IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 431
3300801

	BETWEEN	ANESH NARSINH Applicant
	AND	SWIFT ROOFING LIMITED Respondent

Member of Authority:	Helen van Druten
Representatives:	Claudia Serra, advocate for the Applicant Bryan Easton, counsel for the Respondent
Investigation Meeting:	24 April 2025 at Auckland
Submissions received:	2 May 2025 from the Applicant 9 May 2025 from the Respondent
Determination:	18 July 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Anesh Narsinh is a qualified roofer. He was offered work with Swift Roofing Limited (SWL) to start on 15 January 2024. Both parties disagree on the nature of that employment and dispute whether it was casual or permanent employment.

[2] Mr Narsinh also claims a breach of ss 4 and 65 of the Employment Relations Act 2000 (the Act) as he did not receive an employment agreement despite repeated requests. He also claims he was unjustifiably disadvantaged then dismissed in breach of s 103A of the Act as he was suspended without consultation and not provided with work as was agreed.

[3] Mr Michael Monga (as Director of SWL) says that he offered Mr Narsinh casual employment on a trial basis to help him out. He accepts that he did not provide a copy

of the employment agreement as he was not aware of the requirement to provide an employment agreement for a work trial. SWL disputes that Mr Narsinh was dismissed and says that he abandoned his employment.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Mr and Mrs Narsinh and Mr Monga. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave written closing submissions.

[5] A random name generator tool was used to identify a coworker from Mr Narsinh's previous employer. VMY are randomly generated initials and do not resemble the name of that person.

[6] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[7] SWL is an established roofing company based in Auckland. They engage several roofing crews to undertake longrun metal roofing work as required for clients. The company has three office employees and engages both waged roofers and roofing contractors, usually on a job-by-job basis.

[8] Mr Narsinh was previously employed by another roofing company and left on 21 December 2023 due to an altercation with another employee ("VMY"). On 22 December 2023, Mr Monga phoned Mr Narsinh as he was aware of the altercation and offered Mr Narsinh work at SWL.

[9] The parties recount the phone call of 22 December 2023 very differently. The parties agreed with each other concerning the circumstances that led to the call but had completely different recollections of what was discussed.

[10] Mr Narsinh said that he accepted work with SWL based on that phone call. He says that SWL verbally offered him work on the same terms as his previous role. His

previous role was permanent, 35-40 hours per week, 7.30am to 3.30/4.30pm and he had a ute and fuel card. He says that he was led to believe in the 22 December 2023 phone call that these would be his terms of employment with SWL.

[11] SWL say that no specifics were discussed in the phone call. Mr Narsinh was offered work on a casual basis, was not guaranteed any minimum number of hours and SWL would try to "fit him in" with its work.

[12] Mr Narsinh texted Mr Monga on 7 January 2024 to check arrangements for the following week. He was told by SWL to turn up on Monday 15 January 2024. No employment contract was ever provided.

[13] On 15 January 2024 as the first day of employment, Mr Narsinh was sent home as there was no work. He was contacted later that day by SWL who said there would be no work tomorrow either because it was expected to rain.

[14] Between 15 January and 28 February 2024, Mr Narsinh worked 169.50 hours as a roofer for SWL. After an arm injury on 27 February 2024, he took time to recover and was texted by SWL on 28 February 2024 to come back when his arm was better.

[15] On 4 March 2024 Mr Narsinh was told by phone that there was no work for two weeks because he and VMY could not be working together and there was no other job to place Mr Narsinh at that time.

[16] Mr Narsinh was offered office work by SWL on 6 March 2024 while he recovered but he did not accept this work as he was unsure whether he had ongoing employment.

[17] Matters escalated by phone and text message on the evening of 6 March 2024. On 7 March 2024, following a heated exchange of text messages the previous evening, it was confirmed in a phone call with Mr Monga that it had not worked out and that there was no position for Mr Narsinh at SWL. He was asked by text to return the work ute and did so.

The issues

[18] The issues requiring investigation and determination are:

(a) Was Mr Narsinh unjustifiably disadvantaged by way of suspension and unjustifiably dismissed?

(b) If SWL's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:

i. Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and

ii. Compensation under s123(1)(c)(i) of the Act

(c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Narsinh that contributed to the situation giving rise to his grievance?

(d) Has SWL breached s 4 and/or s 65 of the Act and if so, should a penalty be ordered?

(e) Should either party contribute to the costs of representation of the other party?

Analysis and Findings

Unjustified disadvantage by way of suspension

[19] Mr Narsinh claims that he was unjustifiably disadvantaged by way of suspension when he was told on 4 March 2024 that there was no work for him for two weeks. He said that he was not provided with an opportunity to comment (including whether he could work safely with VMY) and no reasons were given for his suspension.

[20] For this claim to be successful, Mr Narsinh must first establish that he was suspended. Applying the justification test in s 103A of the Act, the action of the employer, or how the employer acted, must be what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[21] To apply the test, the nature of Mr Narsinh's employment is important as the employer obligations may be different for a permanent, part-time or casual employee. As a casual employee, each period of employment is a separate period of employment. As a permanent employee contracted for 30 hours each week, the employee could

expect 30 hours of work each week unless there was a fair and reasonable reason not to do so.

Nature of employment

[22] The parties dispute the nature of Mr Narsinh's employment. Mr Narsinh says that he was a permanent employee as that is what he had been offered in the phone call on 22 December 2023. SWL says that Mr Narsinh was a casual employee. They were trying him out on a trial basis, the arrangement proved unsuccessful and Mr Narsinh ultimately chose to abandon his employment.

[23] With no written employment agreement, the Authority must therefore determine casual or permanent employment status by considering the real nature of the relationship and all relevant matters, including any evidence that indicates the intent of the parties at the time in determining the employment relationship.[1]

[24] The Employment Court in *Jinkinson v Oceana Gold (NZ) Limited* considered the factors relevant to determining whether the real nature of employment is casual or permanent.[2] At [47], the Court held that the following factors are relevant to determining the real nature of the relationship:

(a) the number of hours worked each week;
(b) whether the work is allocated in advance by roster;
(c) whether there is a regular pattern of work;
(d) whether there is a mutual expectation of continuity of employment;
(e) whether the employer requires notice before an employee is absent or on leave;
(f) whether the employee works to consistent starting and finishing times.

[25] Applying the factors from *Jinkinson* above, both parties gave evidence that there was no regular pattern of work and Mr Narsinh's pay report confirmed this. His days varied between four and five days and his hours varied between 19.50 and 31.5 hours per week over the seven weeks he was working.

[1] Employment Relations Act 2000, s 6(2).
[2] *Jinkinson v Oceana Gold (NZ) Limited* [2009] NZEmpC 255.

[26] There was no mutual expectation of specific hours. Mr Narsinh expected to work Monday to Friday 7.30am until 4.00pm as he had done with his previous employer. SWL intended that if there was not any work, he would not get paid.

[27] Throughout his employment period and as early as 15 January 2024 there was no indication that work was assured from one job to the next. Texts from Mr Narsinh illustrated this with queries about the next work period including "anything else you want me to do or head home?" and "is there any work for tomorrow?" On 14 and 28 February and again on 3 March 2024, Mr Narsinh was told to stay at home for various reasons.

[28] There were two occasions on 17 January and 7 February 2024 where Mr Narsinh asked about time off. Neither text provided a definitive indication of employment status one way or the other.

[29] Mr Narsinh relied almost entirely upon the 22 December 2023 phone call to assert that his employment was permanent.

[30] Having considered the evidence of both parties about that phone call, Mr Monga's account of that conversation seems more accurate. During his evidence, it was apparent that he had not thought things through in much detail before making the call to Mr Narsinh. He knew about the circumstances of Mr Narsinh's departure from his previous employer. Mr Monga said that he called Mr Narsinh because he wanted to help him, was not sure how but thought he ought to do something. He wanted to "fit him in as I could" and felt sorry for Mr Narsinh having lost his job shortly before Christmas.

[31] The timing of the phone call also supports this view for several reasons:

(a) The call was made the day after Mr Narsinh's previous employment was terminated and he was facing a Christmas break with no work. Mr Narsinh submitted it was a quiet job market at that time and he had no other employment confirmed.

(b) The call from Mr Monga was unexpected and even Mr Narsinh said he thought Mr Monga "was going to have a go at me".

(c) The call was on the last workday before Christmas when essential matters are getting finalised before the Christmas break. Mr Monga recalled a conversation with no specifics "not at that point of the year" supporting this approach.

(d) The job-by-job nature of many roofing contracts means that Mr Monga would have already sorted the New Year work allocations and therefore not provided details to the extent that Mr Narsinh recalled.

[32] In his evidence and written statement Mr Narsinh gave slightly different recollections of the wording used in the phone call. In his witness statement, Mr Narsinh recalls "Mike said I could come and work for him when the New Year started, and I would be on the same hours per week, hourly wage, company ute and fuel card that I had before…it would be full-time employment, starting on 15 January 2024".

[33] When asked about this in evidence, Mr Narsinh recalled a five-to-six-minute telephone discussion where Mr Monga said "come work with me. I'll match whatever [previous manager] gave you", "Christmas…come early", "lots of work on next year", "work not involving [VMY]" and "fuel card", "keep the ute over Christmas". All of those phrases could apply to a casual or a permanent employment agreement.

[34] The description of roofing industry practice also aligns with an 'as-needed' approach. Like many industries, the roofing industry has a lot of contractors, subcontractors and many of the roofing companies may work together from time to time and know each other. SWL explained that its schedules work several months ahead sorting labour for each contract. On 22 December 2023, when Mr Monga made the call to Mr Narsinh, he said that he was not sure about the details as roofing crews were already finalised for the first part of the year and he told Mr Narsinh this during the phone call. Any money Mr Narsinh earned would be coming out of the overall wages allocated for that job. In other words, any profit would need to be spread among the total number of employees assigned to the particular job requiring Mr Monga to discuss this with affected staff.

[35] During employment, Mr Monga referred to a trial period. This was considered but rejected as a potential indicator of permanent employment. SWL said that Mr Monga understood (incorrectly) a trial period meant that he had 90 days to decide what

was going to happen with Mr Narsinh's employment. Given the rest of Mr Monga's evidence, this blasé approach (as he described it) fits with the rest of his unfamiliarity with employment requirements.

[36] Mr Narsinh's representative also said that the ute was an indication of his permanent employment. Looking at the wider context, this is unlikely. SWL had several utes available at the time and said that it made sense for Mr Narsinh to have access to one if there was one to spare.

[37] There was not sufficient evidence in writing or verbally provided by Mr Narsinh that SWL was offering him permanent employment during the phone call.

[38] On balance, the Authority concludes that SWL intended the employment to be casual and the evidence supports this as more likely than not. As a casual employee, there was no obligation on SWL to provide work or pay wages when no work was offered. Returning to the s 103A justification test within the Act, SWL's action in not providing work for two weeks from 4 March 2024 was not unjustified because he was not a permanent employee. I find the company's actions to be that of a fair and reasonable employer given that Mr Narsinh was a casual employee. It follows that there was no suspension and Mr Narsinh's claim of unjustified disadvantage by way of suspension is unsuccessful.

Was Mr Narsinh unjustifiably dismissed?

[39] Casual employment denotes employment where the employee is employed when and if needed, and where there is no particular expectation of continuing employment. There is conversely no obligation on the employee to accept any particular engagement or offer of work from an employer.

[40] It follows then that an unjustified dismissal can only occur if the employee is dismissed during one of those periods of employment. There is no indication that this occurred. Mr Narsinh was offered further work on 6 March 2024. As he was injured, he was offered work in the office.

[41] As a casual employee, he did not abandon his employment either. He chose (as was his right) not to take up the work on 6 March 2024. Mr Narsinh's text message content on 6 and 7 March 2024 effectively ended any chance of an employment relationship. His claim for unjustified dismissal is unsuccessful.

Failure to provide an employment agreement

[42] Section 65 of the Act requires that the employment agreement must be in writing and, *inter alia*, must include any agreed hours of work or, if no hours of work are agreed, an indication of the arrangements relating to the times the employee is to work.

[43] Mr Monga admits that he did not provide an employment agreement. Therefore, on the face of it, SWL is liable for a penalty for breach of s 65 of the Act.

[44] Mr Narsinh repeatedly tried to get an employment contract from SWL and provided evidence of at least three attempts. Texts and an email between 19 January and 1 February 2024 show Mr Monga having mentioned that he was writing up a contract and "putting the 90-day trial clause in" but nothing eventuated.

[45] Mr Monga says that SWL had good intentions offering Mr Narsinh work and did not intend to mislead him. However, the relaxed approach to the employment documentation has consequences. By failing to provide Mr Narsinh with a written employment agreement and not responding to his repeated requests for clarity and documentation around his employment, SWL's inaction led to Mr Narsinh misunderstanding the nature of his employment. The company failed to communicate effectively with Mr Narsinh about his employment and had an obligation to do so.

[46] Mr Narsinh's penalty claim for a breach of s 65 of the Act as well as for a breach of good faith under s 4, are essentially duplicate claims that describe the same cause of action. In any case, for a penalty to be awarded for a breach of good faith under s 4A of the Act, it must be shown that the failure was deliberate, serious, and sustained or alternatively to undermine an employment relationship. There is no evidence that SWL met these thresholds for any penalty. No penalty is awarded.

Penalties

[47] In relation to breach of s 65 of the Act, the maximum penalty for any breach for a company is $20,000. It falls on the Authority to determine the quantum of any penalty imposed for a breach of the Act.

[48] Specific provision of a penalty for a s 65 breach in the Act emphasises the importance of providing a written employment agreement.[3] A written agreement between the employer and employee provides clarity and agreement on the fundamental terms and conditions of employment from the start. This in turn reduces the likelihood of disputes, provides the parties with wording to rely upon for any enforcement, formalises the intention of both parties to enter into an employment relationship and provides a statutory basis for their mutual good faith obligations.

[49] As an important and fundamental aspect of the Act, a penalty is warranted. Taking an objective view, a 5 percent penalty for SWL's breach seems appropriate and in line with other Authority and Employment Court decisions. This equates to $1,000 to be paid to Mr Narsinh.

Costs

[50] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[51] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Narsinh may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, SWL then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

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3 Employment Relations Act 2000, s 65(4).

[52] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[4]

Helen van Druten
Member of the Employment Relations Authority

[4] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.