

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 672
3218781

BETWEEN MICHELLE MATHESON
Applicant

AND RAINBOW CONFECTIONERY
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Ronald Jones, advocate for the Applicant
Brent Baillie for the Respondent

Investigation Meeting: 9 November 2023

Submissions Received: 9 November 2023 from the Applicant
9 November 2023 from the Respondent

Date of Determination: 13 November 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Matheson was employed by Rainbow Confectionery Limited. Ms Matheson's role was described as "Seasonal Casual" and she worked for a period of nine weeks starting on 25 November 2022.

[2] On 12 January 2023 Ms Matheson was working a shift at Rainbow Confectionery and she asked her supervisor if she could swap the work she was doing with a colleague. Ms

Matheson's supervisor told her to deal directly with her colleague about her request. Ms Matheson did so and it led to an altercation between Ms Matheson and her colleague.

[3] On 19 January 2023 Ms Matheson was told by Rainbow Confectionery that her casual contract would end at the completion of her rostered shift; that decision being made because of her actions on 12 January 2023 in terms of the altercation with her colleague.

[4] Ms Matheson has a number of complaints arising out of the altercation and the notice of her casual contract ending. She says:

- (a) Her supervisor did not act appropriately in relation to her request to swap roles with her colleague and this led to the altercation with the colleague.
- (b) The production manager did not investigate the altercation properly before coming to a conclusion about what occurred, with this conclusion being the basis for her dismissal.
- (c) The production manager did not conduct a fair process with her in connection with the conclusions she made about what had occurred and the decision to dismiss her.

[5] On the basis of these complaints Ms Matheson raised personal grievances for unjustified action causing disadvantage and unjustifiable dismissal.

[6] Rainbow Confectionery responded to those personal grievances advising that Ms Matheson was a casual employee and therefore there was no basis for her to raise the personal grievances; she was not dismissed per se, rather Rainbow Confectionery simply did not offer her any further work because of her behaviour. And, in any event it carried out a fair process and the decision to not offer further work was justified on the basis of the 12 January 2023 altercation and a further incident that occurred on 19 January 2023 after Ms Matheson was told she her casual contract was coming to an end.

The Authority's investigation

[7] The parties were unable to resolve Ms Matheson's personal grievances and she subsequently lodged a statement of problem in the Authority, with claims based on the personal grievances.

[8] I investigated Ms Matheson's claim by receiving written evidence and documents, holding an investigation meeting on 9 November 2023 and assessing the oral submissions from the parties.

[9] As permitted by 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Issues

[10] There are three sets of issues arising out of Ms Matheson's claims:

- (a) What was Ms Matheson's employment status – was she a casual employee or a part time employee?
- (b) Based on Ms Matheson's employment status was she dismissed in a manner that was unjustified?
- (c) In any event does Ms Matheson have a personal grievance based on actions by Rainbow Confectionery, when she was working, which were unjustified and caused disadvantage to her employment.

What was Ms Matheson's employment status?

[11] In deciding whether Ms Matheson was a casual employee or a permanent employee I must assess the real nature of the employment relationship with Rainbow Confectionery.

[12] I do this by firstly assessing any employment agreement as that identifies the parties' intentions. However, the description of the relationship is not determinative.¹

[13] My second step is to consider how the relationship operated, looking for whether it operated in line with the intentions or differently. This analysis will identify a number of factors or characteristics of the relationship, which will assist my overall assessment, such as whether the employee must apply for leave if they do not wish to work on a particular day or whether the employee works a regular shift pattern.

[14] In my view these characteristics of the relationship or factors inform the key aspect of the relationship; whether there is an obligation on the employer to provide work to the employee and an obligation on the employee to accept it.² Using the examples above, if the employer requires notice before an employee takes leave that is a factor that indicates the employee has an obligation to accept work or where an employee works a regular shift pattern then that is a factor that indicates the employer has an obligation to offer work, because there is an expectation created by the regularity of the work.

[15] In summary, what I must do in establishing whether Ms Matheson was employed on a casual or permanent basis is assess how the relationship operated. How the relationship operated will reveal a number of factors or characteristics that inform whether there was an obligation on the employer to offer work and an obligation on the employee to accept work.

What was the contractual status of Ms Matheson's employment?

[16] Ms Matheson signed an employment agreement with Rainbow Confectionery on 25 November 2022. That employment agreement included the following:

- (a) Ms Matheson's role was identified as "Seasonal Casual"

¹ *Baker v St John Central Regional Trust Board* [2013] NZEmpC 34 at [20]; and *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [37].

² *Baker v St John Central Regional Trust Board*, above n 2 at [23]; and *Jinkinson v Oceana Gold (NZ) Ltd*, above n 2 at [41].

(b) Clause two of the agreement provided:

The Employer experiences a fluctuating demand for its services from time to time and requires additional assistance to provide adequate staffing during increased times of demand. ... Because it is not possible to determine in advance the need for such assistance, the Employer wishes to engage the Employee on a casual basis to work only when the need arises and as the Employee decides to be available.

The parties agree that no obligation exists for the Employer to offer the Employee work at any stage. Similarly, the parties agree that the Employee bears no obligation to accept any offer of work made by the Employer.

If the parties mutually agree on an engagement, any placement on the roster from time to time, and any pattern or regularity of any hours worked, shall not indicate or amount to an intention to create an expectation of ongoing work.

(c) The hours of work were described as being work offered from time to time as required by the needs of the business.

(d) There were no express terms that were inconsistent with a casual employment relationship.

[17] So the employment relationship was identified as being casual from the outset and both parties entered into it on that understanding. Ms Matheson had been employed as a casual employee before by Rainbow Confectionery so she knew what that entailed and Rainbow Confectionery used a number of casual employees to cover increases in production due to demand and to cover absence of staff.

How did Rainbow Confectionery operate?

[18] At the time Rainbow Confectionery operated its business through a mixture of permanent full time and part time employees, some fixed term employees and casual employees.

[19] Casual employees were given work on a weekly basis with rosters being put up in the staff area on the Thursday prior to Monday of the following week when work commenced. So, effectively casual employees would have three days notice of the shifts they were being offered.

[20] Casual employees who did not want to work particular days or shifts would tell management in advance of the roster being created or after the roster was done. This included advice on the day a casual employee was rostered on.

How did Ms Matheson's employment operate?

[21] Ms Matheson's employment operated in the same way as other casual employees. She was offered shifts through the weekly roster which she could accept or reject.

[22] Ms Matheson said she expected to receive four shifts per week and she believed this is what happened. She said that she often worked the same shifts each week. On this basis she considered herself to be permanent rather than casual.

[23] Whilst there was some regularity to the shifts Ms Matheson worked in her nine weeks of employment the time worked does not show any real pattern. The only consistent factor is she worked evening shifts but even then, her start and finishing times varied on occasions – although the majority of her shifts were worked from 3:45 pm to 12:15 am.

[24] In her nine weeks of employment Ms Matheson worked:

- (a) One day per week on two weeks;
- (b) Two days per week on two weeks;
- (c) Three days per week on two weeks;
- (d) Four days per week on two weeks; and
- (e) No days at all in one week.

[25] Given the variances in the number of days worked each work there was no pattern of work in terms of the days worked. Of the weeks when Ms Matheson worked two or more days she appeared to work mostly on Tuesdays and Wednesday but not always.

[26] Ms Matheson did turn down work including taking time off for family care reasons and family holiday.

[27] Ms Matheson was paid weekly receiving an hourly wage with an additional 8% for holiday pay added to that rate – this was consistent with a casual employment relationship.

[28] Ms Matheson said that during the time she worked she discussed the possibility of becoming a permanent employee with one of her managers but she accepted that this was never confirmed and she did not sign a new employment agreement for a permanent full time or part time role.

Assessment

[29] Reflecting on how the employment relationship between Ms Matheson and Rainbow Confectionery operated, I conclude there was no obligation on Rainbow Confectionery to offer work to Ms Matheson and there was no requirement imposed on Ms Matheson to accept work that Rainbow Confectionery did offer to her. And therefore, I conclude that the employment relationship was a casual one.

Unjustifiable dismissal

[30] As Ms Matheson's employment with Rainbow Confectionery was casual the circumstances in which her employment stopped cannot give rise to an unjustified dismissal grievance.

[31] The hallmark of a casual employment relationship is that the employee is effectively only employed for the shifts offered and accepted; in between, there is no ongoing work obligation and the employee is not employed. Ms Matheson's employment agreement clearly set this out so there would be no confusion about ongoing obligations.

[32] When Ms Matheson was told she would not be offered further shifts as her contract was ending she was not dismissed. Ms Matheson was able to complete the shift she was rostered on and had accepted for Thursday 19 January 2023 so there was no dismissal in this regard. And then she was no longer an employee when Rainbow Confectionery stopped giving her further work so there was no dismissal in this regard.

[33] Ms Matheson's unjustifiable dismissal claim cannot succeed.

Unjustified action causing disadvantage

[34] Notwithstanding that Ms Matheson was a casual employee she could still have a claim based on an unjustified action causing disadvantage personal grievance. If Ms Matheson had accepted a roster for a particular week, when she was working the shifts for that week, she was an employee and Rainbow Confectionery did owe duties to her.

[35] An unjustified disadvantage grievance is based on an employer acting in a manner that is not justified and that action causes a disadvantage to the employee's employment.

[36] In this case the allegation by Ms Matheson is that her supervisor told her to engage directly with her colleague over a possible swap in their duties for the shift being worked and this was an unjustified action.

[37] I do not accept that. It appears to me in this situation it is appropriate that the supervisor approves the swap – that makes sense in terms of employees completing assigned roles and any swap being acceptable in terms of employees' abilities to do the respective roles. But in terms of the actual swap being done by agreement between the employees it is entirely appropriate that employees negotiate their own change, otherwise there is no choice and the supervisor will be seen to be imposing the change.

[38] In this case there is no unjustified action and the personal grievance cannot succeed.

Conclusion

[39] Ms Matheson was employed by Rainbow Confectionery on a casual basis and any claim she has based on this casual employment coming to an end is not successful. Ms Matheson's remaining claim for unjustified action is also not successful as Rainbow Confectionery did not act in an unjustified manner as alleged.

Costs

[40] Costs are reserved.

[41] As Rainbow Confectionery was successful in defending Ms Matheson's claims it might be entitled to costs, however, as it was not represented in the Authority it appears that there is no basis to award it costs. For these reasons it would seem that no order for costs should be made.

[42] Notwithstanding my observation, if either party thinks it might still be entitled to costs, then it may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum the other party will have 14 days to lodge any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority