



Blurred Lines: Casual or Permanent?

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
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- Monthly newsletter

***Rock v DJ Investments 2019 Limited* [2023] NZERA 98**

Ms Rock was employed for a short period from around January to April 2021. Ms Rock brought a claim to the Employment Relations Authority, alleging that she was unjustifiably dismissed from her employment on 12 April 2021.

The Employer's position was that Ms Rock was casual, and therefore it had no obligation to offer her work beyond 12 April 2021. On this basis, the employer argued the termination was justified.

Therefore, the key issue the Authority had to determine was whether Ms Rock was a casual employee or whether the real nature of the relationship was permanent.

Casual employment is not defined under the Employment Relations Act 2000. Therefore, where the nature of the relationship is at issue, the Authority is required to make an assessment of the "*real nature of the relationship*". The key characteristics that will define a casual employment relationship include:

- (a) *engagement for short periods of time for specific purposes;*
- (b) *a lack of regular work pattern or expectation of ongoing employment;*
- (c) *employment is dependent on the availability of work demands;*
- (d) *no guarantee of work from one week to the next;*
- (e) *employment as and when needed;*
- (f) *the lack of an obligation on the employer to offer employment, or on the employee to accept any other engagement; and*
- (g) *employees are only engaged for the specific term of each period of employment.*

The Court held in *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 (NZEmpC), that where there are mutual obligations between the employer and employee which continue between engagements, there will be an ongoing employment relationship.

The strongest indication of a permanent relationship will be where an employer has an obligation to offer an employee further work and there is an obligation on the employee to carry out that work. Other factors can include a regular pattern of work, payment of sick leave, bereavement leave, and/or is allowed to take annual leave, consistent work start and finish times, and a mutual expectation of continuity of employment.

Sometimes time can be a factor. However, in *Baker v St John Central Regional Trust Board* [2013] NZEmpC 34, an employee who had been engaged as a casual employee over a period of over four years was held to be a casual employee. While St John utilised a roster system, the roster in these circumstances was merely designed to reflect the employee's availability, and it was not a record of who had been allocated and would undertake particular work. The Court emphasised the employee was entitled to decline work, even where they had previously indicated their availability. St John also utilised back up options in the event someone declined work.

However, the requirements for a causal relationship were not met in *Rock v DJ Investments 2019 Limited* and the Authority determined a permanent employment relationship existed. The factors in this case that the Authority found were in favour of a permanent relationship included:

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

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- There were rosters completed ahead of time throughout the period of employment. The Authority noted there would need to be a level of certainty that there would be someone serving while the shop was open. An *“as-and-when-required arrangement was not consistent with one person serving in a regularly open retail clothes shop”*;
- The employee worked twelve consecutive weeks, and over 20 hours each week (with only two exceptions);
- The employee was provided a set of keys to take home; and
- Although holiday pay was paid with the employee's pay on a *“pay as you go”* basis, this was not determinative as it could validly be used for other types of employment.

The consequence of this was that Ms Rock was found to be a permanent employee and the way in which her employment was terminated was unjustified. Ms Rock was awarded 23 weeks lost earnings based on 37.5 hours per week, and compensation for hurt and humiliation of \$18,000 (due to the sudden termination).



ER Seminars - 2023

Our first 2 seminars of the year have sold out. Don't miss out on the final one for 2023 being held on.

Tuesday 12 & Wednesday 13 September 2023

Further information in regard to the course content and registration details can be found on our website – www.mgz.co.nz/training If you wish to enroll simply email your registration and contact details to carey@mgz.co.nz

Legal Updates

Fair Pay Agreement Applications

The Fair Pay Agreements Act 2022 came into force on 1 December 2022. New Applications have been submitted for:

- Security Guard/Officer;
- Commercial Cleaner;
- Early Childhood Education – General; and
- Stevedoring Services – General.

Crimes (Theft by Employer) Amendment Bill

A Bill has been introduced to Parliament that proposes to create a new criminal offence of theft where an employer (either a person or an entity) intentionally fails to pay money to an employee that is owed to them in relation to their employment (either under their employment agreement or as otherwise required by law). On conviction, an employer will be liable to a maximum penalty of a term of imprisonment not exceeding 1 year, a fine of up to \$5,000, or both (for an individual), or a fine not exceeding \$30,000 (for an entity). The Bill is currently awaiting its first reading.

Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Bill

The Bill has had its second reading and is now awaiting the Committee of the Whole House, before the Bill has its third reading and receives its Royal Assent. Currently, the Act allows for small businesses in low-risk sectors to refuse a request for a health and safety representative. The proposed changes will mean that where workers ask for health and safety representatives, the business will be required to initiate an election. However, the Bill will not make representatives a mandatory requirement for all businesses.

Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill

The Bill has commenced its third reading. Once finished, the Bill will receive its Royal Assent. This Bill proposes to extend the time for a personal grievance that involves allegations of sexual harassment from 90 days to 12 months from the date on which the action alleged to amount to the personal grievance occurred or came to the notice of the employee (whichever is later).