IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA

[2024] NZERA 3
3240099

	BETWEEN	THOMAS MAKINSON Applicant
	AND	HOG FUEL NZ LIMITED Respondent

Member of Authority:	Davinnia Tan
Representatives:	Hayley Johnson, advocate for the Applicant Roger Philip, counsel for the Respondent
Investigation Meeting:	19 December 2023 in Napier
Submissions received:	At the investigation meeting
Determination:	8 January 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Makinson was hired by Hog Fuel NZ Limited (HFNZ) as a machine operator in September 2022 at an hourly rate of $24.00 (gross) an hour.

[2] He was given an employment agreement by HFNZ's Operations Manager, Mr Ross Lamborn, which stipulated that his employment was casual, but Mr Makinson claims that the true nature of his employment was a permanent one. HFNZ rejects this claim. The employment agreement was never signed by the parties.

[3] In October 2022, Mr Makinson had a dispute with his co-worker, Chris Barlow, which occurred outside the workplace. The subject of their dispute is largely unrelated to the issues at hand, suffice to say that it related to Mr Makinson borrowing Mr Barlow's car which sustained an engine failure resulting in costs incurred. Their dispute

related to the extent which Mr Makinson was responsible for the engine failure and its associated repair/replacement costs.

[4] As a result of their dispute, Mr Makinson and Mr Barlow exchanged a series of messages. The copies provided to the Authority show that they made disparaging remarks to each other, and the dispute remained unresolved. The copies provided to the Authority also included several notifications showing Mr Makinson had "unsent a message". Mr Barlow claimed that these "unsent" messages were physical threats to him, which included statements by Makinson to "meet me down the road" and "you talk a big game but let's see how big a game you really have." Mr Makinson denies making these statements in the messages sent to Mr Barlow. He stated those unsent messages were some curse and swear words that had been sent in the heat of the moment, rather than threats.

[5] In the exchange of messages, Mr Makinson told Mr Barlow on 25 October 2022 that he was going into work the following day. That day, Mr Barlow called Mr Lamborn and brought the dispute to his attention, and said what the content of the text messages was. Early the following morning on 26 October 2022, Mr Barlow then went to Mr Lamborn's house to advise he was not comfortable going to work that day and showed Mr Lamborn the exchanges of messages between himself and Mr Makinson.

[6] That morning of 26 October 2022, Mr Makinson received a text message from Mr Lamborn that stated:

> Hey bro there's obviously something going on between you and Chris I can't have this within my team sorry mate and I'm not sure I can give you the hours nor the pay you want. So I'm sorry man but I'm gonna let you go.

[7] The following exchange continued as follows on 26 October 2022:

> *Mr Makinson:* Ok. Cause I offered $500 toward his engine instead of $1000 I get laid off my job haha. Fuck what a toss pot.
> Fuck he's a little bitch.
> Unfair dismissal in courts aint it? Firing someone for personal reasons…
>
> *Mr Lamborn:* Come to the yard and we will talk about it mate. I'll be there in 15 mins.
>
> *Mr Makinson*: Feel free to call me to talk about it. What's the point in wasting more gas if I got no job.
>
> *Mr Lamborn*: I'll put an extra $250 in your holiday pay next week for your fuel used. I'll need to come grab that head set too. Let me know when mite [sic] suit you. What's your address?
>
> *Mr Makinson:* …heading to the gym… I'll bring them with me incase [sic].

Mr Lamborn: Ok cheers.

[8] Mr Makinson claims that he was not given an opportunity to discuss his side of the story when Mr Barlow brought the dispute to Mr Lamborn's attention and claims that HFNZ has not acted as a fair and reasonable employer or in good faith under the Employment Relations Act 2000 (the Act).

[9] Mr Lamborn claims that the dispute between Mr Barlow and Mr Makinson was not the basis for his text message to Mr Makinson on 26 October 2022 to "let him go". Mr Lamborn stated in his evidence that he genuinely considered that the messages he had seen, including those that had been subsequently "unsent", were threats made to Mr Barlow, and that he had an obligation and priority to protect his permanent employee from threats and harassment. However, his primary reason for terminating the employment agreement was due to Hog Fuel's inability to pay Mr Makinson the hourly rate he wanted and to provide him with more hours. This had been a separate issue that had been raised prior to the dispute that ensued between Mr Barlow and Mr Makinson.

[10] On 11 July 2023, Mr Makinson lodged a statement of problem with the Authority claiming he had been unjustifiably dismissed and sought compensation of under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), loss of remuneration, and costs.

The Authority's investigation

[11] For the Authority's investigation, evidence was heard from Mr Makinson, Mr Lamborn and Mr Barlow. All witnesses answered questions under oath or affirmation from me and the parties' representatives. I also received a witness statement from Jo Makinson (Mr Makinson's mother) which was taken as read at the investigation meeting. The representatives also gave oral closing submissions.

[12] All material from the parties was fully considered. However, as permitted by s 174E the Act, this determination has not recorded all evidence and submissions received.

The issues

[13] The issues requiring investigation and determination were:

(a) Whether Mr Makinson a permanent employee of Hog Fuel?

(b) If so, was Mr Makinson unjustifiably dismissed?

(c) Has there been a breach of good faith? If so, what penalties should be awarded?

(d) If Hog Fuel's actions were not justified (by dismissing Mr Makinson) what remedies should be awarded, considering:

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

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

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

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

Mr Makinson's submissions and evidence

[14] Mr Makinson's case is that he was a permanent part-time employee who was unjustifiably dismissed.

[15] In support of his claim, Mr Makinson stated that he was expected to be available for work every day and in the event that he was unavailable he was required to seek permission for this absence prior to it occurring.

[16] Mr Makinson stated that he did not receive his holiday pay for each individual engagement of employment but instead this was paid out in a lump sum upon termination of his employment.

[17] Counsel for Mr Makinson submitted that the accrual of holiday pay is consistent with a permanent employee, not a casual one. As such, the true nature of Mr Makinson's employment was that of a part time permanent employee.

[18] Mr Makinson stated that prior to Mr Lamborn making his decision to dismiss him, he was not invited to any meetings to discuss any concerns held by him regarding the dispute. He was not given an opportunity to give his side of the story or explain the position from his perspective. Moreover, the dispute was completely unrelated to the employment.

[19] Counsel for Mr Makinson submitted that there was no reasonable consultation or alternative to dismissal considered, nor was he asked for feedback on a proposed dismissal and therefore there was no feedback contemplated by HFNZ. Even though

Mr Lamborn suggested meeting, Mr Makinson was not informed of the entitlement to bring a support person to the meeting.

[20] Therefore it is submitted that there was no proper or any process engaged by HFNZ in considering and implementing the dismissal despite the obligations in s 103A.

HFNZ's submissions and evidence

[21] HFNZ rejects Mr Makinson's claims in their entirety. HFNZ claims that Mr Makinson was hired as a casual employee and at the time the employment agreement was terminated, Mr Makinson was not engaged in employment with HFNZ. As such, HFNZ was not required to provide notice for ending Mr Makinson's employment agreement because the terms of the agreement did not apply while Mr Makinson was not "in a period of employment" at that time.

[22] Mr Lamborn gave evidence that Mr Makinson was provided with a casual employment agreement (which included HFNZ's harassment and bullying policy) on 19 October 2022. HFNZ only required casual work to be undertaken that was for a specific task and only to be undertaken on an "as required" basis. Mr Lamborn also stated that Mr Makinson only wanted casual hours so as not to impact on his benefit payments. As such, a casual employment agreement was put in place. Mr Lamborn stated that HFNZ only had three employees at that time prior to hiring Mr Makinson, and Mr Makinson was its first and only casual employee.

[23] As context for Mr Makinson's casual employment arrangement, Mr Lamborn stated that Hog Fuel only had three permanent employees which included himself as the Operating Manager. The other two were Mr Barlow and a permanent part-time employee who was in charge of payroll and administration. He stated that a short-term need arose to hire a casual to undertake "as required" mulching tasks, using a mulching machine and undertaking mulching of grafted apple trees at orchards. Mr Lamborn stated that he expected the demand for work to increase over the Spring/Summer season but it did not do so in 2022. Hence, Hog Fuel did not have more hours to provide Mr Makinson. Mr Lamborn also stated that the nature of these "as required only" tasks meant Hog Fuel could only hire on a casual "as required" basis.

[24] Mr Lamborn stated that this arrangement meant that Mr Makinson was required to work "as and when required". As shown by his payslips, he did not have a consistent or regular pattern of work. Mr Makinson was also free to refuse hours and did so when he got a tattoo done and had to attend a court appearance. Mr Lamborn stated that unless

it was clear a task would take a certain amount of time to complete (such as over two or three days), typically he would discuss with Mr Makinson, in advance, whether there was work for Mr Makinson the next day or that morning. On some days there would be no work and Mr Lamborn would advise Mr Makinson accordingly.

[25] This meant that Mr Makinson worked an irregular pattern. An offer of work would be provided in advance of each period. For example, the following was not disputed:

- During the week of 12 September 2022 to 18 September 2022, Mr Makinson worked two days on Wednesday from 7:00 AM - 5:00 PM and Thursday from 7:00 AM - 12:30 PM.
- During the week of 19 September 2022 to 25 September 2022, Mr Makinson worked three days on Wednesday from 7:00 AM – 5:00 PM, Thursday 7:00 AM - 5:30 PM, Friday 10:45 AM - 2.15 PM.
- During the week of 26 September 2022 to 2 October 2022, Mr Makinson worked two days on Thursday 11:00 AM - 5:00 PM and Friday 7:30 AM - 5:00 PM.

[26] In response to the fact Mr Makinson was not paid his holiday pay on top of his hourly rate for each pay, Mr Lamborn stated that there was a miscommunication between himself and HFNZ's employee who processes payroll, which has since been rectified after he was made aware of the error as a result of these proceedings.

[27] Mr Lamborn acknowledged that the dispute between Mr Makinson and Mr Barlow was none of his concern until he was made aware of the communication between them which involved "direct threats" to Mr Barlow and his family. Mr Lamborn stands by his view that the "unsent" messages by Mr Makinson after it was received by Mr Barlow were direct threats to Mr Barlow.

[28] While he acknowledged that both Mr Barlow and Mr Makinson could not work together, Mr Lamborn claims that "more importantly" the reason he terminated Mr Makinson's employment agreement was because HFNZ was unable to give Mr Makinson the hours and hourly rate he was seeking. Mr Lamborn stated that:

> … pre cyclone we had inconsistent contracts… and I had concern about how to stabilise the profitability of the firm as our machinery is extremely expensive and the company is burdened by debt funding.

Analysis

[29] A key feature of a casual employment agreement relationship is that a casual employment agreement ends at the expiry of the agreed engagement. Casual employees work "as and when required" with no expectation of ongoing employment. During the period of engagement, the employee retains the rights contained in the Act and minimum employment standards.

[30] In casual employment arrangements, the employment relationship only exists during the periods of engagement. Casual employment therefore ends at the expiry of each agreed engagement.

[31] As found in *Jinkinson v Oceana Gold (NZ) Ltd (No 2)*[1], the strongest indicator of ongoing employment is an obligation on the employer to offer the employee further work and an obligation on the employee to carry out that work. Similarly, a consistent and highly predictable pattern of work might reflect an ongoing rather than casual, employment relationship.

[32] The Court in *Jinkinson v Oceana Gold (NZ) Ltd (No 2)*[2] provided a list of questions to assist with the analysis:

- How many hours are worked each week?
- Is work allocated in advance by a roster?
- Is there a regular pattern of work?
- Is there a mutual expectation that employment will continue?
- Does the employer require notice before an employee is absent or on leave?
- Does the employee work to consistent starting and finishing times?

[33] Having reviewed the evidence against the applicable law[3], I conclude that the true nature of Mr Makinson's employment was a casual one.

[34] Firstly, he had no set hours of work per week nor was there a regular pattern of work. I do not accept Mr Makinson's evidence that he was expected to be at work at 7:00 AM every morning. The evidence shows that he would often check in with Mr

[1] *Jinkinson v Oceana Gold (NZ) Ltd* (No 2) [2010] NZEmpC 102.
[2] *Jinkinson v Oceana Gold (NZ) Ltd* (No 2) [2010] NZEmpC 102.
[3] *Jinkinson v Oceana Gold (NZ) Ltd* (No 2) [2010] NZEmpC 102 and *Lee v Minor Developments Ltd t/a Before Six Childcare Centre* EMC Auckland AC52/08, 23 December 2008.

Lamborn as to whether there was any work before going in. This is not the behaviour of an employee who was expected to be at work at the same time every day.

[35] Secondly his expectation that employment would continue was a subjective expectation, and not supported by any factual basis. The messages exchanged between Mr Lamborn and himself show otherwise; that work was sporadic and there was no obligation to accept any work that was offered, nor any procedural requirement to apply for time off in advance. The degree of flexibility they both had in terms of work offered and work accepted, and the varying start and finish times, and the ad hoc nature of work, does not support an employment relationship that was permanent in nature.

[36] At the very most, the communication exchange between Mr Lamborn and Mr Makinson show that Mr Lamborn had anticipated more work would be available. However Mr Lamborn made clear his genuine belief that Mr Makinson was only after casual work and therefore casual hours were offered to Mr Makinson, and nothing more. I find that the copy of messages provided to the Authority make this abundantly clear.

[37] Mr Makinson relies on the fact he was not paid his holiday pay for each individual engagement of employment as evidence he was not a casual employee. While payment of holiday pay in each engagement of employment is a feature and requirement of casual employment arrangements, the lack of it in itself is not determinative of the true nature of the employment.

[38] In light of the evidence and context provided by Mr Lamborn, it is plausible that there had been a genuine human error on HFNZ's end given that casual employment arrangements were, at the time Mr Makinson was hired, not the typical or default employment arrangements HFNZ engaged in. In fact, the template employment agreements were based on permanent employment arrangements. The main difference that set Mr Makinson's apart from those was the inclusion of the clause explicitly setting out that:

> **…**
> The employee will work on a casual "as required" basis with no expectation of ongoing employment. The employer will give reasonable notice when asking the employee to work, and the employee may choose whether to accept or decline the work. If the offer of work is accepted, the employee must complete it – unless either the employer or the employee ends this agreement.
>
> Each time the employee accepts an offer of work it is considered a new period of employment. The terms of this agreement will apply to each new period of employment unless the employer and employee agree to any changes.

[39] The other evidence are the several payslips demonstrating that there was never a single week where Mr Makinson had a regular pattern of work, nor were the hours regular in any given week. Mr Makinson stated in evidence that he never expected to be paid the days or hours he did not work. This shows that he agreed that he would only be paid the hours he was offered that he had accepted.

[40] Having found that the true nature of Mr Makinson's employment with HFNZ was a casual employment relationship, I must also find that he was in an agreed period of engagement with HFNZ on 26 October 2022 for his claims of an unjustified dismissal and a breach of good faith to succeed.

[41] On the evidence, I find that Mr Makinson was not engaged in employment on 26 October 2022 as there had been no evidence of an offer and acceptance for any work that day. The messages between Mr Lamborn and Mr Makinson show that the last day there had been an engagement was 19 October 2022. This means that any engagement had expired prior to 26 October 2022, on 19 October 2022.

[42] Accordingly, Mr Makinson's claim of unjustified dismissal is not made out because there has not been a dismissal.

[43] For the duty of good faith to apply, there would also need to be an ongoing employment relationship between engagements and that is not the case with casual employees.

[44] Mr Makinson's claim that there has been a breach of good faith is also not made out.

[45] No orders are made.

Costs

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

[47] If they are not able to do so and an Authority determination on costs is needed HFNZ may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Makinson 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.

[48] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[4]

Davinnia Tan
Member of the Employment Relations Authority

[4] See www.era.govt.nz/determinations/awarding-costs-remedies.