

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 80/09
File Number: 5143918

BETWEEN Stewart Gillogley
 Applicant

AND KiwiRail Limited
 Respondent

Member of Authority: Denis Asher

Representatives: Helen McAra for Mr Gillogley
 Monica Singleton for the Company

Investigation Meeting The parties agreed to a determination on their papers

Evidence & Submissions
Received By 8 June 2009

Determination: 10 June 2009

DETERMINATION OF THE AUTHORITY

The Problem

[1] Mr Gillogley says the Company is in breach of the terms of his employment agreement in that it failed to pay him 5% of gross taxable earnings for the period of his fixed term employment; he seeks payment of that sum, interest on the same and costs.

- [2] The Company says the 5% payment crystallises on the finishing date of an employee's fixed-term employment: as Mr Gillogley did not finish his fixed-term but instead continued by way of permanent employment he is not entitled to payment, i.e. there was no agreed finishing date.

Background

- [3] The parties do not dispute the following:
- [4] Mr Gillogley was employed for fixed terms as a chief officer from 13 August 2004 until 1 April 2007 when by retrospective agreement his employment status changed from "casual" to permanent (refer to the Company's letter dated 27 April 2007).
- [5] Mr Gillogley was employed on fixed term employment agreements for agreed periods from August 2004 (refer to evidence provided on behalf of the Company, by its human resources manager, John Nobilo, namely attachments JN2-JN12).
- [6] However, from August 2005, while Mr Gillogley continued working for the Company his periods of employment were not confirmed in writing.
- [7] At all times his terms and conditions of employment were those set out in the New Zealand Merchant Service Guild Collective Agreements (the CEA).
- [8] Schedule B of the CEA expressly provides that "*(f)ixed term employees shall be covered by the terms of this agreement*"
- [9] Clause 2.1 of Schedule B states that "*(f)ixed term employees shall be notified in writing of the starting and finishing dates of their term of employment before it commences.*"
- [10] Clause 12.2 of Schedule B states:

On the finishing date the employer shall pay the fixed term employee a sum equal to 5% of the employee's taxable earnings for the period of the fixed term employment agreement.

- [11] By letter dated 27 April 2007, and signed off by the respondent on 3 May and the applicant on 11 May, the parties agreed that – effective from 1 April 2007 – Mr Gillogley’s employment status changed from that of “casual” to permanent full time. All other terms and conditions of employment were stated to remain the same.
- [12] Mr Gillogley subsequently raised a claim for the 5% payment.
- [13] The applicant resigned his employment in October 2007.

Mr Gillogley’s Position Summarised

- [14] Mr Gillogley says he was employed by the respondent as a permanent employee between 1996 and 2003 when he resigned. He then returned to work for the Company in 2004: he says he was employed as a third mate in terms of Schedule B of the CEA, i.e. for a fixed term.
- [15] He says that between August 2004 and May 2007 he was employed on the Company’s vessels “on a roster to roster basis” (para 2 of his affidavit). An example dated 24 December 2005 is attached: it stipulates his designation, salary and roster, i.e. 7 days on and 7 days off, and that the CEA applies.
- [16] He says he was never given a fixed term contract to sign “*but I received in writing from the respondent details of each of my next periods of employment ...*” (par 2; above).
- [17] He subsequently accepted the Company’s offer of permanent employment.
- [18] As provided by clause 12.2 of Schedule B of the CEA he claims 5% of his gross taxable earnings for the period of his fixed term employment.

Company’s Position Summarised

- [19] The Company says it is not trying to avoid its responsibilities under the CEA but simply does not believe Mr Gillogley is owed the monies claimed.

- [20] Mr Gillogley was employed on fixed term employment agreements for agreed periods from August 2004 (refer to evidence provided on behalf of the Company, namely attachments JN2-JN12 inclusive to Mr Nobilo's affidavit).
- [21] It is conceded that from August 2005 ongoing employment was not confirmed in writing, but therefore there is no "*finishing date*" (clause 2.1 of the CEA) agreed between the parties as Mr Gillogley instead continued to work for the Company on an ongoing basis.
- [22] The Company's letter of 27 April 2007 offered to vary the fixed term nature of Mr Gillogley's role: he signed an agreement to that change. No question has been raised as to the legality of this variation. Offer, acceptance, consideration and intention to create legal relations characterise the agreed variation.
- [23] To say that 31 March 2007 was a finishing date is absurd as there was simply a continuation of the relationship with the added benefit to the applicant of permanent employment. A *finishing date* was never reached.
- [24] This is a case where Mr Gillogley is attempting to get the benefit of both fixed term and permanent employment.

Discussion and Findings

- [25] Despite some references to "*casual*" in correspondence from the Company to Mr Gillogley offering him periods of employment (e.g. JN3), the respondent accepts the applicant was employed on fixed term agreements since August 2004: para 9 of the respondent's submissions received on 29 May 2009.
- [26] There is a written record of some but not all of those fixed term agreements. There is no evidence of oral agreements in respect of those fixed terms not recorded in writing.
- [27] Section 66 of the Employment Relations Act 2000 has allowed employees and employers to agree that the employment of the former will end, amongst other things, at the close of a specified date or period.

[28] However,

*Before an employee and the 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 ground 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 ...*

(ss. 66 (2); emphasis added)

[29] No issue is raised as to the genuineness of Mr Gillogley's periods of employment.

[30] The Company properly acknowledges that, in breach of the requirements of Schedule B clause 2.1. of the CEA, and since August 2005, Mr Gillogley's fixed term employment agreements were not confirmed in writing (para 10 of the respondent's submissions received on 29 May).

[31] There is no documentary or oral evidence of the Company, after August 2005, reaching *agreement* with Mr Gillogley and *advising* him – per the Act – of how and when his employment would end. But, in light of the apparently regular employment arrangement between the parties up to 1 April 2007, it is safe for me to assume there was at least an oral agreement between the parties such as to meet the requirements of the Act.

[32] Clause 12.2 of Schedule B plainly states that, *on the finishing date the employer shall pay the fixed term employee a sum equal to 5% of that person's gross taxable earnings for the period of the fixed term agreement.* Equally plainly Mr Gillogley has worked numerous fixed term agreements and has not been paid. JN2 is an example of a fixed term employment agreement: Mr Gillogley was not paid on the *finishing date* (in this case 4-weeks from 13 August 2004) 5% of his gross taxable earnings for that period.

[33] It follows that this is not an issue about eligibility only at the time the parties agreed the applicant would give up "*casual*" for permanent employment.

- [34] It appears to me as unfair and unreasonable for the Company to escape its contracted obligation to pay the applicant 5% of his gross earnings by arguing there was no agreement on a finishing date when Mr Gillogley ceased his fixed-term employment and became a permanent employee, i.e. 1 April 2007. That is turning a blind eye to the earlier, discrete periods of fixed term employment as illustrated by at least the attachments JN2-JN12.
- [35] I am also satisfied that the effect of the agreement to make Mr Gillogley a permanent employee included a recognition by the parties of a *finishing date* in respect of the period of his fixed term employment leading up to that date, as required by the CEA, i.e. 1 April 2007.
- [36] Mr Gillogley is entitled to payment of 5% of gross taxable earnings for all periods of his fixed term employment.

Determination

- [37] The question is answered in favour of the applicant: Mr Gillogley is to receive sums equivalent to 5% of his gross taxable earnings for the periods of his fixed term employment with the Company, as well as interest, including up to 1 April 2007. Leave is reserved to the parties in the event agreement is not reached on the quantum.
- [38] Costs are similarly reserved.