

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michael Mackie Davis (Applicant)
AND Peoples Centre Community Medical Centre Trust (Respondent)
REPRESENTATIVES Applicant In Person
Nigel Chee for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 27 April 2005
DATE OF DETERMINATION 28 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The problem between these parties arises from Mr Michael Mackie Davis' ("Mr Davis") claims that he was "*terminated without notice*" and "*disadvantaged by an unjustifiable action*" of his employer the Peoples Centre Community Medical Centre Trust ("the Trust"). The Trust says Mr Davis was employed "*on a fixed term contract with a specific end date*".

[2] The parties were unable to resolve the problem between them by the use of mediation.

[3] The issues to be determined in resolving this problem are as follows:-

- (i) Whether Mr Davis was an employee or independent contractor?
- (ii) If he was an employee, what was the nature of that employment?
- (iii) Whether Mr Davis was "terminated without notice"?
- (iv) Whether Mr Davis was "disadvantaged by an unjustifiable action"?

These issues are dealt with in turn.

Employee or contractor?

[4] The Trust received funding from the Ministry of Health to combat problem gambling in the Tamaki Makaurau area. The Trust engaged Mr Davis as a problem gambling counsellor. While

that funding contract was between the Trust and the Ministry of Health, there is no dispute that it was Mr Davis who successfully sought the funding.

[5] The statement of problem lodged by the Trust resists Mr Davis' claims principally because the Trust says Mr Davis was employed "*on a fixed term contract with a specific end date*". That contention proceeds on the basis that he was an employee.

[6] The law requires that employment agreements are recorded in writing. The terms of Mr Davis' engagement with the Trust were recorded in a letter dated 3 November 2003 and signed by a former Practice Manager Ms Siobhan Matich ("Ms Matich") on behalf of the Trust. That letter is headed "*Letter of Offer for Contract Position of Problem Gambling Counsellor for Contract Term 3 November 2003 to June 31 2004 (sic)*" ("the offer letter").

[7] The offer letter is problematic for it contains inconsistencies. While it variously contains references indicative of an independent contractor eg "*offer you the contract position*", "*Contract Position*", "*as on Contract*" it also has references suggesting employment eg "*as per employment contract*", and "*this offer of employment*". These inconsistencies arise because laypeople often do not appreciate any legal distinction.

[8] In respect of annual leave, there is said to be "*no allocation as on contract*". In respect of sick leave, there is said to be "*no allocation of sick leave as on contract.*" These matters are indicative of an independent contractor arrangement and not an employment because entitlements to annual leave and sick leave (special leave) are minimum entitlements for all employees.

[9] There is a reference to employment contract which presumably would have followed the offer letter. I am told by Mr Davis that there never was a further employment agreement and neither was it intended that there would be.

[10] It is not in dispute that the remuneration for the position was \$35,000.00 for the term of the contract. That term was a 35 week period from 3 November 2003 to June 31 2004 (sic). The hours of work were prescribed from 8.30 am to 5.00 pm.

[11] The law provides that in deciding whether a person is an employee or not, the Authority must have regard to the real nature of the relationship between the parties. That means the Authority has regard to the reality of the situation.

[12] Mr Davis explains that he and Ms Matich expressly agreed that he would be an employee. Mr Davis also says that his holiday pay and sick pay were included in his hourly rate. Mr Davis takes not issues with the legalities of that arrangement. Ms Matich would not co-operate with my investigation when I sought her assistance. I have decided that it is unnecessary for me to pursue matters further with Ms Matich because I have accepted Mr Davis' evidence. What Mr Davis told me in respect of his hourly rate, was evidenced by wage records the present manager Mr Nigel Chee supplied to me subsequently. I find that the intention of these parties was that Mr Davis was to be an employee.

[13] I conclude therefore, having regard to the intention of the parties, the fact that holiday pay and sick pay was provided and the prescribed hours of work, that Mr Davis was an employee.

The nature of the employment

[14] The offer letter is headed "*Letter of Offer for Contract Position of Problem Gambling Counsellor for Contract Term 3 November 2003 to June 31 2004 (sic)*". It is clear and not disputed that Mr Davis' employment was not indefinite but fixed-term. It was to end on 31 June 2004(sic).

[15] The law prescribes certain requirements in respect of fixed-term employment. I am satisfied that because the employment was funded by government grant, there were genuine reasons for specifying the employment was to end on 31 June 2004(sic). I am satisfied that Mr Davis' employment was a genuine fixed-term one.

Termination without notice?

[16] Mr Davis complains that he was terminated without notice.

[17] On Tuesday 29 June 2004 Ms Matich advised Mr Davis that the Trust was not going to seek continued funding from the Ministry of Health to continue the problem gambling programme. Mr Davis did not receive written advice in confirmation contrary to Ms Matich's assurance she would provide the same to him.

[18] Mr Davis' employment was not terminated. Fixed-term employments expire. They come to an end by the mere effluxion of time as the parties agree they will. That is not a termination.

[19] Mr Davis' complaint that he was not given notice is not sustainable. He knew from the very beginning of the relationship that his employment would come to an end one day. That day was the end date specified as 31 June 2004(sic). Mr Davis knew that because he had agreed to it. He was on notice from the very beginning that his employment would eventually come to an end just as he had agreed it would. Mr Davis was given notice of the end date of his fixed-term employment because he was always on notice.

Unjustifiable disadvantage

[20] I have reached the view that Mr Davis essentially complains that the project was not renewed such that his employment would be continued. That is an entirely different matter from the way in which his preceding fixed-term employment came to an end.

[21] The Trust was apparently in a precarious financial position and its management was reluctant to enter into further contractual commitments in light of that situation. That is why it did not seek continued funding.

[22] Mr Davis considers that the funding contract which provided his salary was his contract. That is not correct. The contract was between his Trust employer and the Ministry of Health.

[23] Mr Davis conceded when I put it to him, that he had an opportunity when he negotiated his employment with Ms Matich, to include a provision about notice in the event that the Trust elected not to seek continued funding for his work. He did not do so. He did not have the luxury to take for granted that the Trust would automatically seek further funding.

[24] The Trust's decision not to seek continued funding was entirely its prerogative. Mr Davis has no place questioning that commercial decision and it was not an unjustifiable action by his employer.

Determination

[25] For the above reasons, **I find that Mr Davis does not have a personal grievance and the Authority is unable to assist him in the resolution of his employment relationship problem.**

Costs

[26] As neither party was represented, there will be no orders in relation to costs.

Leon Robinson
Member of Employment Relations Authority