

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 18
3124694

BETWEEN GEOFF MERCER
 Applicant

AND HAYWARD CONTRACTING
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Peter Marshall, counsel for the Applicant
 Jonathan Hayward for the Respondent

Investigation Meeting: 13 January 2021

Submissions and/or further 12 January 2022 from the Applicant
evidence No submissions from the Respondent

Determination: 25 January 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Geoff Mercer, claims that he was unjustifiably dismissed by the Respondent, Hayward Contracting Limited (HCL), on or about 18 March 2020 after his employment changed from casual to permanent.

[2] HCL denies that Mr Mercer was unjustifiably dismissed and claims that he was a casual employee at all times.

The Authority's investigation

[3] 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 the evidence and submissions received.

Issues

[4] The issues requiring investigation are whether or not Mr Mercer:

a) Was a permanent or a casual employee when working for HCL?

If he is determined to be a permanent employee:

b) Was he unjustifiably dismissed by HCL?

Background

[5] HCL is an agricultural contracting company, carrying out work within the farming community. The work is predominantly seasonal in nature, peaking in Spring and Autumn.

[6] Mr Jonathan Hayward, sole director and shareholder, said that HCL employed three permanent employees: a mechanic/driver, a senior machinery operator and a truck driver. During the harvest seasons it would engage a number of casual employees.

[7] Mr Mercer had worked for HCL on two previous occasions prior to 2019. Both were casual employment arrangements, with a written casual employment agreement being provided on the second of those engagements.

[8] During the periods of employment with HCL Mr Mercer said he had carried out various tasks including driving the trucks, trailers and tractor for grass and silage work. The nature of the task depended upon the particular contract HCL was undertaking.

[9] During the casual employment periods Mr Mercer said the employees worked as required, which meant that some days were very long as dictated by the farmers' needs, but on other days there might be no work available. The employment ceased at the end of the season when the harvesting ended and there was no further work available.

[10] Between the periods when he worked for HCL, Mr Mercer operated a firewood business which he operated on his own account, and he also worked for another orchard employer on a casual basis.

[11] The third period of engagement at HCL was initiated by Mr Mercer approaching Mr Hayward on or about September 2019 and asking for work. Mr Hayward said he was in agreement with engaging Mr Mercer again, and they negotiated an hourly rate.

[12] During the meeting Mr Mercer also advised Mr Hayward of his commitments as a result of which he would not be available to work some days. These included inevitable bereavement leave because his father was terminally ill, and a five week pre-booked holiday.

[13] Mr Hayward said he had no issue with Mr Mercer not being available at the times he advised because that was the nature of casual employment.

[14] In November 2019 Mr Mercer returned to work at HCL after a five week holiday, at which time Mr Hayward informed him that a permanent employee had resigned and he wished Mr Mercer to drive the Kenworth truck that employee had previously been driving. Mr Mercer said that Mr Hayward told him that it was unlikely that the permanent employee would return and that therefore he might be driving the truck "for a long time."

[15] Mr Hayward said the permanent driver at HCL had to leave at very short notice and he was not sure how long he would be absent, or if and when he would return, although he hoped he would do so.

[16] Mr Mercer said he was very pleased at the prospect of driving the Kenworth truck because it was a larger vehicle than he had previously driven at HCL, and he undertook responsibility for the upkeep of the truck, although he could not do the mechanical repairs or truck upkeep necessary and this work was undertaken by the HCL mechanic.

[17] Both Mr Mercer and Mr Hayward agreed that other people would drive the Kenworth truck, although Mr Mercer said his other duties decreased over the period to March 2020 and he drove the truck regularly unless there was no work or the truck was being repaired.

[18] Mr Mercer said that his view was that he was now a permanent employee despite not having been provided with a written permanent employment agreement and having worked seasonally in the past. He had not confirmed this perception with Mr Hayward, nor asked him for a written employment agreement.

[19] Relying on his view that the employment had become permanent in nature, when approached by the manager of another business for which he had carried out seasonal work in the past, Mr Mercer informed him he could not undertake work for him because he had been engaged permanently at HCL.

[20] Mr Mercer did not tell Mr Hayward what had occurred or his reason for turning down the other offer of seasonal work.

[21] Mr Mercer was paid weekly. There was no accumulation of holiday pay, and he was paid holiday pay as part of his weekly pay. Mr Mercer said he had not expected to be, nor was he, paid when he went on leave.

[22] Mr Mercer said there were no rosters in place. He would be informed of the next day's work by telephone or text message. If there was no work for the following day, he would usually be informed the day before. If he had not been contacted he would contact HCL to see if he was required to work the next day. After he started driving the Kenworth truck he said there were fewer days without work.

[23] Mr Mercer said he worked long hours, in excess of 40 hour per week, after November 2019, to achieve the tasks he had been set by HCL. He provided a schedule of hours he had prepared to the Authority in support.

[24] Mr Mercer said that on the basis of the change in his duties and his being a driver of the Kenworth truck, it became apparent to him that even after the harvest season had finished, the requirement for him to drive the Kenworth truck would remain and therefore the seasonal nature of his employment no longer remained.

[25] He had not spoken to Mr Hayward to confirm his view that the employment would be ongoing because he knew that Mr Hayward preferred casual employees. Nor did Mr Hayward say anything to him to confirm that the employment would be ongoing after the season ended.

[26] In early March 2020 Mr Hayward had advertisements placed in the classified section of the local press, advertising for Class 5 Drivers. When questioned why he had not considered Mr Mercer for a permanent position, Mr Hayward said that he required someone who could be an "all-rounder" in the business, not a driver only.

[27] On 11 March 2020 Mr Mercer sent Mr Hayward a text message which said:

I can work the next two weekends if needed but not the one at the end of the month. I have a family wedding in Auckland that will require four days off – March 28-31, I'll remind you.

I also have a dentist appointment on March 19, 5pm.

I'd love to go to my next river meeting on March 18, but happy to flag it if I'm needed to work.

Cheers,

[28] Mr Mercer said he received no acknowledgement of his request to take time off, nor did Mr Hayward respond to his offer to work if required on 18 March 2020.

[29] Mr Hayward said he had not responded to the email from Mr Mercer because it was not necessary to do so. Mr Mercer was a casual employee and he could take time off whenever he wished to do so.

[30] On Friday 13 March 2020 Mr Hayward texted Mr Mercer asking how he had used all his logbooks hours in five days, to which Mr Mercer responded setting out the hours he had worked.

[31] On 13 March 2020 Mr Hayward texted to say that the despatcher wanted to know if Mr Mercer would be: “ok staying away a few nights next week, I’m guessing New Plymouth”, to which Mr Mercer responded: “That would be okay”.

[32] That same evening Mr Mercer enquired about the arrangements, to which Mr Hayward texted: “Sorted, day off”. Mr Mercer replied: “Cool”.

[33] On Wednesday 18 March 2020 Mr Mercer texted Mr Hayward asking if there was a plan for the next day. Mr Hayward responded: “I’ve made other arrangements, I will call you tomorrow.”

[34] Mr Mercer said he was offered no further work by HCL and considered he had been dismissed.

[35] Mr Mercer said he had formed this view because of two incidents. The first was that Mr Mercer questioned him about the number of log book hours he was recording, the second was a couple of accidents which caused damage to the Kenworth truck and which were expensive to repair.

[36] Mr Hayward denied there had been any argument concerning the logbook, and said he had regretted the damage to the truck, however accidents to HCL’s vehicles were not an unusual occurrence.

[37] He had no issue with Mr Mercer and had made other arrangements because the truck driven by the HCL permanent employee driver had been involved in an accident, and therefore he assigned that driver to drive the Kenwood truck. There was therefore no ongoing work for Mr Mercer.

Was Mr Mercer a permanent or a casual employee when working for HCL?

[38] Casual employment is not defined in the Act, and therefore the factual evidence is of paramount importance in determining whether or not the employment is casual or permanent in nature.

[39] A strong indication that the relationship is that of casual employment is the lack of an obligation on the employer to offer ongoing work, or for the employee to accept it when offered.

[40] The Employment Court judgment in *Jinkinson v Oceania Gold (NZ) Ltd* which is the leading case in this area set out guidelines in paragraph [47] for determining whether or not the nature of the employment was casual or permanent, these are:

- a) The number 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.¹

[41] Considering the nature of the employment at the start of the third period of employment on or about September 2019 it was clear that both parties intended that the employment would be casual. That had been the basis on which Mr Mercer had worked on the two previous occasions, Mr Hayward intended the employment to be casual and Mr Mercer also understood that it was casual.

[42] In accordance with that expectation Mr Mercer advised Mr Hayward before the third period of employment began of the times when he would not be available to work, and Mr Hayward raised no objection to Mr Mercer not being available. This was in accordance with the nature of casual work.

[43] Between September and November 2019 I find that the relationship between the parties was that of casual employment.

[44] When Mr Mercer returned from his 5 week holiday in November 2019, he was asked to drive the Kenworth truck. Examining the nature of the relationship from that point to consider if it moved from casual to permanent as claimed by Mr Mercer I note the following as relevant:

Number of hours worked

[45] Mr Mercer's weekly hours, which had varied significantly in the period prior to November 2019 consistently totalled more than 45 hours per week after November 2019.

¹ *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225

[46] The fact that long hours are being worked does not denote an ongoing employment relationship because it is the nature of casual work, particularly agricultural casual work, when the evidence of both Mr Mercer and Mr Hayward was that there are days when the work necessitates long hours.

Work allocated by a roster

[47] There was no roster. Mr Mercer said he would be advised by telephone or by a text message whether or not he was required to work the following day.

[48] There is limited evidence of the text messages but I note that the text messages provided by Mr Mercer indicate that there had been a text exchange with Mr Hayward on Friday 13 March 2020 when Mr Mercer asked if he would be required for the following day. The reply from Mr Hayward was “Sorted, day off”. To which Mr Mercer replied “Cool”.

[49] There appear to be no further text messages until five days later on Wednesday 18 March 2020 when Mr Mercer enquired if there was a plan for the following day and Mr Hayward replied that he had made other arrangements but would call Mr Mercer the following day.

[50] I do not find this indicates that the phone or text messages are evidence of an expectation on Mr Mercer’s part that HCL would provide him with work on a daily basis.

[51] Indeed Mr Mercer’s evidence was that ‘there were fewer days when there was no work’ after he started driving the Kenworth truck, and his acceptance that he was not required on 18 March 2020 infers that there was no expectation by either party that work would be provided regularly or to a set pattern. Rather that there was no guarantee made or expected of work being provided.

A regular pattern of work

[52] Mr Mercer provided a schedule of hours worked each week which is consistent with the payslips provided. There are a significant number of hours being completed each week between November 2019 and March 2020 and work was available each week in that period.

A mutual expectation of continuity of work

[53] Mr Mercer held an expectation that his work with HCL would continue after the casual season ended. Mr Mercer had formed this expectation but did not clarify this expectation with Mr Hayward. He confirmed that Mr Hayward had given no indication that he shared or actively encouraged Mr Mercer’s expectation that his employment would be ongoing after the end of the casual period.

[54] Nor did Mr Mercer raise the issue with Mr Hayward. I find this surprising, especially as Mr Mercer turned down an offer of casual employment because of his expectation of ongoing and permanent employment with HCL.

[55] Mr Mercer had a view that the employment was to continue beyond the casual season end, however I find no evidence of a mutual expectation that it would do so.

[56] In this respect I note that there was no change to Mr Mercer's terms and conditions of employment in respect of an entitlement to annual and sick leave, no employment agreement was either provided or requested by Mr Mercer, and no requirement made by HCL that Mr Mercer would seek authorisation to take leave.

[57] Mr Mercer did not raise these issues with HCL which I would have expected had he understood the employment had become permanent.

Notice required prior to absence or leave

[58] Mr Mercer confirmed that there was no requirement for him to apply for leave in advance and to take such leave only with authorisation.

[59] I find that Mr Mercer's email to Mr Hayward on 11 March 2020 is not an application for leave, but notification to HCL of his not being available to work on certain dates. Mr Mercer said Mr Hayward did not respond to the email but I find a response was not required since there is no request to take the leave in the email.

[60] This is in accord with Mr Hayward's evidence that he had not responded because there was no need to do so on the basis that as a casual employee Mr Mercer was either available for work or not.

[61] Mr Mercer did not accrue annual leave, but was paid holiday paid with his weekly wages. Mr Mercer confirmed that he had not expected to be paid when he was absent.

Consistent start and finish times

[62] There is no evidence provided of when the actual hours were worked, i.e. which days of the work, however it would appear that whilst long hours might be worked, there was no set start or finish time.

In summary

[63] Having examined the evidence, I find that the relationship between Mr Mercer and HCL commenced on the basis of casual employment.

[64] During the period of employment from September 2019 to March 2020, Mr Mercer:

- a) worked long weekly hours, however there was no roster and no set start and finish times of working;
- b) Mr Mercer did not work some days even after he started driving the Kenworth truck. Nor did he raise this as an issue with HCL;
- c) There was no requirement for Mr Mercer to apply for leave in advance, nor was he paid when absent, and there was no entitlement to sick pay; and
- d) I do not find a mutual expectation of continuity of work.

In this respect I find it significant that despite Mr Mercer's evidence that he believed he was a permanent employee, in March 2020 he was informing Mr Haywood when he would not be available to work. Had he believed his employment had become permanent, I would have expected Mr Mercer to be requesting to take leave, not informing his employer of when he would not be available to work.

[65] I determine that Mr Mercer was a casual employee during the period from September 2019 to March 2020 when he worked for HCL.

[66] On that basis Mr Mercer has no claim for unjustifiable dismissal.

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

[68] If they are not able to do so and an Authority determination on costs is needed the respondent 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 the applicant 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.

[69] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[70] 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.²

Eleanor Robinson
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].