

[3] The issues for the Authority to determine are:

- (i) Did the parties enter a valid fixed term agreement per section 66 of the Employment Relations Act 2000?
- (ii) if so, did Mr Cloete's employment end by operation of that fixed term?
- (iii) if it did not, was Mr Cloete's dismissal justified?
- (iv) do Mr Cloete's concerns about late salary payments and the provision of a company vehicle amount to unjustified actions? and
- (v) is Mr Cloete liable for repairs to the company vehicle?

Valid fixed term agreement?

[4] The parties agree Mr Cloete's employment agreement contains the following clause:

3 Nature and Term of the Agreement

3.1 Fixed Term Individual Employment Agreement

*This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The parties agree that this is a fixed term employment agreement. This agreement will commence on a date to **be agreed**, and will end six months from commencement. The Employer has genuine reasons based on reasonable grounds for specifying that the employment agreement is to end at this time, namely **for financial viability review**. The parties also confirm that the Employee has been advised by the Employer when discussing this agreement, the reasons for the employment ending in this way.*

[5] The parties executed the agreement on 8 December 2006 concluding a negotiation process which had commenced in August 2006. During this negotiation the proposed agreement, which included the fixed term clause above, was emailed backwards and forwards between the parties. Amendments to the proposed agreement were proposed and made.

[6] On execution of the employment agreement Mr Cloete made the following declaration:

*I, **John Cloete**, declare that I have read and understand the conditions of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement, and have been allowed reasonable time to do so.*

Signed by: [John Cloete]

Date: [8 December 2006]

[7] Mr Cloete said in his evidence to the Authority that he had not noticed the employment agreement was for a fixed term. He said if he had known the agreement

was for a fixed term he would not have left secure employment with a competitor business to accept employment with Tyres Direct.

[8] Mr Cloete executed the employment agreement having actively negotiated the terms of that employment agreement. Upon execution of the document he signed a declaration that he knew what he was signing. Mr Cloete may, as he says, not have absorbed that the employment offered was fixed term in nature, however, the fact and terms of the fixed term were fully disclosed prior to execution of the agreement. The fixed term is binding and properly forms part of the parties' employment agreement.

[9] Section 66 of the Employment Relations Act 2000 prescribes the contents of a valid fixed term agreement:

66 Fixed term employment

- (1) *An employee and an employer may agree that the employment of the employee will end-*
- (a) *at the close of a specified date or period; or*
 - (b) *on the concurrence of a specified event; or*
 - (c) *at the conclusion of a specified project.*
- (2) *Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must-*
- (a) *have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
 - (b) *advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*
- (3) *The following reasons are not genuine reasons for the purposes of subsection (2)(a):*
- (a) *to exclude or limit the rights of the employee under this Act;*
 - (b) *to establish the suitability of the employee for permanent employment.*
 - (c) *to exclude or limit the rights of an employee under the Holidays Act 2003.*
- (4) *If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing –*
- (a) *the way in which the employment will end; and*
 - (b) *the reasons for ending the employment in that way.*
- (5) *Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not effect the validity of the employment agreement between the employee and the employer.*
- (6) *However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1) –*
- (a) *to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or*
 - (b) *as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.*

[10] The employment agreement provides that Mr Cloete's employment will end *six months from commencement*. I am satisfied that the requirements of subsection 66(1)(a) have been met.

[11] Amir Fouladi is the sole director of Tyres Direct. He manages the business and negotiated and executed Mr Cloete's employment agreement. He said the fixed term nature of Mr Cloete's employment was genuine; Mr Cloete was the first sales person employed by the business (Mr Fouladi had performed this role along with the managing director role) and a fixed term was necessary to see if the business could afford the position. I am satisfied the requirements of subsection 66(2)(a) have been met and that a sincerely held proper reason existed for the fixed term agreement¹. I am also satisfied, for the reasons set out in paragraph 8 above, that Mr Cloete was advised when his employment would end and why.

[12] Mr Cloete's employment agreement states in writing the way his employment will end and the reasons why. The requirements of section 66(4) are satisfied.

[13] Mr Cloete seeks to rely on a letter written by David Sheng (a director of a tyre importing business closely associated with Tyres Direct) to Mr Cloete's bank in May 2007 confirming he *is currently employed on a full time basis*. Mr Cloete says this letter says he was not employed on a fixed term. I do not agree. Full time employment does not exclude employment being for a fixed term. One refers to hours of work the other to the duration of that employment.

Did Mr Cloete's employment end by operation of the fixed term agreement?

[14] Mr Cloete asked to meet with Mr Fouladi and Mr Sheng on 19 June 2007 to discuss his dissatisfaction with his work vehicle and late salary payments. The meeting was held on 20 June 2007.

[15] At the meeting Mr Fouladi presented Mr Cloete with a letter which invoked the fixed term clause of the employment agreement and advised his employment was terminated with immediate effect due to financial strain on the business; the monthly expenses associated with Mr Cloete's position (salary, motor vehicle, laptop, mobile telephone) could no longer be sustained. The letter advised Mr Cloete he would be

¹ *Canterbury Westland Free Kindergarten Association v New Zealand Educational Institute*, Goddard CJ, 24 June 2004, CC 14/04

paid until the end of the fixed term period (17 July 2007) plus additional three weeks notice *as per your employment contract*.

[16] A fixed term agreement cannot be brought to an end by the employer by notice at will². Mr Cloete's employment did not end by operation of the fixed term agreement because, on 20 June 2007, that event was in the future. Mr Cloete was made redundant from his position.

[17] The next question to consider is whether the redundancy was for genuine reasons and whether it was affected in a fair and reasonable manner.

[18] I am satisfied that Tyres Direct had genuine reasons to make Mr Cloete's position redundant. The financial records provided to the Authority show Mr Cloete's sales did cover the outgoings necessary to maintain his position.

[19] What Tyre Direct failed to do, and what it was obliged to, was discuss the redundancy proposal with Mr Cloete before the decision was made and give him a fair opportunity to comment³. This failure is significant and fatal to the respondent's claim that it treated Mr Cloete fairly and reasonably. Mr Cloete's dismissal for redundancy was unjustified.

Unjustified disadvantage

(i) Late salary payments

[20] Mr Cloete asked Tyres Direct to pay his salary on the 16th of each month to line-up with his mortgage payments. On two occasions these payments were late. The late payments occurred when the 16th fell on a long weekend and weekend respectively and his salary payments had not been loaded.

[21] Mr Cloete said he was disadvantaged by these late payments. He said he incurred bank fees as a direct result of these late payments. He has not provided any evidence to support this claim. The bank records provided to the Authority show Mr

² *Williams v Attorney-General* 2 ERNZ [1999] 457, 470

³ Subsections 4(4)(c) and (d) Employment Relations Act 2000

Cloete's Tyres Direct salary was paid on or before the 16th of each month. The link between the unarranged overdraft fees noted on the bank statements and the salary payments has not been made out.

(ii) Company vehicle

[22] As part of his terms and conditions Mr Cloete was provided with a company vehicle for which he was entitled to reasonable personal use. He says he was inconvenienced and his employment disadvantaged when Mr Fouladi exchanged the issued vehicle for another. The inconvenience and disadvantage concern Mr Cloete's personal use of the vehicle, specifically, that he could not transport his family safely in the two-seater ute, the vehicle for which his usual four-door vehicle was exchanged.

[23] Mr Cloete said the vehicle exchanges occurred many times during his employment with Tyres Direct but he was unable to be any more specific. Mr Fouladi said the vehicles were exchanged, at most, three times.

[24] The strongest element of this claim, if it could be made out, would be that Tyres Direct failed to discuss the vehicle exchange with Mr Cloete and attempt to accommodate his concerns. However, Mr Cloete's claim is not specific enough to enable me to make any findings.

Counter claims

[25] Tyres Direct has provided no evidence to support its claim of salary advances. Mr Cloete denies he received any salary advances. The claim has not been made out.

[26] Mr Cloete does not deny he damaged the company vehicle early on in his employment. He reported the damage and the matter was not discussed further during his employment. Tyres Direct wishes to revive the issue post dismissal. It has no grounds to do so. The claim is not made out.

Remedies

[27] Mr Cloete has claimed lost wages. This claim cannot succeed. His employment agreement with Tyres Direct was of fixed duration. I have found that fixed term was valid. He has received all monies owed under the fixed term agreement.

[28] Mr Cloete seeks a compensatory payment of \$2000 - \$3000 for the hurt and humiliation suffered as a consequence of his dismissal. He spoke of the financial and emotional pressure his dismissal placed on him and his family. I set the award at \$3000 pursuant to section 123(1)(c)(i) Employment Relations Act 2000.

[29] Having made an order for an award of remedies I must consider whether Mr Cloete has contributed to the circumstances giving rise to his redundancy in a blameworthy manner⁴.

[30] Tyres Direct made Mr Cloete redundant and says as much in the letter of dismissal. I accept the letter accurately states the reasons for Mr Cloete's dismissal and that issues around performance were not central to the decision. There is no blameworthy conduct of Mr Cloete's which contributed to the circumstances giving rise to his personal grievance.

Costs

[31] Mr Cloete is entitled to be reimbursed the \$70 filing fee incurred in lodging his application with the Authority.

Marija Urlich

Member of the Employment Relations Authority

⁴ Section 124 Employment Relations Act 2000