

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 567  
3119958

BETWEEN

ANDREW STRATTON  
Applicant

AND

JONES FAMILY  
INVESTMENTS LIMITED  
Respondent

Member of Authority: Andrew Gane

Representatives: Applicant in person  
Esmari Bezuidenhoud for the Respondent

Investigation Meeting: 15 July 2022 at Auckland

Submissions and other: 20 July 2022  
material received:

Determination: 2 November 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Andrew Stratton claims he was unjustifiably disadvantaged and unjustifiably dismissed from his employment with Jones Family Investments Limited (JFIL). He seeks wage arrears, compensation, as well as reimbursement of legal costs.

[2] Mr Stratton also sought a penalty against JFIL for breaches of good faith, under the Employment Relations Act 2000 (the Act).<sup>1</sup>

[3] JFIL does not agree that it unjustifiably dismissed Mr Stratton and denies that it has committed any breach of good faith as alleged.

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<sup>1</sup> Employment Relations Act 2000, s 4A.

## **The Authority's investigation**

[4] This matter was set down for an investigation meeting on 15 July 2022. During the investigation meeting, I heard evidence from Mr Stratton. I heard evidence for JFIL from the human resources manager Ms Debbie Barker and general manager group and service operations Richard Driver.

[5] 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. In determining this matter, I have carefully considered all the material before me, including all the evidence by the parties and their submissions. With the concurrence of the Chief of the Authority, this determination has been issued outside the timeframe set out in s 174C(3)(b) of the Act.

## **Issues**

- [6] The issues for investigation and determination were:
- (i) Was Mr Stratton a “casual” employee, or was he a permanent part time employee?
  - (ii) Was Mr Stratton unjustifiably disadvantaged by JFIL?
  - (iii) Was Mr Stratton unjustifiably dismissed by JFIL?
  - (iv) If JFIL's actions were found to have unjustifiably disadvantaged and/or dismissed Mr Stratton, what remedies should be awarded considering:
    - (a) lost wages (subject to evidence of reasonable endeavours to mitigate this loss); and
    - (b) interest awarded on any lost wages; and
    - (c) compensation for hurt, humiliation and injury to feelings?
  - (v) If any remedies are awarded, should they be reduced under s 124 of the Act for any blameworthy conduct by Mr Stratton that contributed to the situation giving rise to his grievance?
  - (vi) Did actions by JFIL breach good faith obligations and if so, should a penalty be imposed under the Act?
  - (vii) Should either party contribute to the cost of representation of the other party?

## **Background**

[7] JFIL is an appliance company which is in the business of supplying European appliances. JFIL employed Mr Stratton as a delivery installer on a casual individual employment agreement (IEA) on 9 March 2020 and Mr Stratton commenced employment on the 11 March 2020. Mr Stratton also signed a memo confirming agreement to work on a casual basis dated 9 March 2020.

[8] Mr Stratton says Mr Driver later requested whether Mr Stratton would work 4 days per week, plus some Saturdays, for JFIL. He also said they had discussions around whether he wanted to be permanent part-time. Mr Driver said Mr Stratton was to work on a casual basis only when the business required the additional labour. The casual IEA was not altered to reflect Mr Stratton's understanding of the working arrangement.

[9] On 25 March 2020 New Zealand went into lockdown due to COVID-19. A communication was sent out to the entire team from JFIL directors regarding the operational plans at that stage. Subsequently JFIL learned that Mr Stratton may not have received this update communication as he was a casual worker and not set up on the JFIL database for company announcements.

[10] On 30 March 2020, MJFIL received advice that casual workers were included in the Subsidy claim. Mr Stratton was advised of this. JFIL advised staff that information was changing every day as this was clearly uncharted waters. Mr Stratton was paid six weeks from the government provided wage subsidy.

[11] On 31 March 2020 Mr Driver sent an email to Mr Stratton advising that JFIL was able to carry out essential services and asking whether he was available to work. Mr Stratton declined.

[12] On 22 April 2020, Mr Driver telephoned Mr Stratton to ask of his availability to work. Mr Stratton was not available to work advising that he lived with elderly family and did not want to compromise their 'bubble/health'. JFIL then engaged the next available casual employee.

[13] Mr Driver stated the lockdowns had a devastating effect on JFIL and resulted in 18 full time permanent staff being made redundant in the period between May to June 2020. This negative impact filtered through to the availability of casual work. JFIL sought advice from Employment Advisers and IRD before making any decisions regarding operations.

[14] On 2 May 2020 JFIL advised Mr Stratton of the changes in the business and that all casual work would be placed on hold for the foreseeable future.

[15] Mr Stratton received wages for fortnightly periods ending 12/04, 26/04, & 10/05 2021. Excluding the first week where a partial additional payment was made, the pay constituted only the Wage Subsidy amount.

[16] On 22 May 2020 JFIL advised Mr Stratton that “the business is going through a number of restructures across the different areas of the business and JFIL no longer have a requirement for any of the “casual” workers signed up to our business”.

#### *Personal grievance raised*

[17] Mr Stratton wrote to JFIL on 6 August 2020 raising a personal grievance and seeking arrears of wages.

### **The Authority’s view of the employment relationship problem**

#### *Was Mr Stratton a casual employee?*

[18] I must first determine if Mr Stratton was, as JFIL contends, a “casual” staff member, with no expectation of on-going work, or if he was in fact a permanent part-time employee.

[19] It is well established that there is no statutory definition of “casual” employment. However, casual employment has been defined in case law as follows:

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. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice.<sup>2</sup>

[20] Mr Stratton agreed he was employed on a casual IEA on 9 March 2020, with the first engagement being 11 March 2020. Mr Stratton stated his understanding was that he would work four days per week, plus some Saturdays. Mr Driver said that Mr Stratton was to work on a casual basis only when the business required additional labour.

[21] Ms Barker states there was no guarantee on how many hours per week Mr Stratton would work as he was on a casual agreement and the hours would vary depending on workload. This seems to reflect what happened as before the lockdown, Mr Stratton worked a total of 83 hours over 2.2 weeks (averaging 37 hours per week). Ms Barker stated this was based on the workload Mr Stratton was required to work in the lead up to lockdown.

[22] Mr Stratton said he had a conversation with Mr Driver around the forthcoming series of events during which he asked whether he was covered by the wage subsidy. Initially Mr Driver thought it did not apply to casual workers, however, within the next couple of days Mr Driver was informed that casual workers were considered in the wage subsidy scheme and that JFIL could claim the wage subsidy on Stratton's behalf and advised Mr Stratton.

[23] Mr Stratton was offered work several times since 31 March 2020 and even after his decline of work, still received wage subsidy payments. Mr Driver stated that during Level 2 in May 2020, having not received an indication from Mr Stratton whether he would like to be considered for any work and the fact that most casual work at that stage was stagnant, JFIL proceeded to end most casual agreements, including Mr Stratton's.

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<sup>2</sup> *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 (EmpC), at [40] and [41].

[24] Taken overall, the factors point towards a casual employment arrangement. They show that there was no mutuality of obligations. Mr Stratton was free to work as and when he liked. JFIL was not obliged to offer Mr Stratton any amount of work. Mr Stratton's own evidence is that he exercised his rights also, by declining shifts he was offered.

[25] The employment agreement between the parties explicitly records a casual employment arrangement. The 9 March 2020 letter of offer is headed up "Offer of Casual Employment" and states: "Each period of employment terminates at the end of each separate engagement. Termination at the end of an engagement will not be unjustified and will not be deemed to be a redundancy". Schedule 1 of the IEA states the hours of work are to be agreed at each engagement. The memo of 9 March signed by Mr Stratton confirms he agreed to work on a casual basis

[26] Mr Stratton was offered work after 31 March 2020 and 22 April 2020, which he declined for justifiable personal reasons. As no employment relationship existed after the rejection of the work offers, Mr Stratton could not have been unfairly dismissed as claimed. The Casual IEA clearly indicated the requirement for employment and the termination of employment at the end of the engagement, Mr Stratton's employment had ended.

[27] This was not a case where the original casual employment arrangement had been abandoned in favour of an ongoing employment relationship. Mr Stratton's employment status had not changed to permanent employment over a period of time. He was only engaged over a relatively short period of three weeks. There were no mutual obligations which continued between periods of work, there was no ongoing employment relationship

[28] JFIL's position is that it was entitled to cease engaging Mr Stratton on a casual basis, because it did not have any obligations to Mr Stratton to provide him with ongoing work. JFIL further says that, as a matter of law, when Mr Stratton was not engaged to perform a specific shift, there was no subsisting employment relationship. This is a position that has been approved by the Court of Appeal, which stated in respect to similar practices of assigning work on a short-term basis by the company Drake Personnel:

It is clear that once an assignment has been completed, Drake has no obligation to offer any further assignments, and the employee has no obligation to accept any further assignments. In such a situation it cannot be said that there is a continuing contractual relationship of employment. The Chief Judge was clearly correct in his conclusion that each assignment was a separate engagement....Once an assignment is completed without any further assignment having been agreed, however, the employment relationship has terminated.<sup>3</sup>

[29] The above also describes the true nature of the employment relationship between Mr Stratton and JFIL. As JFIL was not obligated to provide Mr Stratton with any minimum or guaranteed amount of work, it can logically have no liability for not providing him work. In addition, at the time Mr Stratton was advised that JFIL would not be providing him with any future casual work, he was not an employee of JFIL, and therefore JFIL's actions did not (and as a matter of law, cannot) amount to a dismissal.<sup>4</sup>

#### *Personal grievance*

[30] In the circumstances I find that Mr Stratton was employed on a casual IEA and was not unjustifiably dismissed nor unjustifiably disadvantaged through his non re-engagement.

#### *Penalty*

[31] It is accepted that communication by JFIL to Mr Stratton was sporadic, however JFIL's evidence was that the company had some IT issues going into lockdown that accentuated the issue. Although this was unfortunate it did not amount to a breach of good faith in the circumstances. Mr Stratton's claim for a penalty is declined.

#### **Costs**

[32] In the circumstances I consider it appropriate in this matter that costs lie where they fall.

[33] However, if JFIL seeks costs, the parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, they should lodge and serve a memorandum on costs

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<sup>3</sup> *Drake Personnel (New Zealand) Ltd v Taylor*, [1996] 1 ERNZ 342, at 326.

<sup>4</sup> *Dewar v The Wellington Free Ambulance Service Incorporated* ERA Wellington WA506/22

within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Stratton would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[34] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.<sup>5</sup>

Andrew Gane  
Member of the Employment Relations Authority

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<sup>5</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).