IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 163
5572133

	BETWEEN	MATTHEW BOYCE Applicant
	A N D	KELLY SERVICES (NZ) LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Rachel Walsh, Counsel for Applicant Andrea Dunseath, advocate for Respondent
Investigation Meeting:	10 August 2017 at Christchurch
Submissions Received:	18 August & 22 September 2017 from Applicant 8 September 2017 from Respondent
Date of Determination:	27 September 2017

DETERMINATION OF THE AUTHORITY

A. The applicant was unjustifiably dismissed and is entitled to the remedies set out in this determination. I decline to impose a penalty on the respondent.

B. Costs are reserved.

Employment relationship problem

[1] Mr Boyce claims unjustifiable dismissal arising from alleged actions of the respondent. The respondent denies unjustified dismissal. Mr Boyce also seeks the imposition of a penalty.

Background

[2] The respondent is a recruitment consultancy company placing temporary and permanent workers in businesses throughout New Zealand.

[3] In February 2015 Mr Boyce, who had recently left school, was seeking long term, but temporary work before going to university and answered an advertisement on the Seek website which sought applications for pick packers (warehouse workers). The Authority saw a copy of the advertisement which stated that the role entailed working 12 hours a day from 3pm to 3am for five days a week and that it was an "Ongoing, Long Term Assignment".

[4] On or around Friday, 27 February 2015, Mr Boyce met with a representative of the respondent to discuss the terms of employment and the job in question. Mr Boyce says that he was told that the job he had applied for was with Coca Cola Amatil (NZ) Limited but that he would be employed by the respondent under its terms and conditions of employment. Mr Boyce says that he was told that he would be working five days a week from Monday to Friday, 12 hours a day, and that the employment was a long term assignment.

[5] Mr Boyce says that he was given an employment agreement together with what he calls a "subsidiary agreement" which was in the form of a handwritten post-it note.

[6] The individual employment agreement provided to Mr Boyce was the company's standard terms of employment and contained the following material clauses:

> A) This Agreement applies to all subsequent assignments, accepted by the employee.
>
> B) The employee agrees to be bound by the General Employment Conditions of Kelly Services when employed on assignment for any third party ("Client"). The employee acknowledges and undertakes that:
>
> 1. <u>EMPLOYMENT</u>
>
> 1.1 Employment will take place at Client work locations as directed by Kelly Services.
>
> 1.2 Employment commences at the beginning of an assignment at the place where it is to be carried out and ends on termination of that assignment at the place where it is carried out. Kelly Services will endeavour to provide me with approximate assignment duration. However, at any time the

period of an assignment may alter in accordance with our client's needs.

1.3 The employee accepts that at all times whilst on assignment they are a temporary employee of Kelly Services and as such, are not entitled to receive any payment or compensation for redundancy. The employee accepts that no guarantee of assignment duration or continuous employment has been given or implied by this Agreement.

2. ASSIGNMENTS

2.1 A description of the work you will be required to undertake on each assignment will be outlined to you prior to your acceptance of any assignment.

2.2 The employee acknowledges that from time to time assignments will be offered to them that will vary and may not always utilise their full range or preferred skills, which maybe due to a variety of reasons, including rehabilitation.

2.3 The employee acknowledges that they have the right to refuse an assignment without prejudice or penalty, unless it is part of the Kelly Services rehabilitation program.

2.4 The hours, days and times of employment on assignment will be provided to you prior to your acceptance of any assignment.

2.5 The employee acknowledges that once they have accepted an assignment they will provide by the terms and conditions outlined in this Agreement.

3. …

4. COMPLETION OF ASSIGNMENTS

4.1 Once the employee accepts an assignment, the employee is obligated to make every effort to complete the assignment.

4.2 …

4.3 If the employee is unable to complete a long term assignment (4 weeks or longer) the employee will provide Kelly Services with five (5) working days' notice, prior to them terminating the assignment. Failure to do this will jeopardise the employee's employment with Kelly Services and could result in up to five working days' pay being forfeited; this will be deducted from any wages and/or holiday pay owing.

4.4 ..

4.5 The employee accepts that the assignment length may be varied, shortened or terminated without notice and/or reasons being given to them.

5. DIFFICULTY ON ASSIGNMENTS

5.1 Should the employee have difficulty or a problem while on an assignment the employee will contact Kelly Services immediately for assistance.

5.2 …

6. …

7. …

8. REMUNERATION

8.1 The employee agrees that their wages shall be based solely on the hours worked on each assignment.

> Unless otherwise agreed in advance, while on assignment the employee will be paid for the actual time worked. The employee is not entitled to remuneration when not working on an assignment provided by Kelly Services.
>
> 8.2 …
>
> 9. EXTENSION OF HOURS WORKED
>
> 9.1 If the employee is requested by the Client to work hours in excess of the scheduled hours of the assignment, or in excess of nine hours per day or forty five hours per week on an assignment, the employee will immediately advise Kelly Services before the employee commences any additional work.
>
> 9.2 An assignment may involve work over a variety of rosters, that is, day, evening and/or weekend work. In such cases, Kelly Services will notify the employee prior to their acceptance of the assignment.
>
> …
>
> 20. TERMINATION OF EMPLOYMENT BY THE EMPLOYER
>
> ...
>
> 20.2 In the case of a long term assignment (expected duration greater than 4 weeks) Kelly Services will endeavour to provide 5 working days' notice subject to receiving notice of the end of the assignment from the client, but in any event will provide at least one (1) day's notice of termination for the end of the assignment.

[7] The handwritten note which Mr Boyce refers to as the "subsidiary agreement" contained details of the client's address, personal protective equipment requirements, the remuneration ($17.31 per hour) and that the work involved a day shift with two days commencing at 3am and ending at 2.30 pm, and three days commencing at 5am and ending at 2.30 pm. Assuming a lunch break of 30 minutes a day, that amounted to 49 hours a week.

[8] According to Mr Boyce, he was told by the representative of the respondent that the employment was a long term assignment for a minimum period of three to four months. Mr Boyce said he was looking for work for several months, before he started university in the USA in September.

[9] Mr Boyce says that, on 27 February 2015, he attended the premises of Coca Cola, where he undertook an induction. A manager of the respondent was present, Mr Paul Watson. He says that, whilst he had been told that another consultant of the respondent would collect his signed employment agreement on Monday, 2 March, this did not occur.

[10] On Tuesday, 3 March 2015, Mr Boyce was approached by a manager of Coca Cola, and was asked if he could work on Saturdays going forward. Mr Boyce said that he could not, as he played baseball in Auckland on Saturdays. He had already made the respondent aware that he was unavailable to work on Saturdays. Mr Boyce says he was told that the requirement to work on Saturdays was for training, although no indication was given of what the training was for. Mr Boyce says that he could not imagine what the training would be for as the work was straightforward.

[11] Mr Boyce says that, the following day, at 7.30am, he was told by a manager of Coca Cola that his employment was being terminated immediately as he was not able to work on Saturdays. He says that this came as a complete surprise as he had had no warning that this was possible. He was allowed to carry on working until 9am and then had to leave the premises.

[12] Mr Boyce says that his father rang Mr Watson the same day to raise concerns on behalf of Mr Boyce about the termination of his employment. Mr Boyce says that he was offered two alternative assignments. The first was for half a day water blasting later that day, which he declined as he had started work very early that morning, and the second was offered for the following day, for one day only, relocating rental vehicles. However, Mr Boyce was unable to accept that assignment as he did not have an appropriate driver's licence. Mr Boyce says he was not offered any other assignments.

[13] Mr Boyce says that he was subsequently telephoned by Mr Watson to apologise for terminating his employment and requested that he return the employment agreement signed to the respondent company as soon as possible.

[14] Mr Boyce says that he tried to find other jobs but was unable to do so due to his lack of experience, having left school at the end of 2014. A personal grievance was raised with the respondent company on behalf of Mr Boyce on 24 March 2015.

[15] Mr Boyce seeks $10,000 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) together with $16,634.51 in lost wages, the imposition of a penalty on the respondent for a breach of the duty of good faith, together with an award of costs.

[16] The respondent denies that Mr Boyce was dismissed, saying that he was asked directly by Coca Cola to work additional hours, which he refused. The respondent

says that it was not aware of Coca Cola's change to its requirements in respect of Saturday working prior to Mr Boyce being told of it.

[17] The respondent says that it offered alternative temporary assignments to Mr Boyce once it became aware of the problem and continued to do so during 2015, which Mr Boyce did not respond to. Mr Boyce says he did not receive these offers, but he was overseas at the time by then in any event.

[18] The respondent also states that Mr Boyce intended to abandon his employment, and that he did not tell the respondent of his plans when he left New Zealand on or around 27 April 2015 in order to play baseball in Canada for a summer baseball league. Mr Boyce says that opportunity arose unexpectedly with very little notice, and he did not know about it when he first engaged with the respondent.

The issues

[19] The issues that the Authority must determine are as follows:

(a) Was Mr Boyce dismissed by the respondent;

(b) If Mr Boyce was dismissed, was that dismissal unjustified; and

(c) Should a penalty be imposed upon the respondent for a breach of the duty of good faith?

Was Mr Boyce dismissed?

[20] It is the respondent's position in the statement in reply that Mr Boyce was not dismissed; simply that an assignment was terminated by the client. However, this stated position does not align with clause 1.2 of the individual employment agreement, which provides that "employment commences at the beginning of an assignment … and ends on termination of that assignment …".

[21] Evidence was given on behalf of the respondent by Ms Sara Forde, an HR generalist based in Auckland. She said that consultants always tell the temporary employees (temps) that once an assignment ends, the relationship with it does not, and that the temps remain "active" on the respondent's books and are offered new assignments from time to time. Ms Forde accepted, though, that the employees are not paid between assignments and characterised the employment as a casual one, in

the sense that the employees were under no obligation to accept an assignment and that the respondent was not obliged to offer an assignment.

[22] Mr Forde said that the relationship between the respondent and a temp ended when the temp resigned or was terminated for misconduct. By this, I understand Ms Forde meant that the temp became "inactive", and was removed from the respondent's books and no longer offered assignments.

[23] I find that the employment of a temp ends when the assignment ends. However, as we shall see below, the parties do not agree what an "assignment" means.

Fixed term agreement or casual agreement?

[24] Mr Boyce asserts that he was employed on a fixed term contract on the basis that the term of the employment ended upon the ending of the assignment in question. He also asserts that an assignment is the project of the client which requires staff rather than the particular placing of a particular individual with a client. Mr Boyce says that he received a text message on 27 December 2015 out of the blue which told him that there would be no work at Coca Cola the following day. This presumably occurred because Mr Boyce was still on the database of Kelly Services. Mr Boyce says that this shows that the "assignment" at Coca Cola was a long term one and was ongoing until at least the end of 2015. Therefore, the fixed term agreement he was employed under was a long term ongoing one.

[25] The respondent denies that the nature of the employment was one of a fixed term, and asserts that it was a casual agreement.

[26] Section 66 of the Act sets out the requirements for an employment agreement to be a fixed term agreement. It provides as follows:

> **66 Fixed term employment**
> (1) An employee and an employer may agree that the employment of the employee will end—
> (a) at the close of a specified date or period; or
> (b) on the occurrence of a specified event; or
> (c) at the conclusion of a specified project.
> (2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—

> (a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
>
> (b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.
>
> (3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):
>
> (a) to exclude or limit the rights of the employee under this Act:
>
> (b) to establish the suitability of the employee for permanent employment:
>
> (c) to exclude or limit the rights of an employee under the Holidays Act 2003.
>
> (4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—
>
> (a) the way in which the employment will end; and
>
> (b) the reasons for ending the employment in that way.
>
> (5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.
>
> (6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—
>
> (a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or
>
> (b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.

[27] When I analyse the nature of the agreement which both parties accept Mr Boyce was subject to (although he did not sign it) I do not accept that the agreement was one which recorded a fixed term employment in accordance with the provisions of s.66 of the Act. I conclude this because, although an assignment may be a project, the employment agreement does not refer to a "specified" project. A new employment agreement is not given to the employee each time he or she is placed on an assignment. Therefore, in the employment agreement the term "assignment" is a generic one, not a specified one. To be a specified project, a new agreement would have had to have been issued for each assignment, with the assignment specified (e.g., "pick packing for Coca-Cola").

[28] Therefore, as s.66(1) is not satisfied, the employment agreement under which Mr Boyce was employed was not a fixed term agreement.

[29] Ms Dunseath submits that the relationship between Mr Boyce and the respondent was a casual one. I agree with this characterisation. Between assignments

there was no obligation on the respondent to offer an assignment, and there was no obligation on Mr Boyce to accept any assignment that was offered. The relationship fits squarely within the type analysed in *Jinkinson v Oceana Gold (NZ) Limited*.[1] However, the finding that Mr Boyce was employed under a casual agreement for the Coca-Cola assignment does not necessarily mean he was not unjustifiably dismissed. Whilst there is no mutuality of obligation between the parties outside of an assignment, during an assignment, all of the mutual obligations that apply to a permanent employment relationship exist.

What is an assignment?

[30] I do not accept, as submitted by Mr Boyce, that the term " assignment" in the employment agreement refers to a project of a particular client. It must clearly relate to the particular placing of a particular employee, as is asserted by the respondent. Otherwise, by virtue of clause 1.2 of the employment agreement, an individual would remain employed by the respondent throughout an assignment even if the employee could no longer carry it out, or if the client's staffing needs changed, even though the project itself remained in train.

[31] This conclusion means incidentally that, even if the employment agreement which bound the parties had been a valid fixed term agreement, that would not have assisted Mr Boyce. This is because, when Coca Cola unexpectedly terminated the assignment, that would have operated to have brought the fixed term under which Mr Boyce was employed to an end. That termination of employment would not have been a dismissal. Rather, it would have been the ending of employment by a mutually agreed termination. The characterisation of the expiry of a fixed term in this way has been confirmed by the Employment Court in *Salad Bowl Ltd v Howe-Thornley*[2]. Chief Judge Colgan characterised the expiry of a fixed term as the "agreed completion of a fixed term which would not be a dismissal".

How did Mr Boyce's employment end?

[32] Having established that Mr Boyce's employment did not expire by mutual agreement under the terms of a valid fixed term agreement, it must have ended by way of frustration, resignation, abandonment or dismissal. Although both parties

[1] [2009] ERNZ 225
[2] [2013] NZEmpC 152 at [76]

agree that the employment did not end by way of frustration or abandonment, I shall explore these possibilities briefly.

Frustration

[33] In *Workforce Developments Limited v Hill*[3] Her Honour Judge Inglis rejected an argument that a tripartite arrangement such as the present case came to an end by way of frustration of contract when the client of a labour hire company barred the employee of the latter from entering its premises. Judge Inglis referred to s 238 of the Act and said that parties to an employment agreement are not permitted to contract out of their statutory obligations, including the procedural requirements relating to fair process, and their mutual obligations. I believe the same approach is warranted in the present case, as it is well established that labour hire companies owe all the same duties under the Act to their employees as other employers, even when a client insists on dismissal. It cannot be said, therefore, that Mr Boyce's employment ended by way of frustration.

Resignation

[34] This is easily dealt with. Mr Boyce did not resign, and was indeed hoping to be offered another long term assignment by the respondent.

Abandonment of employment

[35] There is no provision in the individual employment agreement for the employment to end if Mr Boyce abandoned his employment. As abandonment is not a statutory concept, it has to be expressly provided for in the employment agreement, with the conditions of abandonment unambiguously set out, to be effective as a means of terminating the employment. In any event, I do not believe that Mr Boyce did abandon his employment at the point when he was seeking work in March 2015. He did leave New Zealand on 27 April 2015 to play baseball in Canada and returned on 30 July 2015. He then left again to go to university in the USA on 17 August 2015. I shall address this below, under remedies.

[3] [2014] NZEmpC 174, at [57]

Dismissal

[36] In the case of *Iritana Horowai Ngawharau v The Porirua Whanau Centre Trust*[4] the Employment Court discussed the concept of a dismissal in paragraphs [68] and [69]. It stated the following (omitting case citations):

> [68] In *Sharpe v MCG Group Pty Ltd* [2010] FWA 2357, Fair Work Australia considered cases dealing with the concept of termination at the initiative of the employer. In my view, the principles discussed in those cases would have equal application in any consideration of the meaning of the same expression in this jurisdiction. In *Sharpe*, it was noted:
>
> > [24] … Essentially, termination at the initiative of the employer involves as an important feature, that the act of the employer results directly or consequentially in the termination of the employment, so that the employee does not voluntarily leave the employee relationship. …
>
> [69] Reference was made in *Sharpe* to a particular passage by Justice Moore in the case of *Rheinberger v Huxley Marketing Pty Ltd*, which had subsequently been referred to with approval by the full Court of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd.* Justice Moore stated:
>
> > However, it is plain from these passages that it is not sufficient to demonstrate that the employee did not voluntarily leave his or her employment to establish that there had been a termination of the employment at the initiative of the employer. Such a termination must result from some action on the part of the employer intended to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect. I leave open the question of whether a termination of employment at the initiative of the employer requires the employer to intend by its action that the employment will conclude. I am prepared to assume, for present purposes, that there can be a termination at the initiative of the employer if the cessation of the employment relationship is the probable consequence of the employer's conduct.

[37] Was Mr Boyce's employment terminated at the initiative of the respondent? At first sight, it was not, as the initiative came from the client of the respondent. However, a closer analysis results in a conclusion that the dismissal was at the initiative of the respondent. This is for three reasons. First, Coca Cola did not terminate Mr Boyce's employment; it terminated the assignment. As it was not Mr Boyce's employer, it could not terminate his employment. Coca Cola may well

[4] [2015] NZEmpC 89

not have had any idea what effect that ending of his assignment would have on his employment status.

[38] Second, the employment agreement between Mr Boyce and the respondent (which contained the respondent's standard terms and conditions) expressly provides that the employment will terminate at the end of an assignment. In this case, the assignment ended when Coca Cola told Mr Boyce he was no longer needed as he would not work on Saturdays. That in turn ended the employment. This was what the respondent intended as it was provided for in its standard terms and conditions of employment.

[39] Finally, the respondent took no steps to reverse the termination. It could have told Mr Boyce that he remained an employee despite what the agreement stated. Instead it treated him as still being on their books, as a candidate; that is, a prospective employee but not as an employee.

[40] Therefore, I am satisfied that Mr Boyce was dismissed at the initiative of the respondent.

Was the dismissal unjustified?

[41] Mr Watson, who no longer works for the respondent, was not called by it and so was not present to give evidence on its behalf. In fact, no-one who was in a management position in the Christchurch office of the respondent at the time the matters transpired in March 2015 still worked for the respondent. Consequently, the respondent was not able to give detailed evidence to contradict Mr Boyce's evidence.

[42] In any event, I found Mr Boyce's evidence to be credible. That is, I find on a balance of probabilities that Mr Watson did not make any effort to find out why Coca Cola suddenly needed Mr Boyce to work on Saturdays, and why his assignment was terminated when he said he could not. This finding is strengthened by evidence given by Ms Forde that, essentially, when a client of the respondent decides it no longer wishes to work with a candidate, the respondent will accept the client's wishes, but will try to find a new assignment for the candidate. I do not agree with the submission of Ms Dunseath that Mr Boyce did not advise the respondent of Coca-Cola's changed requirements. He did so via his father, on the same day (4 March 2015) that he found out that the request to work on Saturdays was actually a requirement.

[43] It has been well established by case law that a labour hire company owes the same duties of good faith towards its employees as any other employer, and cannot simply accept unquestionably a client's decision which affects an employee's employment without further enquiry. I refer, for example, to *Allied Investments Limited v Guise*[5].

[44] Therefore, once the respondent found out that Coca Cola no longer wanted Mr Boyce to work for it, Mr Watson should have enquired why Coca Cola's needs had suddenly changed, and whether any flexibility could have been used to have enabled Mr Boyce to remain on the assignment. For example, Mr Boyce said in evidence that he could have worked on a Sunday but that Mr Watson did not explore with him this option and did not tell him that he had made any attempt to explore with Coca Cola ways of enabling Mr Boyce to continue the assignment.

[45] I conclude that this failure was not what a fair and reasonable employer could have done in all the circumstances. Therefore, the dismissal which followed from the cessation of the Coca Cola assignment was procedurally unjustified, in accordance with s 103A of the Act.

[46] Was the dismissal substantially unjustified? As no attempt was made by the respondent to explore with Coca Cola ways of enabling Mr Boyce's assignment to continue, I cannot be satisfied that the dismissal was otherwise justified. It is as likely than not that Mr Watson could have persuaded Coca Cola to allow Mr Boyce to do the training on a different day.

[47] I will add that, had the respondent made genuine efforts to investigate Coca-Cola's requirements and had it acted reasonably in relation to its obligations to Mr Boyce, an ultimate lack of success in getting Cola-Cola to change its requirements, resulting in the employment coming to an end under the terms of the employment agreement, would not have resulted in an unjustified dismissal.

[48] In conclusion, I find that Mr Boyce was unjustifiably dismissed by the failure of the respondent to take steps to explore ways of enabling Mr Boyce to continue the assignment with Coca Cola.

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[5] [2015] NZEmpC 181

Remedies

[49] Having been successful in his claim of unjustified dismissal, Mr Boyce is eligible for an award of remedies. Sub-section 123(1)(a) to (c) of the Act provides as follows:

> **123 Remedies**
> (1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
> (a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:
> (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
> (c) the payment to the employee of compensation by the employee's employer, including compensation for—
> (i) humiliation, loss of dignity, and injury to the feelings of the employee; and
> (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[50] Section 128 provides:

> **128 Reimbursement**
> (1) This section applies where the Authority or the court determines, in respect of any employee,—
> (a) that the employee has a personal grievance; and
> (b) that the employee has lost remuneration as a result of the personal grievance.
> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[51] Mr Boyce seeks an award of $16,634 in lost wages. This is, apparently, three months' pay. However, in accordance with s.128(2) of the Act, Mr Boyce cannot recover lost wages from the date when he chose to fly to Canada, which was on 27 April 2015. I do not accept that Mr Boyce would have chosen to have carried on working at Coca Cola as a pick packer on $17.31 an hour instead of taking up an opportunity to play baseball in Canada. This intervening event therefore cuts the loss.

[52] Mr Boyce was told he was to work 49 hours a week at $17.31 an hour. That is $848.19 a week gross. Assuming he would have worked from Thursday 5 March 2015 until Friday 24 April 2015, had he not been dismissed[6], that amounts to seven weeks, and two days. That period includes Easter Friday and Easter Monday. It is not known whether he would have worked those days as well, but I will assume he would not have. Therefore, he would have worked a total of seven weeks. That makes a total loss of $5,937.33 gross.

[53] To this should be added five hours that Mr Boyce was unable to work on 4 March 2013, having been told to leave at 09.00. That makes a total of $86.55 gross. Added to the above figure results in $6,023.88.

[54] Finally, Mr Boyce would be entitled to holiday pay for the seven weeks, five hours. That amounts to $481.91 gross.

[55] The respondent did not give any evidence to suggest that Mr Boyce did not make reasonable efforts to mitigate his loss. He certainly did not declare any earnings made during the seven weeks.

[56] Mr Boyce is eligible to be considered for an award under s 123(1)(c)(i) of the Act. When I asked him what the effect on him had been, he said that it had been his first job (although that was not true, as he had had holiday jobs) and he had been fired after two and a half days, not knowing what he had done wrong. Again, I believe that this is not true, he was fully aware that his assignment had been terminated for having been unable to work on Saturdays. He said he had got some teasing from his friends for having lost the assignment, and that losing the assignment had hurt his confidence.

[57] I accept that Mr Boyce would have suffered some injury to his feelings at having been dismissed so quickly after starting the assignment, although the reason for the assignment ending was not inherently shameful. Rather, it was annoying, I infer. I do not accept that $10,000 is an appropriate level of award. A more realistic sum would be $3,000 in my estimation.

[58] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions

[6] I accept Mr Boyce's evidence that he was seeking a long term assignment.

of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act).

[59] Whilst the reason for the assignment ending was Mr Boyce's inability to work on Saturdays, that is not a blameworthy reason. He had advised the respondent of this restriction when he applied for the work. I therefore decline to reduce the award.

Should a Penalty be imposed on the respondent?

[60] Mr Boyce sought the imposition of a penalty for a breach of good faith, although neither Ms Walsh, nor Ms Dunseath made any submissions on penalty.

[61] Section 4A of the Act provides that a party to an employment relationship who fails to comply with the duty of good faith in s.4(1) is liable to a penalty if:

a. the failure was deliberate, serious and sustained or

b. the failure was intended to undermine

i. bargaining for an individual employment agreement or a collective agreement, or

ii. an individual employment agreement or a collective agreement; or

iii. an employment relationship.

[62] I do not find that the respondent breached the duty of good faith in a deliberate, serious and sustained way. I believe that the respondent probably thought it was acting in accordance with its contractual rights. I also do not find that the failure was intended to undermine the employment agreement or the employment relationship.

[63] Accordingly, I decline to impose a penalty upon the respondent.

Orders

[64] I order the respondent to pay to Mr Boyce within 14 days of the date of this determination:

a. The gross sum of $6,023.88 for lost wages;

b. The gross sum of $481.91 for holiday pay on lost wages; and

c. The sum of $3,000 under s 123(1)(c)(i) of the Act.

Costs

[65] If Mr Boyce has incurred any legal costs, and seeks a contribution towards them, the parties should seek to agree how they are to be dealt with. If they are unable to do so within 14 days of the date of this determination, then within a further 14 days Ms Walsh should serve and lodge a memorandum setting out how much contribution Mr Boyce seeks, and the basis for that. The memorandum will need to show that Mr Boyce either has already incurred the costs, or is contractually required to pay those costs to Clark Boyce. Ms Dunseath will then have a further 14 days within which to serve and lodge a reply.

David Appleton
Member of the Employment Relations Authority