holmes attended the accident and emergency centre. He was subsequently hospitalised and underwent surgery.

[51] Mr Weatherly arranged for Mr Holmes to be paid one week's leave and later, after advice from ACC, enquired of Mr Holmes as to whether he wished to have his annual leave reimbursed and to refund the money. Mr Holmes says he requested that he be paid sick leave instead of annual leave.

[52] I have accepted the evidence of Mr Weatherly that Mr Holmes had requested and been granted a weeks holiday from 2 – 6 March. Given that, when Mr Holmes advised Mr Weatherly on Friday 27 February that he would not be taking the holiday to the following week due to injury and requested sick leave instead, section 38 of the Holidays Act 2003 applied.

[53] The Holidays Act 2003 at section 38 provides for an employee who has been granted annual leave and becomes sick before the commencement of the scheduled leave, to be entitled to take sick leave instead of annual leave. The application of this clause is not discretionary but mandatory. There is no dispute that Mr Holmes had adequate sick leave to cover the weeks leave.

[54] I find Mr Holmes was entitled to take the week of 2-6 March 2009 as sick leave and should be reimbursed for the 1 week's annual leave as it would have continued to be an entitlement at the time of his dismissal.

Breach of the Wages Protection Act

[55] The Wages Protection Act requires express consent for any deductions to be made from wages. The employment agreement at clause 15.2 provides for deductions at the employees request and authorizes the employer to deduct at termination for any overpayment made to the Employee for leave taken in advance. This clause does not authorize deductions for any other purpose.

[56] The Job Description and House Rules set out the requirements with regard to training. This document forms part of the employment agreement by virtue of clause

2.2. The document specifies four courses that employees are required to complete as a minimum. The document requires employees to refund the cost of specified training courses if they leave their employment within 12 months of completing the course. However, the documents do not provide consent for any deductions to be made from any wages or final pay.

[57] Mr Holmes final pay slip shows the following deductions were made:

> $450.00 for attendance at an ATV course;
> $450.00 for attendance at a Four Wheel Drive course;
> $225.00 for attendance at a Confined Space course.

[58] Mr Holmes says he did not receive copies of the documents referred to. Whether Mr Holmes was aware of the obligation to refund the training costs or not, does not assist the Authority with respect to whether the deductions were lawful or not. The Job Description and House Rules do not meet the requirements of the Wages Protection Act as no express consent is provided for deductions to be made from wages or final pays. Further, the documentation only covers the course for confined space training.

[59] I find there was no express or other consent for Mr Weatherly to make the deduction of $1,125.00 from Mr Holmes' final pay. In 2005 Mr Weatherly and Mr Holmes reached a verbal agreement which was then confirmed in writing and signed by both parties which show an agreement was reached for specific deductions to be made from Mr Holmes final pay in relation to a training course undertaken by Mr Holmes in 2005. However, no equivalent documents or agreements exist with respect to the training undertaken by Mr Holmes in September and October 2008.

Remedies

Contribution

[60] With respect to the written warnings, Mr Holmes acknowledged that he was made aware that failure to keep his kit bag clean could result in warnings on his employment. He acknowledged at the investigation meeting that he had been spoken to at least 3 possibly 4 times about the state of his kit bag before any warnings were issued. Mr Holmes was clear in his evidence to the Authority that he had no intention of cleaning his kit bag in his own time.

[61] The uncontested evidence of NZIAL was that the kit bags contained safety harness equipment which was used every day for work and were worth in the vicinity of $5,000. Mr Holmes could give no satisfactory explanation as to why he took exception to the direction to keep the kit bag tidy and maintained. In this regard I find Mr Holmes contribution to the action giving rise to his grievance to be total and no remedy will be awarded to him.

[62] With respect to his dismissal, I find no contributory conduct on the part of Mr Holmes and therefore the remedies will not be reduced.

Lost wages

[63] Mr Holmes seeks payment of lost wages for the period 4 May 2009 to 15 March 2010. Mr Holmes took himself out of the New Zealand employment market on 2 August 2009 when he left New Zealand to take up employment in Australia. He then went to Canada to visit family. He gave no evidence as to how much his earnings have been since the dismissal.

[64] The onus is on Mr Holmes to prove the losses that he has sustained as a result of the dismissal and the evidence he has produced is inadequate for me to be able to put a figure on those losses. This should have been the subject of clear evidence.

[65] In the circumstances I find that I cannot award any reimbursement of wages lost as a result of the grievance.

Compensation

[66] Mr Holmes gave evidence as to the shock he felt at the dismissal and that he was upset and became depressed. In the circumstances of this case I consider the modest award of $5,000 to be appropriate.

Arrears of wages

[67] Mr Holmes has been successful in establishing that he should have been paid 1 week's sick leave instead of annual leave for the period 2 – 6 March ($800) and that the deductions amounting to $1,125 ought not to have been deducted from his final pay. These amounts should be reimbursed to Mr Holmes.

Mistaken Payment to Mr Holmes

[68] There is no dispute that following the ending of Mr Holmes employment an amount of $5,177.20 was paid in error, into his bank account. Mr Holmes has made

no efforts to refund this money which he accepts should not have been paid to him. Mr Holmes should now take steps to refund NZIAL the entire amount he received in error.

Summary of orders

[69] New Zealand Industrial Abseilers Limited is ordered to pay to Mr Holmes, within 28 days of the date of this determination, the following amounts pursuant to the Employment Relations Act:

- $5,000.00 for compensation pursuant to section 123(1)(c)(i); and
- $1,925.00 as arrears of wages pursuant to section 131.

Costs

[70] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr Holmes may lodge and serve a memorandum as to costs within 28 days of the date of this determination with submissions in reply being lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority