

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 522
3087752

BETWEEN

JYOTIKA DEVI
Applicant

AND

ECLIPSE RECRUITMENT
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Lawrence Anderson, for the Applicant
Emma Monsellier, for Respondent

Investigation Meeting: 10 November 2020

Further submissions received: 17 November 2020

Determination: 18 December 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Devi was employed by Eclipse Recruitment Limited (ERL) from 8 July 2019 until 11 December 2019. The employment ended because the temporary assignment she had been placed in by ERL ended.

[2] ERL operates a recruitment and temporary staff agency. Employees such as Ms Devi work in temporary assignment roles with third party clients.

[3] Ms Devi says she was unjustifiably dismissed or, in the alternative that she was unjustifiably disadvantaged in her employment. She seeks reimbursement of lost

wages from date of dismissal, the balance of her assignment, holiday pay and compensation for humiliation, loss of dignity and injury to feelings and costs.

[4] ERL says Ms Devi was employed as a temporary employee and that her employment ended under the terms of the parties' employment agreement.

The Authority's investigation

[5] During the investigation meeting the Authority heard evidence from Ms Devi, her husband Rajneel Chand, Melefata Fonua, a co-worker at the assignment location, Lisa Hill, the owner of ERL and Leanne Wallace, who is employed by ERL as a recruitment consultant.

[6] As permitted by s 174E of the Employment Relations Act 2000 (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.

Issues

[7] The issues requiring investigation and determination were:

- a. Was Ms Devi unjustifiably dismissed?
- b. If Ms Devi was unjustifiably dismissed, what remedies should be awarded, considering:
 - i. Lost wages;
 - ii. Use of holiday and sick leave;
 - iii. Compensation under s 123(1)(c)(i) of the Act;
 - iv. Costs associated with representation in disciplinary process.
- c. If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the Applicant that contributed to the situation giving rise to his grievance?

The parties' employment agreement

[8] The parties entered a written individual employment agreement on 8 July which described their relationship as follows:

- A Eclipse Recruitment Limited is a recruitment consultancy which provides services to a third party (Client). Eclipse Recruitment Ltd employs me as a temporary Employee to work on Assignments ... for the Client.
- B I, Jyotika Devi agree to be bound by the following employment terms and conditions ("Terms and Conditions") of Eclipse Recruitment Ltd and accept a position as a temporary employee of Eclipse Recruitment Ltd, on the following Terms and Conditions.

[9] Clause 3 of the employment agreement describes the nature of the agreement and includes:

- 3.3 I understand and accept that the nature of my employment means that each Assignment is a separate engagement and that once an Assignment is completed without any further Assignment having been agreed, the employment relations terminates and there is no continuing contractual relationship of employment.
- 3.4 I understand and accept that upon the termination or early cessation on (sic) any Assignment, for any reasons whatsoever, Eclipse Recruitment Ltd shall not be under any obligation to offer me an alternative or additional Assignment. I further acknowledge that nothing in this agreement shall be interpreted or understood to give any expectation that this agreement will be renewed or that any subsequent agreement will be entered into.

[10] Clause 6 of the employment agreement is titled 'Early Cessation of Assignments' and includes at clause 6.3:

If, for any reason whatsoever, the Client reassesses their need and terminates an Assignment earlier than originally indicated, then my employment will terminate and Eclipse Recruitment Ltd is under no obligation to offer me an alternative or additional Assignment.

[10] Under clause 6 Ms Devi was obliged to give ten days' notice if she could not complete an "ongoing" assignment as defined in the employment agreement. The assignment she was placed in met the parties' definition of "ongoing". Eclipse had no such concomitant notice obligation.

[11] The terms of the subject assignment are not specified in the employment agreement. This is consistent with the temporary nature of such assignments – an assignment could end but the employment relationship between the employee and ERL may continue under the terms the parties had agreed in the employment agreement.

[12] For completeness the key terms of the assignment included the position was full time (Monday to Friday, 8.30am – 5pm) and “Starting Monday 8th July for twelve months”.¹ The Authority is satisfied both Ms Devi and ERL expected the assignment to last for twelve months.

Background

Ms Devi’s employment ends

[13] Ms Devi’s employment in the assignment continued as expected until Wednesday 11 December 2019. She worked the Monday of that week and called in sick on the Tuesday advising she had a doctor’s appointment the following morning after which she would come into work. On Wednesday morning, after the doctor’s appointment, Ms Devi called the client advising she had a medical certificate putting her off work for the balance of the week (three days). The client told her the assignment was ending that day and she needed to contact ERL. There is no dispute Ms Devi was genuinely unwell and had a medical certificate. A number of telephone calls were then made between Ms Devi and Ms Wallace of ERL. Ms Devi has produced a record of telephone calls she made from 11.12am on 11 December and seeks to rely on it to support her recall of events. The record is consistent with the appointment time advised to the client the day before.

[14] ERL says the client rang Ms Wallace on the morning of Wednesday 11 December to advise the assignment was to end. Ms Wallace’s contemporaneous file notes have been provided which record:

I spoke with [the client] and let her know Joy had been put on sick leave for the rest of the week. [The client] said that Joy would have been aware that the workload has slowed right down anyway so will end the assignment. (Joy

¹ The assignment details describe the hours as “flexi” which relates to start and finish times rather than number of hours.

was entitled to sick leave hence the decision to end that week). Bayer run reports and could see her workload had slowed significantly. They said they typically get busy again in Feb and would review closer to that time.

I then called Joy to let her know the assignment was ending due to workload slowing – and as she was going off for the rest of the week anyway and she wasn't entitled to sick leave that [the client] had decided to end the assignment and would reassess in the new year. She understood and I let her know that as soon as we had another opportunity that would suit we would be in touch.

[15] I find it is more likely than not the sequence of telephone calls is as Ms Devi recalls. I am satisfied Ms Wallace's file note is an accurate record of her discussions with the client and Ms Devi on that day.

[16] Ms Devi then emailed Ms Wallace asking for the reasons why the client had ended the assignment "when I was clearly given a one year assignment". By reply email Ms Wallace stated that the workload had slowed as, Ms Wallace stated, Ms Devi was aware and the additional support provided by Ms Devi was no longer needed, that the client can choose to end the assignment and that is why temporary support is used rather than fixed term or permanent employment. The email ends "Our employment agreement is clear that an assignment can end at any time. We do wish you all the best and when other suitable opportunities become available we will let you know."

[17] Some communications followed between Ms Devi, ERL and the client the contents of which are unnecessary to set out in this determination. Ms Devi's final pay was processed on Saturday 15 December. It included one day's pay for Monday 8 December, the only day that week Ms Devi worked. There is no dispute Ms Devi was not entitled to paid sick leave on the four days that week she was unable to attend work due to sickness.

Discussion

Could ERL justifiably end Ms Devi's employment when the assignment ended?

[18] Ms Devi says ERL could not dismiss her because she was engaged to work for the client for a period of twelve months from 8 July 2019 and ERL was bound to employ her for the balance of the period. Ms Devi accepts ERL was her employer and the Authority is satisfied that is the case.

[19] Having established who the employer was and that Ms Devi was an employee the next issue to consider is the nature of Ms Devi's employment.² In particular was her employment casual or ongoing?³ For completeness, Ms Devi was not employed on a fixed term employment agreement.⁴

[20] I have no hesitation in finding Ms Devi's employment was ongoing. The parties had agreed this definition in the employment agreement.⁵ In addition she worked regular days and hours being Monday to Friday and usually 8.30am to 5pm. Variation to those hours was by agreement. Leave was taken on notice and pre-arranged. For example, Ms Devi had sought and been granted leave for two periods in 2020.

[21] Ms Devi's employment was ongoing and she is entitled to consideration of whether her dismissal met the section 103A test for justification⁶.

[22] ERL accepted the client's grounds for ending the assignment that is, that the workload had dropped off. Ms Wallace's file note records she discussed the reason with the client who provided a substantive basis for ending the assignment – the reports the client ran showed the workload had slowed. Ms Wallace told Ms Devi the grounds in one of their telephone calls on 11 December and restated them in the email in reply to Ms Devi's query later that day. It is significant that Ms Wallace raised with Ms Devi that she (Ms Devi) was aware of the reason the assignment was ending and that at the time Ms Devi did not challenge that reason. This is significant because on 11 November, with no challenge from Ms Devi, I find there was no reasonable basis for ERL to believe the assignment was not ending for the reason given.

[23] Given this, has ERL discharged its obligations to Ms Devi in a dismissal setting? This requires an assessment of reasonableness in the circumstances and a key element of those circumstances is the parties' employment agreement. It is clear from

² Section 6 Employment Relations Act 2000.

³ *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at [37].

⁴ Section 66 of the Employment Relations Act 2000 sets out the requirements for fixed term employment.

⁵ Clause 6.1.3 of Ms Devi's individual employment agreement.

⁶ Section 103A of the Employment Relations Act 2000 sets out the test for justification in a dismissal or action.

that document that the parties anticipated the type of situation faced by them on the morning of 11 November that is, that a client may end the assignment before the anticipated end date. The parties agreed that in such a situation Ms Devi's employment would end and ERL would be under no obligation to offer her an alternative assignment.

[24] In a statutory context which requires dismissals are fair and reasonable and in good faith ERL must establish those obligations, assessed in the relevant circumstances, have been met. I find they have been because there was no information before ERL or could reasonably be before ERL that the client was ending the assignment other than for the reasons described above – a drop off in workload. I have carefully considered the various contemporaneous emails and text messages from Ms Devi to ERL and the client on 11 and 12 December. Those contemporaneous written communications do not challenge that the workload had dropped off. They express disappointment that a twelve month assignment had ended well before the expected end date. I have also considered ERL's knowledge of Ms Devi's sick leave and whether it was reasonable for it to deduce from that a different motivation for the client ending the assignment. I find it does not. Ms Devi's absence due to sick leave in the week her employment ended was clearly considered by ERL and it is likely to have been factor for the client ending the assignment but I am satisfied her absence has highlighted the drop off in workload rather it being the underlying, undisclosed motivation. This finding is supported by Ms Wallace's file note and further reasons set out at [29] below.

[25] The assignment ended because of the circumstances of the workplace not because of any issue, perceived or otherwise, with Ms Devi. Further, the reason for the assignment ending was put to Ms Devi, both orally and in writing. Ms Devi's concern about the assignment ending earlier than the expected twelve months was clearly and, I find, fairly addressed in Ms Wallace's email of 11 December.

[26] This not a situation such as that confronted by parties in a number of cases before the Court and Authority where there was a complaint or circumstance asserted for ending the assignment where a fair and reasonable employer could have made further enquiries for example:

- Where the client purports to terminate the assigned employee's employment because of the employee's availability contrary to the agreement between the employee and the employer.⁷
- Where the client insists on the removal of the assigned employee because of a complaint.⁸

[27] These are situations where it was found the employer was obliged to make further enquiry and not *bow[ed] to [the] demands* of the client.⁹ I am satisfied this was not the situation faced by ERL.

[28] ERL understood the reason the client wanted to end the assignment, told Ms Devi the reason the assignment was ending and I am satisfied provided an opportunity to her to raise any challenge or concern. I am satisfied further inquiry and discussion could not have resulted in a different outcome.¹⁰

[29] Ms Devi says the true reason the client ended the assignment was its dissatisfaction with the amount of sick leave she took and this was unfair and unreasonable. There is no dispute that during the period of the assignment Ms Devi took a number of days off due to sickness. If dissatisfaction with the amount of sick leave was the true reason the assignment ended then ERL would likely have been obliged not to bow to the demands of the client and explain the obligations of an employer in such circumstances. However, given the client did not ask ERL to replace Ms Devi with another temp and offered to relook at the situation in the New Year with the possibility then of more work for Ms Devi I am not satisfied any dissatisfaction of the client with the amount of sick leave Ms Devi took was the true motivator for the assignment ending. There was evidence before the Authority of a co-worker's conversations with the client manager about Ms Devi's sick leave but I am not persuaded that evidence is sufficient to establish a hidden motive for ending the assignment.

⁷ *Boyce v Kelly Services (NZ) Limited* [2017] NZERA Christchurch 163.

⁸ *G & H Trade Training Limited v Crewther* [2002] 1 ERNZ 513, *Siale v Professional Property and Cleaning Services Limited* [2019] NZERA 586, *Tulloch v Hays Specialist Recruitment (Australia) PTY Limited* [2016] NZERA Wellington 120, *Hannah v Vbase Limited and Anor* [2010] NZERA Christchurch 44/10, *Charles v Waitakere City Council and Anor* [2007] NZERA Auckland 362/07.

⁹ *G & H Trade Training* at [42].

¹⁰ *Haurao v D & J Gringley Supermarket Limited* [2011] NZERA Auckland 350, [60].

[30] Consideration has been given to whether a fair and reasonable employer could have given Ms Devi notice of the end of the assignment. In the circumstances of this matter, including that the nature of the employment was assignment based, the employment agreement contained no express notice obligation on Eclipse and the specific circumstance of Ms Devi being certified for sick leave for the balance of the week, I am satisfied Eclipse has not breached any obligation owed to Ms Devi in not giving her notice of her dismissal.

Did ERL's actions unjustifiably disadvantage Ms Devi in her employment?

[31] Ms Devi makes alternative arguments that she was unjustifiably disadvantaged in her employment by ERL (i) failing to fairly inquire into the circumstances of the assignment ending, (ii) failing to follow a fair and reasonable process in ending her employment and (iii) failing to explore redeployment options. For the reasons set out above the alternative claims (i) and (ii) do not succeed. In the circumstances of the dismissal, which include the terms of the parties' employment agreement, ERL has discharged its obligations to act as a fair and reasonable employer. In respect of (iii) Ms Devi's situation is not a redundancy. Her employment ended by operation of the terms of the parties' employment agreement when her temporary assignment ended.

Outcome

[32] Ms Devi was very upset by the assignment ending. This is entirely understandable given she understood her assignment was for twelve months. However, that was only part of the picture the other part being Ms Devi had agreed with ERL that her employment would end if the assignment ended. The statutory overlay of the requirements of a fair and reasonable dismissal has been considered and for the reasons set out above the Authority is satisfied ERL have fairly discharged those obligations to Ms Devi.

[33] Ms Devi's claim is unsuccessful. There will be no consideration of the remedies sought.

Costs

[34] Costs are reserved. The parties are encouraged to resolve this issue between them. If this is not possible, Eclipse Recruitment Limited is to file and serve any costs memorandum within twenty-one days of the date of determination and Ms Devi may file and serve any reply memorandum within a further seven days.

Marija Urlich
Member of the Employment Relations Authority