

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 80
5306962

BETWEEN MARK GRAHAM
 Applicant

AND NORTHLAND WASTE
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: David Grindle, Counsel for Applicant
 Ray Lambert, Counsel for Respondent

Investigation Meeting: 01 March 2011, in Whangarei

Determination: 03 March 2011

DETERMINATION OF THE AUTHORITY

- A. The termination of Mr Graham’s employment by Northland Waste Limited (“NWL”) on 22 February 2010 was an unjustified dismissal.**
- B. NWL is ordered to pay Mr Graham \$6,000 under section 123(1)(c)(i) of the Employment Relations Act 2000 (“the Act”)**
- C. NWL is ordered to pay Mr Graham \$1,700 towards his legal costs and to reimburse him \$71.56 for his filing fee.**

Employment relationship problem

[1] Mr Graham claimed he had a personal grievance for unjustified dismissal. He said his employment was terminated unexpectedly and without warning on 22 February 2010.

- [2] NWL denies dismissing Mr Graham. It says Mr Graham was employed on a fixed term basis until 31 March 2010, and that his employment ended because the fixed term expired.
- [3] NWL says it told Mr Graham on 22 February 2010 it would not be renewing his fixed term but it would pay him up to 31 March 2010. NWL says it offered Mr Graham the option of either leaving immediately or continuing to work until the end of the week, and that he elected the later option.
- [4] NWL paid Mr Graham five weeks' wages from 22 February to 31 March 2010. Mr Graham claims a further three weeks lost remuneration plus \$7,000 for hurt and humiliation.

Relevant facts

- [5] Mr Graham was employed as a Mechanic by Waste Works Limited ("WWL") from 10 September 2007 until 30 November 2009. WWL sold its business to NWL, with NWL taking over on 1 December 2009.
- [6] Apart from the change in employer, from 1 December 2009 Mr Graham's employment initially continued on the same terms and conditions he had been on at WWL. Mr Graham says he was offered a Fleet Manager/Maintenance Officer position on 11 February 2010, which he accepted by undertaking the duties of that role.
- [7] Ray Lambert, Managing Director NWL, said its intention was to engage Mr Graham on a fixed term basis only from 1 December 2009 until 31 March 2010, because NWL was reviewing whether it would continue the workshop in which Mr Graham was employed. The lease for the workshop expired on 31 March 2010, so NWL only wanted to engage Mr Graham up until then, at which point it intended to review its business needs.
- [8] Warwick Taylor was the owner and director of WWL. As part of the sale of WWL to NWL, Mr Taylor became the Whangarei Branch Manager for NWL. Mr Taylor said he told Mr Graham about the sale and assured him that he had skills NWL needed, so would be given ongoing employment. Mr Graham's employment did in fact continue after the sale to NWL.

- [9] Contrary to the requirements of section 63 of the Act, NWL did not provide Mr Graham with a copy of his intended employment agreement, nor did it advise him of his right to seek independent advice about the terms and conditions of his employment before he started work on 1 December 2009.
- [10] The witnesses I heard from agreed that on 1 December 2009, Mr Graham's employment continued on as usual in exactly the same way it had with WWL. It was not until much later that he was presented with a fixed term employment agreement.
- [11] There is a conflict in the evidence over the date on which a fixed term employment agreement was first presented to Mr Graham, but the parties agree it was not given to him before he started work with NWL.
- [12] Graham Bell, General Manager NWL, said he gave Mr Graham the fixed term agreement on 23 December 2009, and talked him through it. Mr Graham says he was not given the fixed term agreement by Mr Bell until the last week of January or first week of February 2010. Mr Graham says Mr Bell just passed the employment agreement to him and told him to read it, sign it, and return it, but did not explain it.
- [13] Clause 2 of the intended fixed term employment agreement, which covered position and duties, had not been completed at the time Mr Bell handed it to Mr Graham.
- [14] I am not required to resolve the conflict over the date on which the intended fixed term employment agreement was presented because it was accepted by the parties that Mr Graham never signed or returned it. Nor did he ever tell NWL that he accepted its offer of a new fixed term engagement.
- [15] Mr Graham's evidence was that he had not agreed to become a fixed term employee and NWL's evidence did not contradict that. Mr Graham said he had always believed he had permanent employment with NWL, as was the case at WWL.
- [16] Mr Graham was aware the viability of the workshop would be reviewed when its lease expired at the end of March 2010, but said he thought that if any

changes were made which affected him he would be consulted at the appropriate time.

Determination

[17] NWL strongly disputed that Mr Graham was a permanent employee. It said Mr Graham had always been told, and had understood, his employment was for a fixed term only. I find the evidence did not establish that to my satisfaction.

[18] NWL could not unilaterally impose a fixed term engagement on Mr Graham without his agreement, and the evidence satisfied me that Mr Graham did not agree to become a fixed term employee.

[19] I find that Mr Graham commenced employment with NWL on 1 December 2009 as a permanent full time employee. If NWL had only wanted to employ Mr Graham on a valid fixed term employment agreement, then it should have provided him with an intended fixed term employment agreement for him to sign and return before it took him on as an employee.

[20] I note that if NWL complied with its obligations under section 63A of the Act in relation to bargaining for an individual employment agreement, then the current problem would probably not have occurred.

[21] I find Mr Graham was not employed on a fixed term basis. After Mr Graham had worked for NWL for more than three weeks, NWL offered him a fixed term engagement, which he did not accept. Until a change in his employment status had been mutually agreed, Mr Graham remained a permanent employee.

[22] Although I have significant doubts whether NWL's intended fixed term agreement complied with the requirements of section 66 of the Act, given my finding that Mr Graham had not accepted the proposed fixed term engagement, it is not a matter on which a finding is required.

[23] Mr Lambert said Mr Graham's employment ended because from 22 February 2010 NWL decided to outsource all of the mechanical work being undertaken by employees in the workshop and that has remained the position since then.

[24] I find that the evidence establishes that even if NWL had not relied on the fixed term contract to end Mr Graham's employment, then it was almost certain he would have been made redundant prior to 31 March 2010.

[25] Whilst NWL had good reasons for not requiring Mr Graham's services after 22 February 2010, it did not follow a fair or proper process before terminating his employment. Accordingly, I find Mr Graham's dismissal was unjustified.

Remedies

[26] I find that even if NWL had consulted Mr Graham about its proposed decision to make him redundant it was unlikely Mr Graham could have provided any feedback which changed the outcome, because the savings NWL obtained by the changes it made were well in excess of \$100,000 per annum.

[27] On that basis, I have decided not to award Mr Graham reimbursement of lost remuneration. I note NWL had already paid him three and a half more weeks' pay than he would have been entitled to had he been made redundant.

[28] Mr Graham's evidence satisfied me he suffered humiliation, loss of dignity and injury to feelings. Mr Graham described the shock and humiliation he felt when he was told his employment was ending. He said it was a bolt from the blue because he had just moved in to the Fleet Manager/Maintenance Officer role 11 days earlier.

[29] Mr Graham was distressed he had to remove his daughter from her preschool because he could no longer afford it without a job. He had to relocate out of town to live in his parents' garage. Mr Graham said he was so humiliated and embarrassed he went to work outside of work hours (at 5am), on 23 February 2010 to collect his personal effects because he felt unable to face his colleagues in light of his dismissal.

[30] Mr Graham was visibly upset when describing the emotional effects the dismissal had on him.

[31] I order NWL to pay Mr Graham \$6,000 without deduction under section 123(1)(c)(i) of the Act.

Costs

[32] Mr Graham was legally represented and he sought costs.

[33] As the successful party he is entitled to a contribution towards his actual costs. In the absence of any without prejudice except as to costs offers, I have adopted the Authority's usual tariff based approach to costs.

[34] This matter involved a half day investigation meeting, so I order NWL to pay \$1,700 towards Mr Graham's legal costs and to reimburse Mr Graham \$71.56 for the filing fee.

Rachel Larmer
Member of the Employment Relations Authority