

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 488
3069692

BETWEEN FAGAN LEE
 Applicant

AND TECH 5 RECRUITMENT LIMITED
 First Respondent

AND GROUNDS & SERVICES LIMITED
 Second Respondent

Member of Authority: David G Beck

Representatives: Anna Oberndorfer, advocate for the Applicant
 John Dustow, advocate for the first Respondent
 Katrina Pfeifer, counsel for the second Respondent

Investigation Meeting: On the papers

Submissions Received: 11 May, 29 May and 15 June 2020 from the Applicant
 12 June 2020 from the Respondent

Date of Determination: 1 December 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Fagan Lee, a young worker (then aged twenty one), entered into an employment agreement with the first respondent, Tech 5 Recruitment Limited (“T5”) a labour hire and recruitment agency, on 11 July 2018 that described his employment as ‘casual’. After describing the ‘position’ as being on a casual basis, the obligation placed upon T5 in the employment agreement was to “endeavour to obtain suitable assignment/s for the Agency worker with Clients of Tech 5”.

[2] T5 then placed Mr Lee in a labouring position with the second respondent, Grounds and Services Limited (“GSL”), a contracting company involved in landscaping and green space projects until this assignment terminated on 15 January 2020.

[3] Mr Lee’s application to the Authority claims that he was summarily dismissed in an unjustified manner and/or disadvantaged whilst employed, and he is seeking to make both respondents responsible for the dismissal/disadvantage claims and an alleged breach of good faith.

[4] In the alternative, Mr Lee alleges his employment agreement was breached by T5 and that GSL aided and abetted the breach.

[5] Mr Lee is first seeking that the Authority determine “the real nature of the employment relationship” between himself and the first and second respondents as per section 6 of the Employment Relations Act 2000 (‘the Act’) and he invited the Authority to:

Establish that the Second Respondent is the true or joint employer of the Applicant, and it be found that the First Respondent be liable for being a party to breaches of the employment agreement pursuant to s 134 of the Employment Relations Act 2000.

[6] In response, T5 contends that Mr Lee was engaged on an ongoing casual employment agreement in a placement that naturally ended and that T5 then offered Mr Lee ongoing work with other unnamed clients that was turned down - consequently, T5 argue Mr Lee’s unjustified dismissal claim must fail. T5 also deny acting in manner that disadvantaged Mr Lee and assert that they did not breach good faith obligations.

[7] GSL deny being in an employment relationship with Mr Lee.

What caused the employment relationship problem?

[8] On 9 July 2019 Mr Lee, who at the time was working in a local café, responded to a T5 online advertisement headed “Labourers needed, start straight away” by providing a brief emailed CV indicating that he had relevant labouring experience.

[9] In response, on or around 10 July, Mr Lee was interviewed by a T5 consultant and he was provided with an employment agreement that, he accepted in giving evidence, he knew was for a temporary placement with a T5 client. Mr Lee said he understood the job was

'casual'. Mr Lee said he can only recall one interview but a T5 witness suggested that after an initial interview he was recalled on 11 July and the T5 consultant took him through his employment agreement that is dated as being signed by Mr Lee only on 11 July.

[10] T5 say Mr Lee was given a comprehensive induction including being provided with Personal Protective Equipment ("PPE") including: boots, a helmet and Hi-Viz clothing. Mr Lee could recall the induction and being provided PPE and taking the employment agreement away but not signing it and that he was to be placed at GSL starting 13 July 2018.

[11] Mr Lee then worked for GSL as a labourer, planting trees on various GSL client sites and was paid by T5. The planting work was seasonal (May to November) and weather dependent but generally a steady five day week between the hours of 7:30 am to 5 pm under GSL's direction, was worked by Mr Lee.

[12] During his time at GSL, Mr Lee says he had little contact with T5 apart from sending them his weekly timesheets. Mr Lee recalls apprising GSL of any anticipated absences and that he advised them of any leave he took (but he did not seek their prior concurrence).

[13] Mr Lee says his work progressed largely without incident until the 2018 Christmas break but GSL suggested that he did not show up for work numerous times without explanation. GSL did not raise timekeeping issues with Mr Lee; reasoning that he was a 'temp' provided by an agency and that they had to 'live with this'.

[14] At the end of 2018, GSL closed down their business from 23 December until a return date of Monday 7 January 2019. Mr Lee, believing that he had permission to do so, did not return until Tuesday 15 January.

[15] Upon arriving at GSL on 15 January, Mr Lee was told his services were no longer required by a GSL landscaping co-ordinator. The co-ordinator acknowledged that although the seasonal planting project they were working on was in winding down phase, having overrun from the normal November finishing date, he sent Mr Lee away without any discussion as to the reasons why and that reason included a concern that Mr Lee had failed to show up for work on 7 January without explanation.

[16] The service agreement between T5 and GSL required that GSL not take any disciplinary action against “any Temporary Staff” without contacting them. Another provision required 24 hours prior written notice by GSL to “terminate the provision of any Temporary Staff” but GSL accepted that they did not fulfil this requirement.

[17] Mr Lee then consulted a friend to act as an advocate who then contacted T5’s National HR Manager to ascertain why Mr Lee had been what he considered ‘unjustifiably dismissed’ by GSL. The T5 HR manager then contacted GSL to gauge their perspective of the situation and then emailed Mr Lee’s friend early in the evening of 15 January. This email was objectively, in part, unnecessarily confrontational in tone and somewhat ‘embellished’ - a point T5 witnesses sensibly acknowledged.

[18] The T5 email opened by saying from what they had been told by GSL, T5’s ‘position’ was:

1. Mr Lee has a casual worker’s agreement with Tech5.
2. Tech5 placed Lee with GSL.
3. On late November and during December, Mr Lee began to miss several days of work, in most cases without notice.
4. Prior to the Christmas shutdown, GSL called a meeting with their staff where Mr Lee was present. At this meeting, all staff were advised that they were required to commence work on Monday the 7th of January 2019.
5. Mr Lee failed to attend work that day or during that week. He presented himself today (Tuesday 15th of January 2019).
6. Mr Lee is on a Casual Contract as an Agency Worker. No work is guaranteed and once placed, that placement is not guaranteed. This is all spelled out in his contract. This Contract also allows Mr Lee to refuse to take up or continue in the placement.
7. It is clear to me that Mr Lee was present during a meeting where he was told to present himself to work on Monday the 7th of January 2019. There are plenty of witnesses that will swear to this. Mr Lee failed to attend work for 6 continuous working days thereafter and our client is entitled to replace him or rearrange the staff at hand to cover Mr Lee’s failure to attend work. In such a circumstances, GSL are entitled to reasonably conclude that Mr Lee was no longer taking up this placement. They have made alternative plans that no longer include Mr Lee.
8. However, it is our position that Mr Lee still has an agreement with Tech5 and if Mr Lee is still available, Tech5 will seek further placements with other clients for Mr Lee in accordance with our agreement.

9. Unfortunately, this is the nature of Casual work and there are no grounds for a Personal Grievance, either against GSL or against Tech5. If Mr Lee is insistent in bringing a claim against Tech5 and or GSL, it will be Tech5's position (and I am assuming GSL's position also) that we will be seeking full costs from Mr Lee for defending any claim that will inevitably be dismissed . Depending on how far it goes, it can be as high as \$5000 (per company – so \$10,000 if he chooses to make a claim against both parties). However, I appreciate that this may be premature as Mr Lee has yet to lodge a formal claim and I'm hoping common sense will prevail and we can attempt in trying to replace Mr Lee [sic].

On a side issue and in the interest of completeness, GSL (and Tech5) don't accept Mr Lee's assertion that he was told to report on Monday the 14th of January 2019. Even if he did [sic], he failed to present himself on the day without notice or explanation. Such actions on its own [sic] can allow a client to replace the agency worker.

In closing, can you please confirm if Mr Lee is available for further work in accordance with his Contract with us? Or is he wishing to terminate this agreement.

[19] Mr Lee did not respond in a timely manner. Mr Lee then sought legal advice on 16 January but Mr Lee's new advocate waited until 28 March 2019 to write to both T5 and GSL with a "Notification of Personal Grievance". The grievance letter claimed Mr Lee had been unjustifiably and summarily dismissed without due fair process, his employment agreement had been breached, he had been unjustifiably disadvantaged and the respondent parties had failed to be responsive and communicative in breach of good faith duties. Compensatory remedies were sought that did not include re-establishing the employment relationship between Mr Lee and T5.

[20] Neither party responded to the grievance letter so Mr Lee then filed the matter with the Authority on 8 August 2019.

The Authority Investigation

[21] I received briefs of evidence and heard from Mr Lee and a number of witnesses from T5 and GSL and submissions from all parties' advocates and counsel.

[22] As permitted by s 174E of the Act I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I

have likewise, carefully considered the submissions and information received from the three parties and refer to them where appropriate and relevant.

The issues

[23] The issues I will sequentially deal with are:

- i. Was there an employment relationship between Mr Lee and GSL?
- ii. If the answer to (i) is yes – can Mr Lee pursue any remedies against GSL?
- iii. Did T5 do what a reasonable employer could have done in all the circumstances when they became aware that GSL had unilaterally ended Mr Lee' employment?
- iv. Was Mr Lee unjustifiably dismissed from his employment?
- v. In the alternative, was Mr Lee unjustifiably disadvantaged during his employment?
- vi. If there were breaches by T5 of Mr Lee's employment agreement did GSL incite, instigate aid or abet any such breach and if so, should GSL be liable for a penalty under s134 (2) of the Act?
- vii. If Mr Lee establishes any of his claims what remedies should he be awarded?
- viii. Do any issues of contribution arise if remedies are deemed appropriate?

Was there an employment relationship between Mr Lee and GSL?

[24] The central issue Mr Lee identified was that although he was initially engaged by T5 he believed his employment was of a nature and duration with GSL that became permanent rather than him being a casual agency worker of T5's. In support of this proposition Ms Oberndorfer cited the full Employment Court authority of *Prasad v LSG Sky Chefs New*

Zealand Limited that held two individuals engaged by a labour hire company were employees of the company they were placed at. The Court came to this conclusion by applying the test in section 6 of the Act to assess what the “real nature” of the relationship between the individuals and the company controlling the workplace was.

[25] The Court, in distinguishing the matter from an earlier authority¹ indicated :

We do not accept that the mere fact that the present case involves a work arrangement which differs from the traditional model, namely a self-styled labour hire arrangement with an end-user and an intermediary, means that s 6 of the Act has no application, or that a different analytical approach is required. It seems to us that the core question remains precisely the same, no matter how convoluted the structure of relationships or the number of intersecting links in a labour-supply chain. In the present case it is an assessment of the real nature of the relationship between each of the plaintiffs and LSG which the Court is concerned about and which may or may not lead to the conclusion that the plaintiffs were engaged under contracts of service. We see s 6 as driving the required analysis, not the common law relating to contract formation.²

Application of s 6 of the Act to Mr Lee’s situation

[26] Utilising the approach and headings used by the Court in *Prasad*³ I undertake the following analysis.

The terms of the agreement (intention of the parties)

[27] Unlike the situation in *Prasad*, Mr Lee had a comprehensive and well written employment agreement with T5 as the placement agency. The agreement defined the nature of the relationship and limitations on ongoing work and the party’s respective obligations. In giving evidence, Mr Lee expressed himself with a high level of articulation and he demonstrated that he understood the nature of the arrangement between T5 and GSL (and any other ‘clients’ of T5) and that each assignment was ‘temporary’ with no obligation of T5 to provide ongoing work. Throughout the employment agreement, Mr Lee is described as an “Agency Worker” and on the final page of the agreement Mr Lee signed an “Agency Worker Declaration”.

[28] On the evidence I heard and recall of the parties, I am not convinced Mr Lee had a practical opportunity to seek legal advice on the terms of the employment agreement that was

¹ *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC , [2010] ERNZ 223.

² *Prasad v LSG Sky Chefs New Zealand Limited* [2017] NZEmpC 150, [2017] ERNZ 835 at [31].

³ At [42] – [90].

provided to him. It was explained to him by the T5 recruitment consultant on the day he was advised of his engagement with GSL and I do accept evidence that T5 adequately took him through the key terms carefully and associated documentation around his placement – nevertheless, this was not an ideal situation. T5 breached s 63A(2)(c) of the Act⁴. It is possible that a prospective ‘agency worker’ could be confused by the use of various unfamiliar terms without advice being sought. In this context, Mr Lee said he essentially understood, after being somewhat confused about what a labour hire firm was (as opposed to a recruitment agency), that he was a casual and that he was being ‘placed’ in a temporary assignment with GSL. This perception was also reinforced by Mr Lee’s evidence later during the investigation, when he displayed an understanding that he was a temporary worker at GSL (albeit that he suggested he thought that had later ‘morphed’ into a permanent employee of GSL – discussed below).

[29] In addition, I sighted the service agreement in place between T5 and GSL headed “TERMS FOR THE SUPPLY OF SERVICES”. The agreement covered both the provision of temporary staff and the recruitment of permanent employees. For temporary staff, the agreement said that the customer was to supply T5 with information on the duties to be undertaken, location, hours of work and relevant health and safety and any other information T5 could reasonably require.

[30] T5 also provided the Authority with a copy of a “Job Order Form” dated 13 July 2018 detailing GSL’s requirements at the time they engaged Mr Lee and six others as “Planting Labourers”.

[31] It is also noted that the services agreement provided that if GSL subsequently engaged a T5 provided worker within 12 months then a percentage of remuneration or a set penalty was to be paid.

[32] Despite evidence from GSL that their need was to engage temporary workers for a specific project and those engaged as such never being on GSL’s payroll system, the job order form does not mention the status of the workers and the duration of employment section is left blank. As an indicator of the provided workers being temporary the order form specifies that

⁴ Section 63A (2)(c) *Employment Relations Act 2000* requires that the employer “give the employee a reasonable opportunity to seek advice....”.

T5 supply PPE equipment and certify that those workers being 'placed' are "Site Safe". As a further indication of this being a labour hire agreement an "Agreed Client Rate" was specified with a significant margin above the rate Mr Lee was paid.

[33] On 12 July 2018, Mr Lee received an email from T5 detailing "TECH 5 ASSIGNMENT PARTICULARS". The email, under a section entitled "Fixed/Anticipated Duration", indicated: "Daily subject to client contract continuation/termination".

[34] On balance, on hearing all the evidence and viewing the documentation, I am not persuaded that GSL was seeking permanent employees from T5 for the work Mr Lee undertook.

[35] Standing back and applying the approach used in *Prasad* of: "What would a reasonably informed reasonable observer take from the documentation?"⁵ I conclude that this points away from there being any intended or documented employment relationship between Mr Lee and GSL as the employment agreement includes an explicit exposition of the operational relationship and boundaries between the parties.

[36] In concluding, I do have a misgiving about the term 'casual' being used by T5 and the loose language of 'agency worker' or 'temp' being applied to a situation that is better categorised as a fixed term engagement to complete a project. It emerged in cross examination that GSL were not provided with a copy of Mr Lee's employment agreement and that they were unaware that as a 'casual' Mr Lee ostensibly had the right to turn down work. GSL witnesses' believed a 'temp' or stop-gap worker was being provided and their expectation was that the employee would be available on an 'as and when needed' basis.

How the operation operated in practice

[37] As a starting point, I observe that Mr Lee was screened by T5 and did not attend any interview or significant induction at GSL (as contrasted with the situation in *Prasad* where LSG Sky Chefs required additional signing on documentation defining the relationship and induction/training akin to an ongoing employee).

⁵ At [60].

[38] The level of ongoing contact with T5 once Mr Lee was placed at GSL, was limited to him completing weekly timesheets. However, on 7 September 2018 a GSL supervisor raised a concern about Mr Lee's productive capacity in an email with their T5 consultant. This evidences GSL's belief that T5 was responsible for any ongoing performance issues.

[39] In addition, although latterly expressing concerns about Mr Lee's attendance record, there was no evidence that GSL specifically raised such with Mr Lee (or T5). T5 provided PPE and evidenced a request from Mr Lee to provide him with new boots during his placement.

[40] All work direction, including job location and expectations of hours of work, was controlled or communicated by GSL. One crucial difference emerged in that Mr Lee was not always paid for work being interrupted by rain whereas GSL employees were remunerated for such if no work could be found for them.

[41] Timesheets were authorised by a GSL signature then forwarded to T5 for payment. The 'arrangement' for who Mr Lee would contact if absent on sick leave was mixed with evidence suggesting that he would contact GSL direct or at times not at all, but would not go through T5 despite that being a requirement of his engagement. The taking of annual leave was similarly casual as Mr Lee had an 8% holiday pay loading but he also took unpaid leave that was suggestive of him treating the employment relationship as casual.

[42] GSL, whilst expressing mild frustration, did not provide any evidence of them controlling Mr Lee's leave or having raised concerns with T5. A GSL witness indicated that "Due to the nature of the work we do and the hard labour involved, we have a high turnover rate. It is not unusual for temporary staff to just stop showing up". On days they were busy, GSL employees would often not follow up with T5 unless they needed to replace someone.

[43] Mr Lee's timesheets evidenced a fairly regular working pattern over six months but the length of employment was, GSL asserted, coming to a halt at the end of 2018 as the planting was a seasonal activity. However, weather delays meant that planting work was extended into early 2019.

[44] In summary, GSL provided regular work that was not rostered (so absence was not an issue) when available. At times Mr Lee did not avail himself of the earning opportunities

provided and GSL took a relaxed approach to his absences. Had Mr Lee continued in employment beyond 2019 it is likely, from evidence GSL provided, that this would not be ongoing beyond the end of March 2019. By contrast with the situation in *Prasad* Mr Lee did not work long hours for a significant length of time or pick up additional hours ⁶.

[45] GSL witnesses acknowledged that temporary and permanent staff worked alongside each other, undertaking the same labouring jobs. Apart from how rain days were treated and a suggestion that permanent staff were distinguished by company branded PPE and tended to arrive at the depot before commencing work, I conclude it was reasonably clear that GSL used T5 to supply temporary workers to work on transitional projects or contracts that GSL engaged in for third parties as well as them maintaining a core workforce.

[46] Evidence suggested that the very nature of GSL's 'business model' was contracting for others on various projects of fixed durations.

Control and integration

[47] As above, Mr Lee when engaged on the temporary planting project, was integrated into GSL's business. Mr Lee took direction from GSL management and supervisors; worked alongside GSL employees and attended meetings and was invited to an end of year staff barbecue. The only distinction to an outside observer would be that Mr Lee did not wear GSL branded PPE gear.

[48] GSL exercised a significant degree of control over where and when Mr Lee carried out his work but not total control if he did not perform it. Mr Lee had ongoing contact with T5 with his timesheets and although infrequent, T5 did conduct site visits. Set against this, Mr Lee had a degree of autonomy beyond what a GSL employee would experience in that he controlled his level of leave and the timing of such. Paradoxically, GSL did not appreciate this but on a pragmatic basis chose not to make an issue of it until he did not return at the time scheduled for the end of the Christmas/New Year closedown.

[49] I conclude that operationally Mr Lee was under a high level of control including for health and safety reasons but not to the same degree that was exercised by the employer in *Prasad* – GSL treated Mr Lee as a "temp" as evidenced by GSL contacting T5 when they

⁶ At [76].

perceived his performance was wanting. Mr Lee had a degree more latitude afforded him than an existing GSL employee.

The fundamental test

[50] This is sometimes known as the overall test, where I must stand back and look at the totality of the situation. In this context I have to consider whether it was reasonable to conclude that GSL had intentionally engaged Mr Lee directly or whether any features of the relationship that, as Mr Lee's advocate put it, had "morphed into a permanent employment relationship". On the former I find it was self-evident from the documentation and the fact that T5 paid Mr Lee that GSL never intended to enter into an employment relationship.

[51] On the latter issue, Mr Lee suggested the fact that he was moved from different worksites without T5 input was suggestive of him being treated as permanent. I am not convinced by the logic of this contention. Mr Lee gave evidence that he had inquired about becoming permanent with GSL, which tends to affirm he knew that he was temporary and he did not raise any concerns with T5 about being moved around by GSL. Further, the labouring tasks Mr Lee undertook remained largely the same regardless of work location.

[52] The manner by which Mr Lee's temporary employment ended with GSL that was no doubt distressing to him and did not allow him a chance to explain his late return after the holiday break is indicative of him being treated as an easily "dispensable" agency worker.

[53] Finally, I do need to consider whether there were as in *Prasad*, any additional vulnerability factors such as a significant bargaining imbalance,⁷ exploitation factors or capacity issues including language or comprehension issues. I could not find any such parallel extraordinary or compelling features in Mr Lee's situation that would as the current law stands, allow me to conclude that GSL should be brought into the ambit of a personal grievance action.

[54] To explain how I have contrasted Mr Lee's situation with the authority his advocate cited to support his situation (*Prasad*) I have taken account of the following guiding passage:

Much will depend on where a particular case sits on the spectrum. It is less likely that a host organisation will be found to be in an employment relationship with a

⁷ At [93].

labour hire worker where, for example, the arrangement and the obligations, rights and roles of each party is well documented, understood and agreed at the outset, and the work is provided on a supplementary and temporary basis. It becomes increasingly likely that an employment relationship will be found to exist where, for example, the documentation is non-existent or unclear; the work is of indefinite duration, is expected to be provided and is expected to be performed by the individual; a significant degree of supervision, control and direction is exercised by the host; and performance issues are dealt with by it.⁸

Conclusion

[55] I conclude that there was no employment relationship between Mr Lee and GSL and that he is unable to pursue any remedies for his personal grievance against GSL.

The contractual relationship between Mr Lee and T5 and the obligations created

[56] As I have found above, T5 was Mr Lee's employer. Two issues arise from this:

- (i) Was Mr Lee a 'casual' employee and did his employment end as a result of this categorisation.

- (j) What contractual or other duties did T5 owe in the situation when GSL ended Mr Lee's placement.

[57] The first 'port of call' is Mr Lee's employment agreement that is headed "Casual Employment Agreement" and under "Application" it indicates:

- 1.1 This casual agreement shall commence on and continue as required until such time as it is terminated by either party pursuant to the termination clause in this agreement.
- 1.2 Each period of engagement will be an agreed time, and may be terminated by either party on notice in under this agreement.
- 1.3 These terms and conditions will apply to each assignment the parties agree to, unless varied by agreement in writing.

[58] The above is followed under cl 2 "Position and Duties" with:

⁸ At [92].

2.1 The position is on a casual basis. Tech 5 will endeavour to obtain suitable assignment/s for the Agency Worker with Clients of Tech 5. Work will be provided as and when available to and required by Tech 5. Work is not guaranteed, and any assignments to be worked will be agreed from time to time. The Agency Worker shall not be obliged to accept any assignment offered by Tech 5.

2.2 The Agency Worker acknowledges that the nature of casual work means that there may be periods when no suitable work is available and agrees that:

- a. the suitability of the work to be offered shall be determined solely by Tech 5;
- b. Tech 5 shall incur no liability to the Agency Worker for each assignment.

2.3 When an assignment is offered to the Agency Worker, Tech 5 shall provide the Agency Worker with written advice of the details of the Client and the position. These will be set out in the format of the attached template "Schedule Three – Assignment Particulars". A separate and new "Assignment Particulars" schedule will be agreed and provided to the Agency Worker for each new Assignment.

[59] Further indications of the employment relationship being casual in the agreement include:

- Holiday pay being on an 8% 'pay as you go' basis.
- Sick leave being computed on a casual worker's basis.
- No redundancy provisions.
- No fixed hours of work and a stipulation that the Agency worker "is being employed on an as required basis and has no fixed hours".

[60] Contra indications that the agreement has indicative of ongoing employment, include:

- An abandonment of employment clause.
- A 'conflict of interest' provision.
- A twelve months' restraint of trade clause.
- A leave without pay clause requiring the employee to seek T5 consent for taking leave as well as a sick leave clause requiring a medical certificate after an absence of three days.
- A termination on medical grounds provision.
- Employee protection provision covering restructuring.

[61] Despite the employment agreement having several references to the giving of ‘notice’ of termination and a payment in lieu of notice provision, no notice period is specified other than the period of notice that the employee should give T5.

[62] I find that operationally the employment relationship between T5 and Mr Lee was not in this context as clear cut ‘casual’ as T5 label it in the traditionally understood sense. Mr Lee was not ‘filling in’ for an absent worker or being part of an ‘on call’ arrangement providing relief cover for an employer, he was placed in an assignment of ongoing, regular hours for a fixed term duration tied to an external event (the completion of a project).

[63] However Mr Lee, without being explicit about it, at times treated the work as casual and GSL tacitly acknowledged up to the point of him being ‘sent away’ that ‘temp’ workers may not always attend work to a reliable pattern.

[64] In addition to provisions in the employment agreement and the fact that the Act provides no definition of “casual employment”, useful guidance on determining what is a genuine casual relationship is found in the Employment Court decision *Jinkinson v Oceania Gold (NZ) Ltd*, identifying the following relevant factors:

- 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 finish times.⁹

Conclusion

⁹ *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at [47].

[65] Taking into account and applying the above factors, I find that ‘casual’, whilst not best describing how the relationship should ideally have operated (fixed term would be a more apt approach), is a reasonably accurate categorisation in this particular context.

[66] I find Mr Lee’s claim that he was unjustifiably dismissed cannot succeed.

Duties owed by T5 and the potential disadvantage claim

[67] Whilst Mr Lee has failed to establish that he was unjustifiably dismissed by both T5 and GSL I have to deal with a separate claim that T5 allegedly acted in a manner that disadvantaged Mr Lee. This is advanced by Mr Lee on the basis that T5 were not sufficiently “communicative in maintaining the employment relationship”.

[68] On the facts, I find that T5 failed to meet the justification test set out in s 103A of the Act and attendant good faith obligations by failing to ascertain Mr Lee’s perspective of why he did not show up for work at GSL on 7 January 2019. T5 unquestionably accepted GSL’s perspective of events and communicated such to Mr Lee in an unnecessarily confrontational manner.

[69] Given that Mr Lee’s employment was summarily terminated by GSL, I find that T5 did not act in good faith toward Mr Lee and also that this omission broadly breached a contractual obligation contained in cl 6 of the employment agreement that T5: “Act as a good employer in all dealings with the Agency Worker”.

[70] I find that a ‘good employer’ in these circumstances would have properly investigated the situation and then perhaps attempted to mediate between GSL and Mr Lee to resolve the matter. This could have included T5 being upfront with GSL to explain that the ‘temp’ they had provided was actually employed by T5 as a ‘casual’ and thus entitled to ‘pick and choose’ when he attended work. This is an unsatisfactory dichotomy that T5 as a Labour Hire company placed themselves in and it led to them not affording Mr Lee obligations they contractually and statutorily owed to him.

[71] Having found the above, I also find that T5 by their omission to not advocate for Mr Lee, disadvantaged Mr Lee and he is entitled to consideration of a remedy for such an oversight.

Section 134(2) of the Act – is a penalty for GSL allegedly being a party to a breach of an employment agreement appropriate?

[72] The submission on this issue was somewhat confusing. Mr Lee claimed that GSL should be held liable for a penalty for being a party to a breach of Mr Lee's employment agreement. Initially, no specific provision of the employment agreement was identified as being the subject of the breach and the submission concentrated on the acts and omissions of T5. What I took from the submission is that T5 failed to prevent GSL from ending Mr Lee's employment and that: "These breaches were both instigated and aided by the second respondent" being GSL. Conceptually, I find that this claim requires a degree of knowledge by GSL of the contractual arrangement (although not knowledge of the exact terms) that T5 had with Mr Lee and that GSL deliberately intended to interfere with it.

[73] On the facts, GSL were not provided with a copy of Mr Lee's employment agreement and the only document they had governing the relationship with T5 employees was the service agreement that allowed GSL to "terminate the provision of any Temporary Staff at any time by 24 hours prior written notice". This commercial arrangement arguably mitigates against any suggestion that GSL deliberately intended to interfere with the relationship between T5 and Mr Lee.

[74] Ms Oberndorfer suggested that it is not acceptable for a commercial contract to override or encroach on employment rights and cited a discussion in an Authority decision: *Charles v Waitakere City Council & Anor*.¹⁰ This decision did discuss this principle and in context I have found that T5 do owe Mr Lee obligations, but it is a big stretch to use this decision as authority for a penalty action against GSL. In *Charles*, Member Arthur found insufficient evidence to establish a breach by the third party cited.¹¹ Here, Mr Lee has merely raised an inference of GSL coming within the ambit of s 134 of the Act and I find that there was insufficient evidence provided to allow me to consider any penalty action against GSL.

¹⁰ *Charles v Waitakere City Council & Anor*, ERA Auckland, 19 November 2007.

¹¹ At [56] – [66].

Remedies

[75] Having found that T5 initially breached the Act in not allowing Mr Lee sufficient time to get advice on the content of his employment agreement and that T5 did not act in a fair and reasonable manner when they became aware of the circumstances of the summary ending of Mr Lee's placement, I must conclude that Mr Lee was disadvantaged by T5's actions and omissions.

[76] Mr Lee is entitled to a remedy under s 123 of the Act. Because I have found that the nature of the relationship with T5 was casual his claim for lost wages fails but given Mr Lee's employment agreement was deficient in not providing notice I award Mr Lee what would be a reasonable common law notice based on the nature of his occupation and his pay cycle - that being one week's pay in the amount of \$760.87 gross.

[77] I heard evidence from Mr Lee that he suffered distress and embarrassment and confusion as to why T5 chose to simply accept GSL's version of events and when he raised the issue with T5 the response was confrontational and to Mr Lee, impliedly threatening. Tech 5 in their submission sensibly accepted that "the language used was regrettable and the same message could have been presented in a less confrontational manner". Mr Lee subsequently says he lost confidence in T5 as an ongoing employer – I found that to be a reasonable assumption.

[78] In summary, T5 displayed no openness in hearing Mr Lee's explanation of why the employment with GSL ended and he was not treated with any agency or dignity. As a result Mr Lee described a loss of self-esteem and that later he suffered mild depression.

[79] In the circumstances, I find that a modest award is required and I fix that at \$6,000 under section 123 (1)(c)(i) of the Act.

Contribution

[80] Section 124 of the Act states that I must consider the extent to which, if any, Mr Lee's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation* ¹²

[81] I find that Mr Lee did not conclusively establish that the reason for his employment ending with GSL was as he asserted - that an employee of GSL gave him permission to return a week later after the Christmas break and, despite finding T5's response to his raising the matter was unnecessarily confrontational, I do find that Mr Lee overreacted by immediately engaging an advocate rather than simply approaching T5 to explain the circumstances of his departure from GSL. Mr Lee then failed to engage further with T5 in a timely manner after they offered to try and find him alternative employment which despite Mr Lee's scepticism was consistent with the obligations T5 had under the terms of the casual employment agreement.

[82] In the circumstances a modest reduction of 10% confined to Mr Lee's award under s 123 (1)(c)(i) of the Act is warranted.

Summary of remedies

[83] I find that Mr Lee has not established an employment relationship with Grounds & Services Limited. Mr Lee has established a personal grievance that he was disadvantaged whilst in the employ of Tech 5 Recruitment Limited. Tech 5 Recruitment Limited must pay to Fagan Lee:

- (i) \$760.87 (gross) as an in lieu of notice payment.**

- (ii) \$5,400 compensation for hurt and humiliation.**

¹² *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Costs

[84] The parties are encouraged to resolve the question of costs between themselves noting that Mr Lee has not made out his claims against Grounds and Services Limited and that he was partially successful in his claims against Tech 5 Recruitment Limited.

[85] If no agreement can be reached, I invite Mr Lee to make a costs' submission within 14 working days of this determination being issued and I will provide GSL and T5 a further 14 days to respond.

David G Beck

Member of the Employment Relations Authority