7 April 2016

Research Director
Finance and Administration Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: fac@parliament.qld.gov.au

Dear Research Director,

Labour Hire Industry in Queensland

Thank you for the opportunity to comment on the inquiry being undertaken by the Finance and Administration Committee into the practices of the labour industry in Queensland.

The Society notes the terms of reference for the inquiry and makes the following submission to that review. The Society’s submission has been prepared with the input of its Industrial Law Committee.

The Society’s submission does not purport to address all matters raised in the issues papers for the review. Rather, it addresses some practical issues which members encounter in this field concerning the effectiveness of enforcing current industrial relations laws in the labour hire industry.

Issues

The essence of these arrangements is that labour hire employees are generally employed on a casual basis by a labour hire business and their service essentially “rented out” to clients of the labour hire business at a profit. It is accepted that businesses in general may have a need for short term workers to fulfil their operational needs, for instance to cover for absent permanent employees or for short term or uncertain tasks. The “need” for casual labour hire employees to carry out work for longer periods of time in circumstances otherwise analogous to full time employment is more questionable.

Most labour hire arrangements appear to retain the relationship of employment between the labour hire employee and the labour hire business, albeit of a casual nature. “ODCO” style contracting arrangements in the labour hire context (whereby an individual worker operates under a contracting agreement with a labour hire business and their services are let out to a client of the labour hire business) have the capacity to even more adversely affect the legal
position of the worker in the triangular arrangement between a labour hire worker, labour hire business and client.¹

Our members have had occasion to give advice to labour hire employees who, after having worked on an essentially full time basis for the one client for a considerable time, often several years, have been told by their labour hire employer that the client business no longer has need of their service. Often, no or little reason is provided by the labour hire employer for an abrupt and seemingly arbitrary end to the relationship between the labour hire employee and the client business. Such a result may be viewed as contrary to the spirit of the industrial relations system in Australia.

The concept of dual employment is not one which has gained traction in Australian industrial relations jurisprudence to date. Traditionally, courts and commissions have adopted the conventional common law orthodoxy that a casual labour hire employee has no recourse against a client of the labour hire employer. Further, the common feature in unfair dismissal application cases (generally involving long serving casual employees) has been that the declaration of the labour hire employer that there may still be (or in fact have been) offers of assignments to the employee has been sufficient to render the application invalid on jurisdictional grounds (ie, the employment has not been terminated).

However, not only unfair dismissal cases are affected. The benefits of workplace rights under the Fair Work Act 2009 (Cth) do not apply directly to labour hire employees (although there may be some indirect capacity to seek redress against labour hire clients through the accessorial liability provisions of the legislation).

The labour hire employee has the worst of both worlds because they may be subject to disciplinary action by the client for their performance and conduct even though the client is not their employer.

Anti-discrimination legislation may be of assistance in specific cases due to the breadth of those provisions but obviously depend on the claimant’s ability to put forward evidence of the discriminatory reason.

Examples of the cases our members have given advice on include situations where the labour hire employee has been terminated for performance reasons but without being accorded procedural fairness but also, for having raised concerns or having made complaints about treatment by other employees or for being considered a “troublemaker”.² Also, sometimes agreements between a labour hire business and casual workers contain post-employment restraint provisions which can make it difficult for dismissed workers to obtain alternative work.

¹ In a sham contracting context, see Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors [2015] HCA 45 – judgment summary attached

² Noting that laws in relation to the termination of employment in the private sector currently fall within the purview of the Commonwealth.
Labour Hire Industry in Queensland

Whilst each case obviously depends on its own merits, it may be that there is a tightening of approach by the Fair Work Commission in dealing with these types of issues. A copy is enclosed of the decision of DP Asbury in Ms Jayleen Kool v Adecco Industrial Pty Ltd T/A Adecco [2016] FWC 925. Of particular relevance in this case were the facts that the labour hire business could not prove the employee’s knowledge of the inherently uncertain nature of her assignment (in that case with Nestle), the failure of the client to provide the employee with any prior warning in relation to her conduct before the termination and the failure of the labour hire business to offer the employee another appropriate assignment taking into account her circumstances and the prior lengthy assignment.

Possible options

The legal position of a casual labour hire employee is significantly more precarious than that of a casual employee directly employed by a client. Possible options to address this situation include:

a. alerting labour hire employees and ODCO style labour hire workers to relevant issues through educational programs;

b. the development of a code, similar to the Small Business Fair Dismissal Code and checklist, which would assist in filtering meritorious unfair dismissal claims;

c. legislatively specifying that, for the purpose of unfair dismissal claims and claims of breach of workplace rights, the acts of the client should be regarded as law as the acts of the labour hire employer;

d. the legislative creation of direct obligations between the labour hire client and labour hire employee, particularly in the area of workplace rights.

Thank you for the opportunity to provide comments and submissions to the inquiry on the Labour Hire Industry in Queensland.

Please do not hesitate to contact either myself or have a member of your staff contact our Policy Solicitor, Anmaree Verderosa on (07) 3842 5872 or a.verderosa@qls.com.au if you wish to discuss these concepts further.

Yours faithfully

Bill Potts
President
HIGH COURT OF AUSTRALIA

2 December 2015

FAIR WORK OMBUDSMAN v QUEST SOUTH PERTH HOLDINGS PTY LTD & ORS

[2015] HCA 45

Today the High Court unanimously allowed an appeal from the Full Court of the Federal Court of Australia. The High Court held that s 357(1) of the *Fair Work Act* 2009 (Cth) prohibits an employer from misrepresenting to an employee that the employee performs work as an independent contractor under a contract for services with a third party.

Quest South Perth Holdings Pty Ltd ("Quest") operated a business of providing serviced apartments and employed Ms Margaret Best and Ms Carol Roden as housekeepers. Contracting Solutions Pty Ltd ("Contracting Solutions") operated a labour hire business. Quest and Contracting Solutions purported to enter into a triangular contracting arrangement under which Contracting Solutions purported to engage Ms Best and Ms Roden as independent contractors under contracts for services, and then purported to provide the services of Ms Best and Ms Roden as housekeepers to Quest under a labour hire agreement. Quest represented to Ms Best and Ms Roden that they were performing housekeeping work as independent contractors of Contracting Solutions, despite the fact that they continued to perform that work for Quest under implied contracts of employment.

Section 357(1) provided that: "A person (the *employer*) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor."

The Fair Work Ombudsman commenced a proceeding in the Federal Court claiming, amongst other relief, pecuniary penalty orders against Quest for contraventions of s 357(1). The Federal Court ordered at first instance that the proceeding be dismissed so far as it related to that claim, and an appeal from that order was dismissed by the Full Court. The Full Court held that s 357(1) would only be contravened by an employer's representation to an employee which mischaracterised the contract of employment that existed between the employee and the employer as a contract for services made between the employee and the employer, not between the employee and a third party.

By grant of special leave, the Fair Work Ombudsman appealed to the High Court. The High Court unanimously allowed the appeal, holding that s 357(1) prohibited the misrepresentation of an employment contract as a contract for services with a third party. The Court declared that Quest contravened s 357(1) by representing to Ms Best and Ms Roden that the contracts of employment under which they were employed by Quest were contracts for services under which they performed work as independent contractors.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

Please direct enquiries to Ben Wickham, Senior Executive Deputy Registrar
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DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Ms Jayleen Kool
v
Adecco Industrial Pty Ltd T/A Adecco
(U2015/4381)

DEPUTY PRESIDENT ASBURY  
BRISBANE, 17 FEBRUARY 2016

Application for relief from unfair dismissal.

1. BACKGROUND

[1] Ms Jayleen Kool applies under s.394 of the Fair Work Act 2009 (the Act) for an unfair dismissal remedy with respect to her alleged dismissal by Adecco Australia Pty Ltd T/A Adecco (Adecco). Adecco is a labour hire business that provides labour to its clients in various industries, including the food manufacturing industry.

[2] Ms Kool initiated contact with Adecco on 18 October 2012 with a view to undertaking work for its clients. On 22 October 2012, Ms Kool was assigned to work for one of Adecco’s clients – Nestle Chalet Patisserie (Nestle). Ms Kool worked at the Nestle site from this time until 11 March 2015. Ms Kool asserts that she was unfairly dismissed because she worked at least 38 hours per week at the Nestle site for two years and five months without any issues being raised in relation to her conduct and work performance. Ms Kool contends that she was removed from that site without any warning or valid reason, at the request of Nestle’s site manager, because of issues involving other employees in which she had no involvement. Ms Kool further asserts that no real efforts were made by Adecco to place her in another position after her removal from the Nestle site.

[3] Adecco objects to Ms Kool’s application on the basis that she has not been dismissed. The objection, as articulated in Adecco’s Form F3 Response to Ms Kool’s application, was that Ms Kool’s assignment at the Nestle site ended but Ms Kool continued to be employed by Adecco, evidenced by the fact that she was offered and accepted further assignments with other Adecco clients after her Nestle assignment ended. Adecco contended that Ms Kool’s application should be dismissed and that Ms Kool should be ordered to pay its costs in relation to her application.

[4] Ms Kool’s application for an unfair dismissal remedy was made within the period required in subsection 394(2) of the Act. No other jurisdictional issues arise. Ms Kool is a person protected from unfair dismissal as defined in s.382 of the Act. Adecco is not a small business employer and the dismissal was not a case of genuine redundancy. The matter was
listed and dealt with on the basis that the hearing would encompass both the jurisdictional objection raised by Adecco and the substantive question of whether, if the jurisdictional objection was dismissed, Ms Kool was unfairly dismissed. A hearing was conducted on the basis that it was considered that this was the appropriate course, having taken into account the matters set out in s.399 of the Act and the views of the parties.

[5] Ms Kool was represented by her mother, Ms Pam Kool, who on behalf of her daughter was involved in a number of attempts – via discussions with management of both Adecco and Nestle – to obtain an explanation for why Ms Kool had been removed from the Nestle site. Ms Pam Kool also provided a statement in support of the application. Adecco was represented by Mr Chad Issa, its Senior Workplace Relations Advisor.

[6] Ms Kool gave evidence on her own behalf. Evidence in support of Ms Kool’s application was also given by:

- Ms P Kool;
- Mr Tony Heesakkers, formerly the Senior Factor Analyst for Nestle;
- Ms Wendy Towner, Packing Room Team Leader for Nestle and Ms Kool’s direct Supervisor.

[7] Evidence for Adecco was given by Ms Sarah Olechno, Branch Manager, Wacol. A further witness statement made by Ms Margaret Coyne, Recruitment Specialist for its Wacol Branch, was also filed on behalf of Adecco. Ms Coyne was not present at the hearing and was not available for cross-examination. I accept that Ms Coyne was ill on the day of the hearing. I have accepted Ms Coyne’s statement on the basis that I needed to inform myself about the relevant facts and circumstances where Adecco’s evidentiary case was deficient. That the hearing was for the purpose of dealing with both the jurisdictional objection and the substantive case was apparent from the Directions issued by the Commission.

[8] Unfortunately Adecco’s representative did not appear to understand that the hearing was intended to deal with both the jurisdictional objection made by Adecco and the substantive application and did not call any evidence or make submissions directed to the question of whether, if Ms Kool was dismissed, the dismissal was unfair, on the basis of the factors in s. 387. Further, a number of evidentiary matters that should have been included in a witness statement were set out in the submission filed by Adecco.

[9] During the hearing I pointed out to Adecco’s representative that there was no evidence before the Commission to support assertions he was making about Ms Kool’s contract of employment or the attempts to obtain an alternative placement for her. Adecco was given an opportunity for a witness to adopt evidentiary matters set out in its written submissions and did not take this opportunity. Adecco was also permitted to call further evidence from Ms Olechno about the terms of Ms Kool’s contract of employment but did not seek to tender documentary or electronic evidence about those terms.

2. EVIDENCE

2.1 Terms of Ms Kool’s employment

[10] It is not in dispute that Ms Kool commenced an employment relationship with Adecco on 18 October 2012. Ms Kool was assigned to work at the Nestle site and was engaged there
for two years and five months. During this period Ms Kool states that she worked 5 or 6 days per week and a minimum of 38 hours per week, not including overtime. Ms Kool also said that she worked continuously for this period except for public holidays, when Nestlé did not operate. Adecco does not dispute Ms Kool’s evidence about the hours she worked. Ms Kool also states that she enjoyed her work and the regular income it provided and the convenience of the proximity of that work to her place of residence.

[11] Adecco tendered a copy of a “Candidate Declaration” said to be a written contract between Ms Kool and Adecco, entered into on 18 October 2010. The Candidate Declaration is said to set out the terms and conditions of employment under which employees are “engaged with Adecco” and relevantly provides:

“1. I acknowledge and accept that I am under the care, direction and supervision of Adecco’s client during the period of any client assignment. The client’s care and supervision relates to my defined working hours, client specific regulations and policies, and the manner and proficiency in which my work is to be performed.

2. I acknowledge and understand that I will be engaged by Adecco as a casual (“Hourly-hire”) employee in accordance with the relevant statutory instrument (e.g. Award, Workplace Agreement).

... 7. I accept that each casual assignment is a separate period of employment, that Adecco does not control the length of any client assignment, and that the client may vary or conclude the assignment at one hours’ notice.

8. In the event of a variation to an assignment or upon the commencement of a new assignment, the provisions of this document shall be unaffected and shall remain in force until replaced or varied.

... 17. I shall be paid weekly and only upon Adecco’s receipt of a correctly completed time sheet that has been authorised by an appropriate client supervisor/manager.”

[12] The Candidate Declaration tendered by Adecco is a generic document and does not have any information specific to Ms Kool. The Candidate Declaration was tendered as an attachment to Adecco’s outline of submissions. There is no evidence that Ms Kool ever received the Candidate Declaration, much less that she signed and accepted it. In her oral evidence, Ms Olechno said that when potential Candidates approach Adecco for placements, they are emailed an “e-registration”. Part of the e-registration is the provision of a username and password to the Candidate who then logs on and completes a registration. Ms Olechno said that part of that registration is the Candidate Declaration. Ms Olechno “believes” that a Candidate cannot progress with registration until they have “ticked to say that [they] understand and have read the declaration”. Candidates are not required to physically sign a Candidate Declaration.

[13] The following exchange occurred between Ms Olechno and I in relation to the Candidate Declaration:

“So how is that - how do you forward that to applicants for positions, and how do you find out that they have read and understood it and agreed to it?—Because it's sent to them as an email along with their whole registration piece that they have to complete,
like an application form as well as a health questionnaire. And then afterwards they have this candidate declaration that says, "Have you read and understood" — and they have to tick that to move to the next stage to submit the application.

Okay. So I assume you could have, if you wanted to, produced what the applicant ticked and filled in electronically?---Yes.

But you haven't?---I haven't what, sorry?

You haven't produced it. I have no evidence, do I, that all of this material got to the applicant and that she ticked the box to say she had read it and understood it, or sent it back?---It has been completed. The application was completed by her on 18 October 2012.

Yes, but do I — can you tell me, is it attached to your statement? Is it in evidence somewhere that I have missed?---I don't believe so.

Right. Okay. Thanks. So basically people read that and then they tick a box on a screen electronically by email to say that they have read it and understood it?---Yes.

Right. Okay. So nowhere would there be a signed document with the applicant's signature on it?---I don't believe so, no.”

[14] In response to a question from me, Ms Kool stated that she does not recall seeing or signing the Candidate Declaration. 11 Ms Kool recalls that she did attend at Adecco at the time of her commencement and does remember "doing something on computer work, and going down to [Nestle] and signing papers down there" 12. Ms Kool accepted that her engagement with Adecco was as a casual employee and that to some degree she understood the nature of casual work.13 However, Ms Kool stated that she was told that the position with Nestle was a full time position and that she was guaranteed work every day, all the time.14 Ms Kool also said that management of Nestle treated her like she was a member of Nestle’s team.

[15] Under cross-examination Ms Kool said that she understood that she is an employee of Adecco placed at client sites, but said that she had only reached this understanding after her dismissal. Ms Kool made an earlier application for an unfair dismissal remedy alleging that she had been dismissed by Nestle and agreed that she now understood that her employer had been Adecco. However, Ms Kool maintained that she had always dealt with Nestle on all employment matters and had believed that Nestle was her employer.

[16] In its submissions to the Commission, Adecco maintained that Ms Kool had signified her agreement with the Candidate Declaration by electronically checking a box and emailing the document to Adecco. Adecco also contended that Ms Kool was required to complete an Adecco timesheet during the period she was assigned to Nestle and to submit it through an “on-line portal” in order to be paid. Ms Kool disputed this assertion and said that she manually completed a time card held by Nestle and submitted that time card to Nestle management. There was no evidence placed before the Commission in relation to time cards or other related documentation that may have been submitted by Ms Kool during the period she was employed by Adecco and assigned to Nestle.
2.2 Cessation of Ms Kool’s engagement/assignment at Nestle

[17] Adecco filed an unsigned witness statement made by Ms Coyne. As previously noted, Ms Coyne was not present at the Hearing to give evidence and was not available for cross-examination. Given the dearth of evidence called by Adecco, I have considered Ms Coyne’s statement in order to establish the events that resulted in the cessation of Ms Kool’s assignment at the Nestle site. Ms Coyne states that on 16 March 2015 she was contacted by Ms Brooke Jackson, Nestle Production Coordinator, who advised that Nestle was proposing to meet with Miss Kool regarding “inappropriate/unprofessional conduct”. The conduct was said to include an allegation that Ms Kool was “clocking” other staff in and out of their shifts.

[18] Ms Coyne attended at the Nestle site on 16 March 2015 and witnessed Ms Kool coming out of the office of Mr Scott Carlson, Nestle Factory Manager. Ms Coyne spoke to Mr Carlson who advised her that there was “some unprofessional (clicks (sic) and gossiping) behaviour onsite which didn’t fit in to the companies (sic) conduct or values”. Ms Coyne states that Ms Jackson and Mr Carlson informed her that Ms Kool had previously been spoken to about “clocking in and out and gossiping” but that “on this same day” Ms Kool proceeded to engage in the same conduct. Ms Coyne was advised by Ms Jackson and Mr Carlson that they “would like” Ms Kool’s engagement to cease “as Ms Kool was no longer required”.

[19] According to her statement, Ms Coyne then spoke with Ms Kool privately and advised Ms Kool that her assignment at Nestle was ending, effective immediately. Ms Coyne states that Ms Kool told her that she had “got in with the wrong crowd”. Ms Coyne advised Ms Kool that Adecco would attempt to find her “some other employment”. Under cross-examination Ms Olechno agreed that she told Ms P Kool during a telephone conversation that Ms Kool’s assignment with Nestle had ended because she had clocked someone out and Nestle were not happy about that. Ms Olechno also said that she was informed by a colleague that management of Nestle stated that Ms Kool had been spoken to about this conduct before.

[20] Ms Olechno was also asked whether Ms Kool had been spoken to about the accusation or given an opportunity to respond to it and said that she did not know because she was not at the meeting. Ms Olechno confirmed that Ms Kool’s assignment at Nestle was ended by Adecco on the instructions of Nestle.

[21] Ms Kool agreed that around the time her placement with Nestle ended there had been some gossip in Nestle’s workplace and issues concerning card clocking – a practice whereby an employee would clock another employee off. Ms Kool also states that the precipitating event leading to her dismissal was a dispute between two of Nestle’s supervisors – one of whom is Ms Towner. Ms Kool agreed that in the past she had engaged in the practice of clocking off another employee but maintained that on that occasion she was directed to do so by her then supervisor and that she had clocked her supervisor off. In response to the proposition that she should have known that this was the wrong thing to do, Ms Kool said that she was taking directions from her supervisor. Ms Kool also said that she had not done this since 2014.

[22] Ms Kool’s evidence is that on 2 March 2015, she was asked to attend a meeting with Ms Jackson and Mr Carlson of Nestle. At the meeting, Mr Carlson questioned Ms Kool about events in the factory. Ms Kool said that she felt as though Mr Carlson was blaming her for events and that she did not understand fully what was occurring. Ms Kool was also questioned
about clocking cards and explained to Mr Carlson that in 2014 she had clocked off a Supervisor and that she had been directed to do so by the Supervisor and on that basis did not believe that this was inappropriate. Ms Kool then left this meeting and later went home early. Ms Kool’s evidence about the events surrounding her leaving early is dealt with below.

[23] On 11 March 2015, Ms Kool attended for work at 7.00 am, her normal start time. At or around 12.30pm, Ms Kool was called to a meeting with Mr Carlson and Ms Jackson and asked by Mr Carlson if “there was anything [she] needed to say regarding [her] clocking card last week”. Ms Kool responded that there was nothing that should be wrong. Following this response, Mr Carlson threw his pen down and put to Ms Kool that she “left work last Monday being the 02/03/2015 at 6.30pm…but [her] card was clocked out at 7pm”. Ms Kool states that she left work at 6:45pm on this date.

[24] Ms Kool explained to Mr Carlson that she did leave Nestle early on 2 March 2015, to get herself something to eat as she had not had a break all day and had been under an “enormous amount of pressure due to our talk in the office on that day”. Ms Kool said that on 2 March 2016 she broke down crying in the car park as she felt that Mr Carlson was “blaming [her] for everything that had been happening”. Later, after leaving the site to get food, Ms Kool continued to be emotional and contacted her Supervisor Ms Towner to advise that she would not be returning to work as she was too emotional. In her statement filed in these proceedings, Ms Kool said that she did request that Ms Towner sign her out for the day and that Ms Towner had clocked her card, which had not been a problem in the past. In response to questions from me, Ms Kool said that she did not tell Ms Towner to clock her off and that clocking off was not mentioned.

[25] At Hearing, Ms Kool gave the following evidence:

"
---so on the 11th, on the Wednesday, I got called back into the office again and talking to [Mr Carlson] and [Ms Jackson] on the day, and then they said, "You were clocked off on the day." And I said, "No, I wasn’t." You know "I hadn't been clocked off." I had made arrangements with Wendy Towner to let her know that I won’t be coming back on the site. It was nothing to do with clock-on. And then they had their little meeting. They asked me to go and leave, but they said "Adecco is here." So when I was down in the lunch, I think it was [Ms Coyne] and [Mr Carlson] and -- [Ms Coyne], [Mr Carlson] and [Ms Jackson] were in the office having their own little meeting. I didn't sit down with them at all. [Ms Jackson] came back into the changing rooms where I was and she said, "Hey Jay, just going to send you home today, a little bit early."
"

[26] According to Ms Kool, she was then asked to leave the room. At this time, Ms Coyne arrived and had a discussion with Mr Carlson. Ms Kool asked Ms Jackson whether she should pack up her locker, to which Ms Jackson replied “yes you better”. Ms Kool said that she then spoke to Ms Coyne who said that she had “tried her best”. Ms Jackson escorted Ms Kool to her car. During this time Ms Kool states that Ms Jackson said that she had tried everything and that she had requested Adecco make Ms Kool “high profile for another job”. Ms Towner was also present at this time. Ms Kool said that other than the statements made by Ms Coyne and Ms Jackson, she was given no reason for being asked to leave Nestle. Ms Kool said on a number of occasions during her evidence and in submissions that she wanted to know why she had been dismissed.
[27] Ms Towner’s evidence is that she saw Ms Kool at work on 2 March 2015 and noticed that she was “quite upset”. As Ms Kool did not want to talk to Ms Towner about why she was upset, Ms Towner did not press the issue. At 6:30pm on 2 March 2015, Ms Kool said to Ms Towner that she had not had a second break and Ms Towner told her to take the break. Ms Kool left the Packing Room at about 6:35pm. Fifteen or twenty minutes later, Ms Towner received a phone call from Ms Kool who said that she was “very upset & crying” and that she was going to go straight home. Ms Towner told Ms Kool that this was “more than okay”. Ms Kool asked Ms Towner to check if she had clocked off as she could not remember. Ms Towner agreed to do this. Ms Towner said that she looked at Ms Kool’s clocking card and “clocked it off without even thinking”. Ms Towner maintained that Ms Kool did not request that she clock her off, and only requested Ms Towner to check if she had clocked off or not.19

[28] Ms Towner also said that if employees had not clocked off she would “write down the time they left [and] then initial it” and that this practice has “never been a problem in the past”. Ms Towner did not attend the meeting on 11 March 2015 between Ms Kool, Mr Carlson and Ms Jackson but saw Ms Kool and Ms Jackson in the car park after the meeting. Ms Kool was very upset and crying and Ms Towner was requested to leave by Ms Jackson as Ms Jackson stated it was “a private matter”. Ms Towner returned to the Packing Room.

[29] About an hour later, Ms Jackson entered the Packing Room and advised everyone that Ms Kool no longer worked at Nestle. Ms Towner enquired with Ms Jackson why this had occurred but Ms Jackson refused to answer, stating that too much gossip would travel around the factory. About an hour later, Mr Carlson approached Ms Towner and they had a discussion about the events of 2 March 2015, during which Ms Towner said that:

“I told [Mr Carlson] exactly what had happened & that not at any time did [Ms Kool] ask me to clock her out, I done that myself without even thinking, I made it very clear that it was not done intentionally nor was done with any sort of malice. Many things were discussed and I asked why [Ms Kool] wasn’t working there anymore & [Mr Carlson] [didn’t] want to discuss it but he did say that he had received complaints about [Ms Kool]”

[30] Ms Towner states that she finds it hard to believe that other employees would complain about Ms Kool as she was one of the best workers; had very good attendance; and was always friendly to other employees. Ms Towner was not aware of any issues with Ms Kool’s performance or conduct.20 Ms Towner states that there was no on-going concern with Ms Kool clocking other employees in and out.21

[31] The following day, Ms Towner again spoke with Mr Carlson to ask if Ms Kool was dismissed because of Ms Towner’s actions in clocking her off on 2 March 2015. Ms Towner said that she was crying while speaking with Mr Carlson and asked for Ms Kool to be given her job back. Ms Towner states that Mr Carlson said that Ms Kool did not lose her job for this reason, but he did not tell her why Ms Kool did lose her job, other than to state that Ms Kool “didn’t fit in here”. Ms Towner said that she disagrees with that statement.

[32] According to Ms Towner, after Ms Kool ceased to work at Nestle’s site, five additional employees were placed there through Adecco.22 Ms Towner agreed under cross-examination that Nestle did advertise for additional casual employees through Adecco approximately once each year and that the needs of Nestle with respect to casual employment fluctuate.
Mr Heessakkers said that on 11 March 2015, Mr Carlson called a meeting of the management team at Nestlé during which Mr Carlson advised that Ms Kool would be ending her employment immediately. Ms Jackson then stated that after talking to Ms Kool a decision had been made that it would be “best to let her go”. The management team were told that the week prior, Ms Kool had left her shift early and had requested Ms Towner to clock her off.

According to Mr Heessakkers it is not uncommon for employees to contact their Team Leader if they have forgotten to clock off. It is normal practice, according to Mr Heessakkers, that in this scenario the Team Leader will either clock off the person, or write down the end time and then initial the time card. Mr Heessakkers also said that Ms Jackson told him that the reason for ending Ms Kool’s placement with Nestlé was the “clocking behaviour”. Further, Mr Heessakkers said that he had a discussion with Mr Carlson during which Mr Carlson initially agreed that the events leading to Ms Kool being removed from the Nestlé site related to “clocking behaviour” but Mr Carlson subsequently denied this and advised that there were other behavioural issues. Mr Carlson also insisted to Mr Heessakkers that Ms Kool had not been dismissed by Nestlé but rather by Adecco, after having initially stated that Nestlé had terminated her employment.

In cross-examination, Mr Hessakkers stated as follows:

“You stated earlier that you were unsure as to who dismissed, or whether Jayleen was, in fact, dismissed. You said originally that you thought Nestlé dismissed Jayleen but now you're unsure? What made you made you think it was Nestlé, or that Nestlé had any right to dismiss Jayleen?---Because Scott - when Scott brought the management team together, he said that Jayleen was no longer working for Nestlé or no longer with Nestlé effective immediately. That suggested that Nestlé made the call to terminate Jayleen and I'm not sure about the technical details, whether Adecco has terminated or whether Nestlé has terminated, but it's clear to me that initiative it's from Nestlé and not from Adecco. It is on grounds but something between Brooke, Scott and Jayleen, and Adecco had no role in this.

Are you saying that if there was a dismissal that it was at the initiative of Nestlé not Adecco?---That's what I believe, yes.”

2.3 Attempts by Adecco to find alternative work for Ms Kool

Ms Coyne states that she assisted Ms Kool to prepare an updated resume. On 17 March 2015, Ms Coyne contacted Ms Kool to “check up and see how she was going”. At this time, Ms Kool began to discuss unfair dismissal with Ms Coyne and requested that Ms Coyne speak with Ms P Kool about the matter. There was evidence of a number of discussions between Ms P Kool and various managers of Adecco and Nestlé in relation to the allegation that Ms Kool had been unfairly dismissed. During a discussion with Ms P Kool, on or around 17 March 2015, Ms Olechno stated that Ms Kool was not dismissed, that Ms Kool’s employment with Adecco would continue and that Adecco would “continue to seek alternative work” for Ms Kool. Ms Olechno also advised Ms P Kool that as Adecco had limited clients in the food manufacturing industry it may take some time to find an alternate placement for Ms Kool.
Written submissions filed by Adecco in relation to the hearing of Ms Kool’s unfair dismissal application, state as follows with respect to attempts to find another placement for Ms Kool:

“8. On 24 March 2015, the Applicant was placed at the site of the Respondent’s client Brumby State Books (Brumby), for a period of two days.

9. On 1 April 2015, the Applicant was placed at the site of the Respondent’s client, Brumby.

10. In addition to the work offered to and accepted by the Applicant at paragraphs 8 and 9, above, beyond the alleged termination date of 11 March 2015, the Respondent has continued to offer the Applicant the opportunity to be placed at its clients sites on the following days:

   a) On 13 April 2015, the Respondent contacted the Applicant stating that it was awaiting further instructions from Brumby, but that the Applicant was still on its availability list and would be contacted if a suitable role arose.

   b) On 11 May 2015, the Respondent rang the Applicant, using the telephone number provided by the Applicant to the Respondent, relating to an available position; however, the Respondent was unable to leave a voice mail. The Respondent sent an SMS to the Applicant, on the same telephone number.

   c) On 12 May 2015, the Respondent rang the Applicant, using the telephone number provided by the Applicant to the Respondent, relating to an alternative available position; however, the Respondent was unable to leave a voice mail. The Respondent sent an SMS to the Applicant, on the same telephone number.

   d) On 19 May 2015, the Respondent rang the Applicant, using the telephone number provided by the Applicant to the Respondent, relating to an alternative available position; however, the Respondent was unable to leave a voice mail. The Respondent sent an SMS to the Applicant, on the same telephone number.

   e) On 19 May 2015, the Applicant returned the telephone call of the Respondent and advised, using words to the effect, that she:

      i. was looking for full time work in the Wacol Carole Park area and that one day was not enough for her;
   
      ii. is currently doing a course in beauty to upgrade her skills; and

      iii. had been getting the Respondent’s messages but did not have telephone credit to reply and was using someone else’s telephone on the day the telephone call of the Respondent was returned. The Respondent advised that if anything suitable arose that it would advise the Applicant.

   f) On 21 May 2015, the Respondent rang the Applicant, using the telephone number provided by the Applicant to the Respondent, relating to an alternative available position; however, the Respondent was unable to reach the Applicant.
and left a voice mail and sent an SMS to the Applicant, on the same telephone number.

g) On 1 June 2015, the Respondent rang the Applicant, using the telephone number provided by the Applicant to the Respondent, relating to an alternative available position; however, the Respondent was unable to leave a voice mail. The Respondent sent an SMS to the Applicant, on the same telephone number.

h) On 2 June 2015, the Respondent rang the Applicant, using the telephone number provided by the Applicant to the Respondent, relating to an alternative available position; however, the Respondent was unable to leave a voice mail. The Respondent sent an SMS to the Applicant, on the same telephone number.

i) On 9 June 2015, the Respondent rang the Applicant, using the telephone number provided by the Applicant to the Respondent, relating to an alternative available position; however, the Respondent was unable to leave a voice mail. The Respondent sent an SMS to the Applicant, on the same telephone number.

j) On 9 June 2015, the Applicant returned the telephone call of the Respondent and advised, using words to the effect, that she:

- had a job interview and was unable to work; and
- wanted a position closer to the Wacol Carole Park area.

The Respondent advised that if anything suitable arose that it would advise the Applicant, pending the outcome of her job interview.”

[38] During the hearing, I raised with Mr Issa that there was no witness evidence of the attempts made by Adecco to find Ms Kool further employment but that rather, Adecco had included factual assertions about these attempts in its submissions.25 I indicated that leave could be sought for Ms Olechno to adopt the evidentiary material set out in the submission as her evidence on the basis that she is the Manager of Adecco’s Wacol Branch and dealt with Ms Kool during the period of her employment with Adecco. This invitation was not taken up. Instead, Ms Olechno was asked some questions about attempts to find Ms Kool another placement and stated that Ms Kool had been offered “six or seven” assignments and had taken up one assignment with Brumby Books for “a couple of days”. Ms Olechno also said that attempts had been made to contact Ms Kool “around May or June” in relation to these positions.26

[39] Ms Kool said that the contact with Adecco had been mainly from her and Ms P Kool rather than the company initiating the contact.27 Ms Kool also said that she was unable to return telephone calls from Adecco because she did not have an income with which to pay for credit on her mobile telephone. Ms Kool said that she did contact Adecco when she was able to use another person’s phone. Ms Kool disputes that Adecco made attempts to contact her on as many occasions as asserted in Adecco’s submissions but accepts that she was contacted by Adecco on three occasions to talk about further work. On other occasions when Ms Coyne contacted Ms Kool, the discussions were about Ms Kool’s resume. Further, when Ms Kool called Adecco in response to text messages about possible work, the discussion would be about Ms Kool’s resume rather than further placement.
[40] In relation to the placement on 24 March 2015 and 1 April 2015, Ms Kool stated that she initiated contact with Adecco in relation to that placement as she had seen an advertisement about it. In response to a question from the Commission, Ms Kool said that she was seeking full time work and if possible, at a location close to her home. Ms Kool further stated that the alternate placements offered to her were for single days or for limited times rather than the on-going work that she had at Nestle. Ms Kool said that it was not financially viable for her to accept a single day placement given the area where she lived and that she was not in a financial position to travel for a single day of work. Ms Kool is also completing a beauty therapy course with the aim of transitioning into employment in the beauty therapy industry. Ms Kool stated that she was last contacted by Adecco on 9 June 2015 and that she did advise that she was attending a job interview that day. Ms Kool has had no further contact regarding placements with Adecco clients since that date.

[41] Ms Kool stated that she is a single mother with three dependent children. As a New Zealand citizen Ms Kool is not eligible for Centrelink payments or other assistance from the Australian Government. Ms P Kool also informed the Commission that Ms Kool has learning difficulties. Directions were issued after the hearing requiring Ms Kool to file and serve further material in relation to her earnings during the period of her employment with Adecco and her placement with Nestle and details of attempts to obtain other employment and earnings since the cessation of her employment. The Directions also provide Adecco with an opportunity to indicate whether Ms Kool was required for cross-examination in relation to that material. Ms Kool provided further material to the Commission establishing that she earned $24.17 per hour for day shift, $29.01 per hour for night shift and $36.26 per hour when she was paid at the rate of time and a-half. Ms Kool also provided pay slips said to indicate that her average earnings were between $750 and $850 per week.

[42] Ms Kool states that she commenced looking for other employment in or around March 2015 and provided evidence of applications for positions with a range of employers which were unsuccessful. Ms Kool had a number of short term assignments and from 20 April 2015 until 20 October 2015 Ms Kool had an assignment with one employer through another labour hire company and has since obtained permanent employment with that Company. Ms Kool also tendered documents evidencing loans that she had received from family members and friends to assist her during the period that she did not have employment.

3. RELEVANT LEGISLATION

[43] In order to determine Adecco’s jurisdictional objection, it is necessary to determine whether Ms Kool was dismissed. Section 386 of the Act relevantly states:

“386 Meaning of dismissed

(1) A person has been dismissed if:

(a) the person’s employment with his or her employer has been terminated on the employer’s initiative;...

(2) However, a person has not been dismissed if:

(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the
employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

... (3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.”

[44] If Ms Kool was dismissed, it will be necessary to consider whether Ms Kool’s dismissal was unfair on the grounds that it was harsh, unjust or unreasonable by applying the criteria in s.387 of the Act, as follows:

“387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.”

4. CONSIDERATION

4.1 Labour hire employers and unfair dismissal laws

[45] The business model of labour hire companies is generally that they employ persons (usually on a casual basis), and place those persons in the businesses of other companies with which the labour hire company has a contractual relationship (host employers). In some cases the labour hire employees will work intermittently or for specific periods of time at the
premises of the host employer – for example to replace the employee of a host employer temporarily absent from the workplace for a specified period, which is ascertained in advance of the placement or which may be extended or terminated during the period of the placement if circumstances change. The labour hire employee may have been required by the host employer to meet a seasonal or operational fluctuation. In other cases, labour hire employees may be required to work at the host employer’s premises for lengthy periods; under the supervision and management of the host employer; integrating with the employees of the host employer; and for all intents and purposes forming part of the host employer’s workforce.

[46] The diversity of such arrangements is considerable, reflecting the need for flexibility in modern workplaces. However, these arrangements can be a minefield for all concerned, both in practical terms and in terms of rights and obligations arising under legislation, industrial instruments and contracts of employment. The actions of a host employer – particularly when its managers and supervisors engage in disciplinary action against labour hire employees – can have a direct and fundamental impact on the rights and obligations, as between the labour hire company and its employees.

[47] Where a labour hire employee is placed with a host employer and the labour hire employee is engaged on arrangements such as those outlined in Adecco’s Candidate Declaration, the end of the placement will generally not constitute dismissal of the labour hire employee so that the labour hire employee could make an application for an unfair dismissal remedy. This is particularly so where the host employer decides that it no longer requires the services of the labour hire employee and there is no indication that this decision is based on the conduct, capacity or performance of the employee. In such cases the labour hire employee is removed in accordance with the contractual relationship between the labour hire company and the host employer and as provided for in the contract of employment between the labour hire company and the labour hire employee.

[48] Where managers of a host employer inform a labour hire employee that he or she is to be removed from site on the basis of conduct, capacity or work performance, the actions of the host employer may be tantamount to dismissal. This is particularly so where managers or supervisors of the host employer have also been involved in disciplining the labour hire employee. A labour hire employee seeking to contest such action by making an application for an unfair dismissal remedy, faces considerable difficulty, principally because the host employer is not the employer of the labour hire employee. It is also the case that a labour hire company may face considerable difficulty preventing a host employer from taking disciplinary action against an employee of the labour hire company.

[49] However, the contractual relationship between a labour hire company and a host employer cannot be used to defeat the rights of a dismissed employee seeking a remedy for unfair dismissal. Labour hire companies cannot use such relationships to abrogate their responsibilities to treat employees fairly. If actions and their consequences for an employee would be found to be unfair if carried out by the labour hire company directly, they do not automatically cease to be unfair because they are carried out by a third party to the employment relationship. If the Commission considers that a dismissal is unfair in all of the circumstances, it can be no defence that the employer was complying with the direction of another entity in effecting the dismissal. To hold otherwise would effectively allow labour hire employers to contract out of legislative provisions dealing with unfair dismissal.
4.1 Was Ms Kool dismissed?

[50] An employee is dismissed if the actions of the employer result directly or consequentially in termination of employment and the employee does not voluntarily leave the employment relationship. When an employee is employed by a labour hire company under a contract of employment that provides for the employee to be placed in the premises of another entity so that the employee is “on hire”, the underpinning employment relationship may remain in operation between placements, depending on the terms of the employment contract and the particular facts.

[51] Adecco submits that Ms Kool’s placement with Nestle ended on 11 March 2015, but that she remains an employee of Adecco. In the alternative, Adecco submits that if the Commission finds that Ms Kool’s employment has ended, then the ending of the employment relationship was not at the initiative of Adecco. In support of these submissions, Adecco contends that Ms Kool was employed pursuant to terms of employment contained in the Candidate Declaration. It is further submitted that the Commission should accept that the Candidate Declaration was emailed to Ms Kool and that she indicated her acceptance of its terms by checking a box and returning the Candidate Declaration by electronic means. In the alternative, Adecco submits that the Commission should be satisfied that Ms Kool accepted the terms set out in the Candidate Declaration because she “operated in line with it”.

[52] Adecco relies upon the Decision in Tse v Ready Workforce (a division of Chandler Macleod Pty Ltd) [20] (Tse) where Commissioner Cloghan held that:

"...given the nature of Mr Tse’s contract of employment, I find that it continues to exist, albeit only enlivened when a mutually tripartite (Employer, client and employee) assignment is found."

[53] Tse involved an application under the general protections provisions of the Act. The Commission was considering a jurisdictional objection to Mr Tse’s application on the grounds that he had not been dismissed. The facts set out in Commissioner Cloghan’s Decision indicate that Mr Tse was involved in a number of incidents involving another employee at the host employer. Following the final incident, the host employer requested that Ready Workforce not assign Mr Tse to the host employer again. There was evidence that Ready Workforce attempted to discuss the matter with Mr Tse but, following an unsuccessful attempt to contact Mr Tse, emailed Mr Tse to advise that his placement with the host employer was closed and that Ready Workforce would contact him to offer suitable work when it became available.

[54] I am not persuaded that the factual matrix in Tse is analogous to that of Ms Kool. In Tse, the Commission had uncontested evidence about Mr Tse’s contract of employment with Ready Workforce and the terms of that contract of employment were not in dispute. In this matter, Adecco has not led any evidence that Ms Kool accepted or understood the terms contained in the Candidate Declaration, and Ms Kool’s evidence is that she has no recollection of seeing that document much less of having indicated that she accepted its terms.

[55] The Respondent also relies upon the Decision in Bradford v Toll Personnel Pty Ltd T/A Toll Ipec [32] (Bradford) where Commissioner Gregory held:
"...the Applicant in the present matter was not terminated by her employer, Toll Personnel. Her current assignment was instead discontinued, however, her employer remained ready to find work elsewhere when the Applicant was medically cleared fit to resume work."

[56] Similarly, the facts in Bradford are not analogous with the current matter. As with Tse, there was evidence before the Commission of the conditions of employment, signed by the Applicant that formed the contract of employment between the parties, which was a matter that Commissioner Gregory considered in assessing the effect of the Respondent’s actions. The reasons for the alleged dismissal in Bradford were not related to the Applicant’s performance or conduct but rather a restructure of the client’s operations. Commissioner Gregory found:

"In this case the employee’s placement came to an end because of a decision taken by the business in which she was placed to end the use of casuals in data entry work at that location. Once this became evident the labour hire employer indicated to the applicant that once fit to resume work it would look to find work for her elsewhere."

[57] In Bradford, Commissioner Gregory also went on to note that if a labour hire employer does nothing to find and offer other work at the conclusion of a placement, then it may be found that there has been a termination employment at the initiative of the employer.

[58] Adecco has not specified how it is said that the decisions of Tse and Bradford are analogous to the present matter. I am not satisfied that they are of much assistance in determining the particular questions raised by this case. In both Tse and Bradford the Commission accepted that whether or not a person is dismissed turns on the particular facts including: the terms of the contract of employment on which the employee is engaged; the circumstances surrounding the placement or employment ending; the particular circumstances of the employee and other matters that may be relevant.

[59] Adecco bears the onus of establishing its jurisdictional objection to Ms Kool’s application for an unfair dismissal remedy on the grounds that she was not dismissed. To succeed with the jurisdictional objection, Adecco was required to put evidence before the Commission to establish its contentions to the required level of proof – the balance of probabilities. I am not satisfied that Adecco has made out its case.

[60] There is insufficient evidence upon which I could reasonably be satisfied about the terms of Ms Kool’s contract of employment and that she was employed on terms set out in the Candidate Declaration. There is no evidence that Ms Kool understood – much less accepted – the terms set out in the Candidate Declaration. If those terms were emailed to Ms Kool and she acknowledged her acceptance of them by checking a box electronically, then evidence of that transaction could and should have been tendered by Adecco. Ms Olechno agreed that evidence of the transaction is available and that it had not been put before the Commission. Adecco had every opportunity to put its case and to make out its objection.

[61] I do not accept that Ms Kool conducted herself in accordance with the terms set out in the Candidate Declaration. To the contrary, Ms Kool went to work at the Nestle site for at least 38 hours a week (and often worked in excess of 38 hours a week) for two years and five months. During that time, Ms Kool was supervised by Nestle staff and had little or no dealings with staff of Adecco. Ms Kool’s undisputed evidence is that she submitted Nestle
time sheets to Nestle and not to Adecco, and I accept Ms Kool’s evidence on this point. It is also the case that there was no evidence of Ms Kool submitting time sheets to Adecco placed before the Commission. I do not accept that there was a contract of employment between Ms Kool and Adecco that provided that her employment would end on completion of her assignment with Nestle or any other client of Adecco. There is no documentary or electronic evidence of such a contract, and the conduct of Ms Kool and Adecco during the period of her placement with Nestle is inconsistent with such terms.

[62] I do not accept that Ms Kool remained employed by Adecco after her assignment with Nestle ended. The evidence is that on 11 March 2015, Ms Kool was effectively removed from the Nestle site and her assignment at that site was terminated. This is not a case where Nestle decided that it no longer required Ms Kool’s services or the services of labour hire employees generally, because of some operational change or other imperative, unrelated to Ms Kool’s conduct, capacity or work performance. The evidence of Ms Towner was that additional employees from Adecco were placed at Nestle after Ms Kool’s assignment ended. Further, it is not a case where a short term, ad hoc placement was ended. It is clear that Ms Kool’s assignment at Nestle was ended because it was concluded that she had engaged in some kind of misconduct in relation to clocking off.

[63] Adecco did little, if anything, to place Ms Kool in another position after the termination of her assignment at the Nestle site. On Adecco’s own evidence, Ms Kool was placed at a site of one of its clients on 24 March for a period of two days and again on 1 April 2015. Thereafter, there was no contact with Ms Kool until 13 April 2015. I accept Ms Kool’s uncontested evidence that she made contact with Adecco about the placements on 24 and 25 March and 1 April, rather than Adecco making contact with her and offering her the placements. I also accept the evidence of Ms Kool that much of the contact made by Adecco with her after the termination of her Nestle assignment, related to her resume and not to specific employment offers.

[64] Ms Kool had enjoyed a long term placement in which she ordinarily worked full time hours. That placement was ended by Adecco at the behest of Nestle in circumstances where Nestle management had determined that Ms Kool had engaged in misconduct. After her assignment at Nestle was terminated, Ms Kool was not offered further work for, at best, a two week, and at worst, a four week period, and the work that was offered was fundamentally different to that she had performed while at Nestle in that it was sporadic and uncertain. These factors, in combination, constituted dismissal and in all of the circumstances of this case, I am satisfied and find that Ms Kool’s employment was terminated at the initiative of Adecco.

4.2 Was Ms Kool’s dismissal unfair?

4.2.1 Was there a valid reason for the dismissal of Ms Kool?

[65] Where an employee is dismissed because of capacity or conduct, the employer bears the onus of establishing that the reason for the dismissal was a valid reason. It is well established that a valid reason for dismissal is one that is sound, defensible and well founded. The Commission is not concerned with the question of whether, on the information available to the employer, the decision to dismiss an employee was a reasonable one. Rather the Commission must decide whether there was a valid reason for the dismissal on the basis
of the evidence of the primary facts placed before it. A dismissal may be harsh, unjust or unreasonable, notwithstanding the existence of a valid reason for the dismissal.

[66] In the present case, Adecco made no submission and called no evidence that specifically addressed the matters in s. 387 of the Act, notwithstanding the notice of listing and the Directions required that Adecco file and serve material in relation to the substantive matter of whether, if Ms Kool was dismissed, the dismissal was unfair. However, the evidence placed before the Commission makes it clear that the reason for Ms Kool’s removal from the Nestle site was that Nestle managers formed a view that she had engaged in misconduct associated with clocking off and that Adecco accepted that this was the case and terminated her assignment at the Nestle site.

[67] This is not a case where Nestle decided that it wished to reduce the number of labour hire employees working at its site or where there was some fluctuation in work requirements at the Nestle site or Ms Kool was replacing an employee who had returned from leave or some other absence. This was also not a case of a labour hire employee who knowingly entered into a contract of employment which made it clear that the role was temporary and could end at any time and where the placement ended because the host employer no longer wished the work to be performed by a labour hire employee or for some other operational reason relevant to the host employer.

[68] There was also uncontested evidence from Ms Kool that she was told by Adecco management that there was no work available at Nestle when in fact Adecco was advertising for another worker at the Nestle site within a week of Ms Kool being removed from that site. Ms Towner also confirmed that additional labour hire employees supplied by Adecco had undertaken work at the Nestle site after the cessation of Ms Kool’s assignment at that site.

[69] It is clear from the evidence – including the statement of Ms Coyne tendered by Adecco – that management of Nestle instituted disciplinary discussions with Ms Kool about allegations relating to clocking off. It is also clear that management of Nestle formed a view that Ms Kool had engaged in misconduct associated with clocking off; that Ms Kool had been spoken to previously in relation to that conduct; and that for this reason it wanted her removed from the Nestle site. Ms Kool was escorted from the site by Ms Jackson who is a manager of Nestle. Management of Adecco simply acquiesced in that decision without any independent verification of the misconduct alleged against Ms Kool. Ms Kool asserts that there was no discussion with her about the conclusions that Nestle management had reached in relation to the clocking off allegations and there is no evidence to the contrary.

[70] There is also uncontested evidence from Ms Towner and Mr Heessákkerks that Ms Kool was not guilty of misconduct in relation to clocking off.

[71] I accept that Adecco, by virtue of its contract with Nestle for the supply of labour, may have been required to remove Ms Kool from Nestle’s site when it was requested to do so. I was not assisted by the failure of Adecco to call any direct evidence about the terms of its contract with Nestle for the supply of labour and the rights of Nestle to seek to remove labour hire employees from its site. However, it is clear from the evidence placed before the Commission by Adecco that the reason for the removal of Ms Kool was her conduct.

[72] If I accept Ms Coyne’s witness statement as being a true and correct version of events, it is apparent that Ms Coyne simply acquiesced in the removal of Ms Kool from the Nestle
site in circumstances where she had no independent view that there was any issue with Ms Kool’s capacity or conduct. There is no evidence of any independent attempt on the part of Ms Coyne or any Adecco manager, to verify whether there was a valid reason for the removal of Ms Kool from the Nestle site, in circumstances where Ms Coyne’s statement makes it clear that Ms Coyne knew that the reason for Ms Kool being removed from the site was allegations about her conduct. I do not accept that Adecco has established that there was a lack of alternative placements for Ms Kool or that she unreasonably refused an alternative placement so that it could be said that this constituted a valid reason for dismissal.

[73] Accordingly I am satisfied and find that there was no valid reason for Ms Kool’s dismissal related to her capacity or conduct.

4.2.2 Did Adecco comply with the procedural matters in s. 387 of the Act?

Notification of reason – s. 387(b)

[74] According to her statement, Ms Coyne knew that Nestle management had concluded that Ms Kool had engaged in some form of misconduct. Management of Adecco accepted that this was the case, without any discussion with Ms Kool. The fact that management of Nestle required that Ms Kool be removed from its site and that Adecco may have had no say in the matter due to the terms of its contract with Nestle, does not alter the fact that Adecco terminated Ms Kool’s long term assignment with the result that it dismissed her, without informing her of the reason for doing so, and in circumstances where its management knew that the reason for the assignment ending was a conclusion by its client Nestle that Ms Kool had engaged in misconduct.

Opportunity to respond to reason related to conduct – s. 387(c)

Support person – s. 387(d)

[75] There is insufficient evidence about what the managers of Nestle said to Ms Kool when the clocking off allegations were raised with her, for me to conclude that Ms Kool was given an opportunity to respond to those allegations. In any event, Adecco cannot abrogate its responsibility to notify Ms Kool of the reason related to her capacity or conduct, for her removal from a long term and steady placement and to give her an opportunity to respond to that reason. Given that there was no discussion between Ms Kool and management of Adecco about the clocking off issue, there was no refusal to allow Ms Kool a support person and this consideration is not relevant.

Warnings – s. 387(e)

[76] There is no evidence that Ms Kool was warned about the clocking off conduct in circumstances where that conduct was believed by Nestle to be unsatisfactory performance. According to Ms Coyne, she was told by Mr Carlson and Ms Jackson that this matter had been previously discussed with Ms Kool. Ms Coyne does not state that she or any other manager of Adecco was aware of any previous discussions between Ms Kool and management of Nestle about issues related to Ms Kool’s performance. There is insufficient evidence upon which I could be satisfied that Ms Kool had been warned about the unsatisfactory performance.
Size of Adecco's Enterprise – s. 387(f) and s. 387(g)

[77] Adecco is a large employer with dedicated human resource management specialists and expertise. This is not a relevant consideration in whether Ms Kool’s dismissal was unfair.

Other relevant matters – s. 387(h)

[78] There are a number of relevant matters which in my view arise in this case. Managers of Adecco who dealt with Ms Kool’s case proceeded on the basis that she was a casual employee placed with Nestle and that her placement could be ended at any time for any reason. Given its business model and the way in which it engages employees, this view is not surprising. However, in its dealings with Ms Kool, those managers have failed to appreciate that:

- A fundamental change to the terms and conditions under which an employee is working can constitute dismissal;
- Failure to offer work to a casual employee can constitute dismissal;
- An employee who is dismissed for reasons relating to the employee’s conduct or capacity is entitled to call into question the validity of the reason for the dismissal by contending that he or she did not engage in the alleged conduct;
- An employee who is dismissed for reasons that include the employee’s conduct is entitled to raise a failure on the part of the employer to afford the employee procedural fairness as a basis for asserting that the dismissal was unfair; and
- An employer cannot abrogate its responsibilities to afford procedural and substantive fairness to a dismissed employee by relying on the fact that unfair treatment was meted out by another entity in which the employer had placed the employee.

[79] Ms Kool had a lengthy assignment at the premises of Nestle during which she worked regular hours on what was essentially a full time basis. That assignment was terminated because management of Nestle reached adverse conclusions about Ms Kool’s conduct and because management of Adecco accepted this without question and without consideration of the need to afford Ms Kool substantive or procedural fairness. The effect of this failure was heightened by the fact that Ms Kool is a single mother of three children who is unable to access any form of government assistance because she is a citizen of New Zealand.

5. CONCLUSION

[80] For these reasons, I am satisfied and find that Ms Kool’s dismissal was unfair. I am also satisfied that Ms Kool should have a remedy for her unfair dismissal. Ms Kool has filed additional material in relation to remedy. I am also conscious that Adecco has not addressed the question of remedy in the event that its jurisdictional objections are not upheld. If Adecco wishes to cross-examine Ms Kool in relation to the material that she has filed or make further submissions in relation to remedy, addressing the matters in s. 392(2) it is required to advise the Commission by close of business on Wednesday 24 February 2016 and further directions will issue. In the absence of advice from Adecco, I will proceed to determine the question of remedy on the basis of the material before me.
DEPUTY PRESIDENT

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1 Exhibit 1.
2 Exhibit 4.
3 Exhibit 2.
4 Exhibit 3.
5 Exhibit 5 and Exhibit 6.
6 PN88 to PN90.
7 PN582.
8 PN582.
9 PN582.
10 PN606 to PN612.
11 PN185.
12 PN185 to PN187.
13 PN221 to PN222.
14 PN225 to PN226.
15 Witness Statement of Louise Coyne submitted by Adecco.
16 PN103 to PN104.
17 PN197 to PN198.
18 PN154.
19 PN339 to PN344.
20 PN349.
21 PN371.
22 PN377 to PN382.
23 PN297.
24 PN311 to PN312.
25 PN45 to PN54.
26 PN392-599.
27 PN98 to PN102; PN212.
29 PN675.
31 Ibid at [52].
32 [2013] FWC 1062.
33 [2013] FWC 1062 at [31].
34 Ibid at [55].
37 B, C and D v Australian Postal Corporation T/A Australia Post [2013] FWCFB 6191 at [41].