Determination Number: AA 205/05
File Number: AEA 9/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Terry King (Applicant)
AND	Taskforce Recruitment Limited (First Respondent)
AND	A1 Jobs Limited T/A Taskforce Recruitment (Second Respondent)
REPRESENTATIVES	Glenn Finnigan, Counsel for Applicant Stephen Langton, Counsel for Respondents
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	11 April 2005
SUBMISSIONS RECEIVED	26 April, 2 and 9 May 2005 2 June 2005
DATE OF DETERMINATION	

DETERMINATION OF THE AUTHORITY

[1] An employment relationship problem which remained unresolved after mediation, has been referred to the Authority for investigation and determination. The applicant Mr Terry King complains that he was unjustifiably dismissed by one or other of the respondents Taskforce Recruitment Ltd and A1 Jobs Ltd. Mr King also complains that his bonus entitlement was not paid in full by his employer.

[2] As it happened, Mr Finnigan and Mr Langton both in final submissions urged that the respondent Taskforce Recruitment Ltd was the employer at material times. The facts and the law point to that conclusion and I find accordingly.

[3] The contended dismissal of Mr King occurred in the following circumstances. Mr King and Mr Paul Royse of the first and second respondent companies (referred to as "TRL" and "A1" for short) had discussions about further work for Mr King after a particular assignment with Broadlands had ended in March 2004. Mr Royse sent Mr King an email on 29 March which began; *we'd like you to take on a temporary assignment with us doing outbound marketing of Taskforce Recruitment.* After detailing the hours of work and the remuneration for the job, the email concluded with the following;

> *Dependant on the success of the project we may then negotiate a contracted role to undertake this work in the future.*

[4] Mr King was agreeable to working on the project and commenced on 14 April 2004. He worked full time for the next fortnight in an office where Mr Royse was located, and the two kept in close contact about the project and how it was progressing.

[5] After a fortnight Mr Royse asked Mr King not to come into work for a few days at the beginning of the week starting on Monday 3 May. He explained that there had been a hold-up with the flow of new material available for Mr King to work on. After taking the Monday off, Mr King returned to work where he was greeted by Mr Royse with the advice that his assignment was not going to be continued and that his job had finished.

[6] The evidence of Mr King was that Mr Royse had explained this advice by saying that he had found someone else who was able to do the job "quicker and cheaper". Mr Royse did not admit to using those words although he told the Authority, "I may well have said that". I find it is likely he did say something quite similar. That finding is consistent with his further evidence that on or about 30 April 2004 he had employed another person to continue the project that Mr King had been working on. About this Mr Royse candidly said in his evidence,*…the reality is that we continued on the project with someone else.*

[7] If what occurred was a dismissal then it was clearly an unjustified dismissal. Mr Royse was obviously dissatisfied with the way Mr King was going about the job and with the results he was getting. I do not consider that the viability of the project itself was reviewed by Mr Royse and that for that reason he decided not to proceed further with it. This was not a redundancy situation because the position remained, although Mr King was replaced in it.

[8] Whether or not there was any basis for the employer to have concerns about Mr King's performance, no attempt was made to follow any procedure, and certainly no fair and adequate procedure, to properly address such problems with him. The news that he had been replaced in the job was the first Mr King heard of any dissatisfaction with him. Instant dismissal for performance reasons after working for only two weeks on a new project, is likely to be justifiable in very few cases, if any, and this is not one of them.

[9] Returning however to the fundamental question of whether the termination of Mr King's employment by TRL occurred by dismissal, the answer to that depends on the precise terms of the contractual relationship that had purportedly existed between TRL and Mr King since September 2003. Those terms are documented under the heading "Employment Contract (Temporary Staff)". Both Mr King and TRL signed the contract under which the company was described as;

> *1.1……a personnel consultancy which employs me* [Mr King] *as a temporary employee to work on assignments ("Assignments") for third parties ("Clients").*

[10] Another term provided the following;

> *5.2 Due to the nature of my temporary employment, I understand that the length of any Assignment may be reduced without notice.*

[11] A liberal construction of clause 5.2 above would permit either TRL or it's client to reduce the length of the assignment without notice, and it would also permit the reduction to be total rather than just partial.

[12] As well as clause 5.2 which was potentially highly advantageous to TRL and its clients and correspondingly disadvantageous to Mr King, there was an express term disentitling Mr King to any remuneration from TRL when not working on an assignment provided by the company to a client. There was no express obligation on the part of TRL to provide its temporary employee any assignments or even to actively seek assignments for him.

[13] I find that in reality, with no work and no pay, there was no subsisting employment relationship in between assignments and it was a fiction for the contract to suggest otherwise. The contract purports to provide temporary employment for Mr King at the will of TRL, as and when the employer sees fit. At best, in the period between each bout of temporary employment there may have been an agency agreement.

[14] A further highly unusual if not irregular term of the contract expressly permitted TRL to unilaterally vary the contract at any time. However the crowning term of the contract permitted TRL to terminate Mr King's employment "at any time without notice." It is a matter of implication that lawful grounds would be needed to justify such summary dismissal.

[15] The liberties taken by TRL for itself in the drafting of this "Employment Contract" might be explained by the references in it to the Employment Contracts Act 1991, except that that statute had been long repealed by 2003 when the contract was executed by Mr King.

[16] The defence by TRL of its actions against Mr King on 4 May 2004 is a supple one, bending backwards and forwards to fit around different clauses in the employment contract and also around the separate legal personality of TRL and A1.

[17] As I understand one line of evidence and argument, it is that the temporary assignment referred to in the 29 March email of Mr Royse was with A1 and that clause 5.2 had been invoked to reduce the length of the assignment to nothing. That line continues with the proposition that despite the reduction of his assignment Mr King remained employed by TRL, although without work or pay. A quite different line taken was that Mr Royse had terminated the employment in reliance upon clause 17 of the contract. If that was the case, as maintained by Mr Royse in his evidence, then the termination was the action of TRL and was therefore a dismissal from the contended subsisting employment contract.

[18] I reject the chameleon defence presented. Although TRL and A1 as registered companies had separate legal personality, there was little distinction maintained between them in the running of the Taskforce Recruitment business. The 29 March email did not refer to A1 as a client Mr King was assigned to and Mr Royse agreed that he had not mentioned A1 in that regard. The defence based around clause 5.2 is simply an opportunistic one. I reject the proposition that although assignments were to be in relation to "third parties" or "clients," it was contemplated under the Employment Contract that TRL/A1 would be a client of itself by wearing at the same time the hats of Personnel Consultancy, Client and Employer.

[19] Even if clause 5.2 had been invoked the reality remains that the total reduction of the assignment also brought about a termination of the employment by dismissal.

[20] Further I find that TRL simply tried to maintain a charade when it wrote to Mr King in September 2004, over three months after his assignment had been terminated, advising him that despite that termination he had remained employed by TRL.

[21] TRL was too clever by half in drafting the "Employment Contract" to try and minimise its obligations owed to employees. It also seems not to have heard of the requirements of s.66 of the Employment Relations Act 2000 (the current statute) with regard to fixed term employment. As TRL failed to satisfy those requirements it follows that it was not permitted to agree to fixed term employment. It further follows that the employment was permanent but was terminated at the initiative of TRL and therefore by the action of dismissing Mr King.

[22] I find that looked at on any reasonably arguable basis the employment ended with dismissal.

Further I find that the dismissal was completely unjustified, as there were no grounds for it and there was no fair procedure even attempted to be applied to it.

[23] Mr King is entitled to the personal grievance remedies of reimbursement and compensation, as have been claimed by him. The amounts of these need no reduction for contribution as there was nothing he did in his performance of the work that could be regarded as blameworthy. In the two weeks he was employed Mr King was not told by Mr Royse that there was a problem with his work and it follows that he was not given an opportunity to improve his performance, as required to justify a dismissal for performance. There was no consultation or discussion at all before dismissal was abruptly pronounced on 4 May (and in the presence of bystanders).

[24] I accept the evidence of Mr King and his wife as to the humiliation that was suffered by him through being summarily dismissed without cause. Suggesting to him in September 2004 that he was still employed aggravated his hurt feelings.

[25] As reimbursement for five weeks wages that I am satisfied Mr King lost, TRL is ordered to pay him $3,650 under s.123(a) of the Act. The claim for bonus payments was withdrawn.

[26] As compensation for hurt feelings and general distress that I am satisfied Mr King suffered, TRL is ordered to pay him $7,000 under s.123(c)(i) of the Act.

[27] Costs are reserved to enable the parties to attempt settlement of the question, before any application is made back to Authority by Mr King for an order.

A Dumbleton
Member of Employment Relations Authority