IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 386/10
5285996

	BETWEEN	LIANA KAYE Applicant
	AND	NORTH BEACH LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Anamika Singh, Counsel for Applicant Clive Bennett, Advocate for Respondent
Investigation Meeting:	5 August 2010 at Hamilton
Submissions received:	13 August 2010 from Applicant 17 August 2010 from Respondent
Determination:	26 August 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Liana Kaye, claims that she has been unjustifiably dismissed from her employment with the respondent, North Beach Limited ("North Beach"). Miss Kaye further claims that the dismissal constituted a breach of the obligation of North Beach to act in good faith.

[2] North Beach claims that Miss Kaye was a casual employee and denies that Miss Kaye was unjustifiably dismissed, or that it breached its obligation to act in good faith.

Issues

[3] The issues for determination by the Authority are:

i. Was Miss Kaye a casual employee or a permanent part-time employee with North Beach?
ii. If Miss Kaye was a permanent part-time employee was she unjustifiably dismissed?
iii. If Miss Kaye was unjustifiably dismissed, did this constitute a breach of good faith on the part of North Beach?

Background Facts

[4] During the school holidays in early 2009 North Beach placed an advertisement on their Hamilton store window advertising a casual position. Miss Kaye applied for the position but was told it had been filled. Miss Kaye continued to contact the store from time to time and was in due course invited for an interview.

[5] The interview that took place on or about May 2009 was conducted by Ms Bredesen, the Manager at the Hamilton Store. Miss Kaye stated that at the interview she had been told that the position required her to work weekends and additional hours during the school holidays.

[6] Miss Kaye also said that at the interview in May 2009 she was not told the position was that of a casual employee and that, having been told the advertised position had been filled, her belief was that this position was in the nature of permanent on-going part-time employment given the expectation that she would be required to work every weekend.

[7] Ms Bredesen stated that the store employed 5 full-time employees and that 15 casual employees were employed to enable the store to meet seasonal fluctuations in trade. Ms Bredesen says she did tell Miss Kaye that the position was casual. I consider it more likely than not that Ms Bredesen did not specifically refer to the fact that the position was of a casual nature, having assumed that Miss Kaye should have understood this to be the case.

[8] On 23 May 2009 Miss Kaye commenced working for North Beach as a Sales Assistant at its Hamilton store.

[9] Miss Kaye worked the first four weekends thereafter, both Saturday and Sunday, and an additional Monday, 1 June 2009. Miss Kaye had not been rostered to work the following two weekends, (20 and 21 June and 27 and 28 June) as she was on holiday. Miss Kaye said she had notified Ms Bredesen of this impending holiday in the week prior to her start date of 23 May, when she had attended the store to complete the appointment documentation. Ms Bredesen said that she was informed only after Miss Kaye commenced employment but prior to the holiday being taken. On balance, I find the evidence of Miss Kaye the more credible on this point.

[10] On her return from holiday Miss Kaye worked the next two weekends (4 and 5 July and 11 and 12 July) and also worked on Thursday 2 July and Friday 3 July.

[11] Miss Kaye did not attend for work at North Beach following 12 July 2009 due to a period of illness associated initially with her having undergone a medical procedure and subsequently from stress as a result of finding the body of a friend who had committed suicide. Miss Kaye says she provided three, possibly four, medical certificates for these absences. Ms Bredesen agreed that there were at least two medical certificates supplied.

[12] On Wednesday 19 August Miss Kaye, having recovered sufficiently to be able to return to work, went into the Hamilton store to check the roster for her shift allocation but was told by Ms Bredesen that there were no shifts available as she had been replaced by a new employee. Ms Bredesen offered to find out if Miss Kaye's accrued holiday pay could be paid out.

[13] On Thursday 20 August Miss Kaye telephoned Ms Harkness, the North Beach Head Office Manager, to enquire about her employment status. Ms Harkness telephoned Ms Bredesen and then confirmed to Miss Kaye that she had been replaced. Ms Harkness confirmed Miss Kaye's accrued holiday pay would be paid. Miss Kaye subsequently received a payment from North Beach for the pay period ended 20.08.09 itemising the holiday pay owing of $118.25 as being 8% of gross earnings from 23.05.09 to 20.08.09 and stating: "Final Pay – processed 8% of Gross Earnings. Good luck Liana!"

[14] Miss Kaye considered that she had been dismissed from her employment.

Determination

Was Miss Kaye a casual employee or a permanent part-time employee with North Beach?

Intention of the parties

[15] In deciding whether a person is employed under a contract of service the Authority must consider all relevant matters which include the intention of the parties.[1]

[16] Miss Kaye started work on 23 May 2009 and was given an employment agreement which she signed on 30 May. The employment agreement was headed "Casual Employees". Miss Kaye was also given a copy of the North Beach Employee Handbook ("the Handbook") which stated that it comprised "general terms of employment applicable to all employees". Miss Kaye stated she did not retain a copy of the employment agreement but did keep a copy of the Handbook.

[17] The description of the employment agreement as "casual' is an indicator of the intention of the parties in entering into the employment relationship but is not determinative[2] of the real nature of the relationship between the parties. His Honour Judge Couch in *Jinkinson v Oceania Gold (NZ)*[3] said:

> *All relevant matters must be taken into account in making that decision and the parties' description of their relationship is not to be treated as determinative.*

[18] The employment agreement at clause 4 "Hours of Work' states: "*You will be advised verbally by the Company of the time and duration which you are requested to work on any occasion*". However Miss Kaye said that she was not advised verbally of her hours but rather that her hours of work were set out on a roster displayed in the staff room and available at least two weeks in advance. Ms Bredesen agreed that the roster was available in advance.

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[1] S6 Employment Relations Act 2000
[2] S 6 (3) Employment Relations Act 2000
[3] CC/09, 13 August 2009 at para [37]

[19] Clause 4 "Hours of Work' further states: "*It is a condition of your employment that you make yourself available to work one weekend day and one late night each week when required by the Company"*. Ms Bredesen confirmed to the Authority that the casual employees were expected to be available to work at least one day of the weekend.

[20] It is not usual for casual employees to be expected to provide medical certificates for periods of sickness absence but although the employment agreement is entitled "Casual Employees', at clause 8 it specifies that "*All sick leave must be substantiated with a medical certificate if it is requested."* This requirement is mirrored in the Handbook on page 9.

[21] Miss Kaye provided medical certificates to cover the periods of absence, her evidence being that when she had telephoned to inform Ms Bredesen that she would not be coming into work, Ms Bredesen requested a medical certificate. Thereafter she had provided them in the belief that this was the procedure in accordance with the Handbook.

[22] Ms Bredesen denied that she requested a medical certificate for any absence but agreed that there were at least two medical certificates provided. Ms Bredesen further agreed that she did not inform Miss Kaye that medical certificates were not required from casual employees.

[23] The employment agreement states at clause 4: "*As a Casual employee your term of employment ceases at the end of each period for which you are engaged to work."* However when Miss Kaye attended the store on or about 19 August, she was informed by Ms Bredesen that there were no shifts available for her, the reason being that a replacement employee had been appointed. This position is inconsistent with the statement in the employment agreement.

[24] I find that the description of the employment relationship as 'casual' as stated on the employment agreement is not consistent either with the provisions contained within it or with the pattern of dealing between the parties. The employment

agreement therefore is not determinative of the real nature of the relationship between the parties.

Analysis of the distinction between casual and on-going employment

[25] The Employment Court judgment of *Jinkinson v Oceania Gold (NZ)*[4] contains a helpful examination and analysis of the distinction between casual employment and ongoing employment.

[26] In this judgment, His Honour Judge Couch analysed in detail the lines of authority derived from other jurisdictions, these being English, Australian and Canadian, in addition to that of New Zealand. These common law principles are complemented by the statutory framework in New Zealand, in particular that of the Employment Relations Act 2000.

[27] The judgment highlights that a major determinant of the distinction between casual and ongoing employment is the extent to which there exist between the parties "*mutual employment related obligations between periods of work"*[5] The essence of casual work lies in a series of engagements which are complete in themselves, whilst ongoing employment contemplates a continuing pattern of regular and continuous work.

[28] Judge Couch quoted with approval a decision of the Canada Labour Relations Board in which the Board said:[6]

> *In the notion of casual work, there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have work done. Conversely, as soon as the need is foreseeable only part-time work is automatically created: the employee is not a casual worker but a part-time one.*

[4] CC/09, 13 August 2009
[5] Ibid at para [40]

[6] *Bank of Montreal v United Steelworkers of America* 87 CLLC 16,044

[29] A list of factors designed to assist in the analysis of an employment relationship originated from the Australian authorities to which Judge Couch referred and these are outlined in the judgment. These include[7]:

a. The numbers of hours worked each week
b. Whether work is allocated in advance by a 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.

[30] Whilst North Beach issued Miss Kaye with an employment agreement clearly entitled 'Employment Agreement – Casual Employees", as set out in the preceding paragraphs I have found that this is not determinative, and I therefore need to examine the true nature of the employment relationship between the parties.

[31] In so doing I find that there are several indicators that the employment of Miss Kaye was more consistent with a continuous or permanent employment arrangement than with a casual arrangement.

[32] The hours Miss Kaye worked were allocated in advance by a roster rather than by North Beach telephoning Miss Kaye to ascertain her availability to work on each occasion she was required to work. The rosters were available at least two weeks in advance of the shifts being worked.

[33] Although Miss Kaye was not employed for a long period of time, during the time she was employed, this was on a regular basis for weekends, Saturday and Sunday; and although occasionally she worked additional hours on other days and occasionally finished early, there is a pattern that indicates that her regular hours at the weekend were 9.00 a.m. to 6 p.m. I therefore find that there was a regular pattern of working.

[34] I also find that there was a mutual expectation of continuity of employment:

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[7] *Jinkinson v Oceana Gold NZ CC/09*, 13 August 2009 at para [47]

a. North Beach rostered Miss Kaye to work approximately 2 weeks in advance, sometimes longer in advance

b. Miss Kaye understood herself to be employed under a contract which required her to be available to work weekends and consistently advised her employer in advance of her inability to attend work

c. Miss Kaye advised her employer in advance of her holiday booked prior to her employment starting

d. Miss Kaye provided medical certificates in accordance with both the provisions of the handbook with which she had been issued, and with clause 8 of the employment agreement.

[35] In accordance with section 28 of the Holidays Act 2003, the employer may regularly pay holiday pay with the employee's pay to two categories of employee. Casual employees fall into the second category of employee[8] as being those employees who work for the employer on such intermittent or irregular basis that it is impracticable for the employer to provide them with four weeks annual holidays.

[36] Although not conclusive, as I believe there has been a genuine misunderstanding of the provisions of the Holidays Act 2003 by the employer, the accrual of holiday leave entitlement as evidenced by (i) clause 6 of the employment agreement and (ii) the payment of holiday entitlement in the last payment made to Miss Kaye, also points to an ongoing employment relationship.

[37] In light of these indicia, I conclude that Miss Kaye was a permanent part-time employee with North Beach.

Was Miss Kaye unjustifiably dismissed?

[38] Section 103A Employment Relations Act 2000 sets out the test of justification:

[8] S 28(1)(ii)

> *For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[39] The decision to dismiss must be justifiable on a procedural basis. The basic requirements as outlined in *NZ Food Processing Union v Unilever NZ Ltd*[9] are notice informing the employee of the allegations, a real opportunity for the employee to respond to the allegations, and a decision not tainted by bias or pre-determination.

[40] Although Miss Kaye had been absent for several weeks from work due to illness prior to her dismissal, and although Miss Kaye stated that Ms Bredesen told her that her absences were becoming 'a hassle' when Miss Kaye rang to say she was ill and could not work a weekend; Ms Bredesen had at no time informed Miss Kaye that her employment could be in jeopardy as a result of her absenteeism. There had been no meetings held with Miss Kaye to discuss her absenteeism, to give her an opportunity to provide an explanation, or to advise her of possible consequences.

[41] In conclusion, there was no evidence of a disciplinary process having been followed in line with the requirements of procedural fairness. I consequently find no procedural fairness in the decision to terminate Miss Kaye's employment.

[42] I accept that this is accounted for by the fact that the employer mistakenly but genuinely believed that Miss Kaye was a casual employee, but having determined that Miss Kaye was a permanent part-time employee, it was necessary for North Beach to have both procedural and substantive justification for the dismissal decision.

[43] The facts indicate that North Beach based the decision to replace Miss Kaye with another employee on her lack of reliability. The Handbook advises that "*Continuous sick leave and absenteeism is unacceptable and may be cause for termination of employment.*" Prior to her illness Miss Kaye had been conscientious in

[9] [1990] 1 NZILR 35

her work attendance. Miss Kaye provided medical certificates in accordance to what she believed was the correct procedure. North Beach did not dispute that the illness was genuine. North Beach had no grounds for assuming that Miss Kaye would be unreliable on her return to health and to the workplace. I find no substantive justification for the dismissal.

[44] A fair and reasonable employer would not have taken the action North Beach did in all the circumstances at the relevant time. I find that Miss Kaye was unjustifiably dismissed.

Did the unjustifiable dismissal of Miss Kaye constitute a breach of good faith on the part of North Beach?

[45] I find that North Beach did not comply with either the basic tenets of natural justice or with the statutory good faith obligations.

Remedies

Reimbursement of lost wages

[46] Miss Kaye is seeking lost remuneration for the period between the time of dismissal and the hearing. I am satisfied from the evidence of the efforts made to mitigate her loss that Miss Kaye made reasonable and proper attempts to find suitable alternative employment.

[47] On the basis that by February 2010 Miss Kaye had obtained suitable alternative employment, I find that Miss Kaye is entitled to reimbursement of lost wages from the date of dismissal to the end of January 2010. This amount is calculated on the basis that contractually Miss Kaye was expected to work one weekend day and one late night each week. From the pattern of working supplied by the parties, this consisted of 8 hours on the weekend day and an average of 3.25 hours on the week day night. I have therefore calculated lost wages on the basis of 11.25 hours at $12.50 per hour for 24 weeks.

[48] I make the following awards:

a) A payment in respect of lost wages in the sum of $3,375.00 gross;
b) As interest on that amount, $176.85, pursuant to s 11, Sch 2, Employment Relations Act 2000.

[49] In determining the level of any compensation awarded under s 123 (1) (c)(i) I have taken into consideration the full extent of all the stressors impacting upon the emotional well being of Miss Kaye at the time the dismissal occurred. Of these I consider that while the loss of her employment was distressing for Miss Kaye, the two preceding events, these being the medical procedure Miss Kaye underwent and the finding of the body of her friend who had committed suicide, were substantial contributors to her subsequent depressive illness.

[50] I make the following award:

c) A payment under s. 123(1) (c) (i) of the Employment Relations Act 2000 for hurt, humiliation and injury to feelings in the sum of $2,000.00.

[51] I am required under s 124 Employment Relations Act 2000 to consider the issue of any contribution that may influence the remedies awarded. Although Miss Kaye was absent for a significant period of time, this was on genuine medical grounds and I accept that prior to this time Miss Kaye had been conscientious at attending work when expected to do so. I find no contributory behaviour on the part of Miss Kaye.

Summary of Findings and Awards

a. Miss Kaye was a permanent part-time employee with North Beach
b. Miss Kaye was unjustifiably dismissed
c. North Beach did not act in good faith in its dealings with Miss Kaye
d. North Beach is ordered to pay to Miss Kaye:

i. $3,375.00 as lost wages;
ii. Interest on that sum of $176.85
iii. $2,000 as compensation under s 123 (1)(c)(i)

Costs

[52] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority