IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION AT PARAGRAPHS [46]&[47] OF THIS DETERMINATION

[2011] NZERA Auckland 60
5327764

	BETWEEN	PAUL MacDONALD Applicant
	AND	CANOE RACING NEW ZEALAND Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Jim Roberts and Harriet Dymond-Cate, counsel for Applicant Penny Swarbrick, counsel for Respondent
Investigation Meeting:	7 and 9 February 2011
Determination:	16 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Paul MacDonald has applied to the Employment Relations Authority for an investigation and determination of a problem arising from an employment relationship entered into with Canoe Racing New Zealand (CRNZ).

[2] Although the parties engaged in mediation in an attempt to resolve the problem, as they did not reach settlement the investigation proceeded.

Paul MacDonald

[3] Mr MacDonald is a highly accomplished international athlete and well known public figure. He is one of New Zealand's most successful Olympians of all time, having won three Gold medals, a Silver and a Bronze in Kayaking. He is also a multiple world champion in canoe racing. His success and his services to sport have been recognised with an MBE and he has numerous other achievements and honours.

CRNZ

[4] Canoe Racing New Zealand is the umbrella organisation for that sport. Its affiliates are various canoe clubs throughout New Zealand, such as the club Mr MacDonald has been a long time member of. CRNZ selects boat crews to compete at Olympic Games, World Championships and other top level events. It employs coaches for the kayakers and generally provides financial backing and support for the athletes. For funding CRNZ is almost totally dependent on Sport and Recreation New Zealand (SPARC).

The employment relationship

[5] Mr MacDonald's entry into the employment relationship followed an advertisement placed by CRNZ seeking Boat Coaches for a number of positions. They were at the levels of Men's and Women's Elite, Under 19 and Under 23. Mr MacDonald applied on 25 February 2010 for the position of Elite Women's K4 Coach. The day after being interviewed by representatives of CRNZ he was advised his application had been successful and he accepted the offer of the position on 6 March 2010.

[6] Remuneration was confirmed later in March. A rate of pay initially offered by CRNZ to Mr MacDonald was increased to take account of travel required by team coaches to Europe for international competition to be held later in 2010. By 1 April at the latest Mr MacDonald had commenced employment under an oral employment agreement with CRNZ.

[7] The written agreement was not provided until mid-April, when a formal contract for the position Mr MacDonald had accepted was sent to him. It was a comprehensive agreement, setting out over some 26 pages, including four schedules, the terms and conditions of employment.

[8] Mr MacDonald signed the agreement without alteration shortly after receiving a copy of it, and he returned it to CRNZ at the end of April.

[9] Mr MacDonald's employment relationship problem arose out of clause 2C of the written agreement, which was headed "Fixed Period of Employment." In its entirety the clause provided:

2.1 Subject to clause 3 (Trial Period) your employment is for a fixed period commencing on 1 April 2010 and ending on 31 August 2010 ("Fixed Period") subject to:

(a) you resigning from your employment under clause 32.1 of this Agreement or

(b) CRNZ terminating your employment in accordance with this Agreement.

2.2 In accordance with section 66 of the Employment Relations Act 2000 the Fixed Period of employment will end as described below:

(a) prior to the end of the Fixed Period, CRNZ will

(i) confirm the date on which the Fixed Period is to end ("Final Day");

(ii) confirm the reasons for the Fixed Period coming to an end; and

(iii) if there is any need for an extension to the Fixed Period, negotiate an extension of this Agreement with you:

(b) at the end of work on your Final Day, this Agreement will automatically expire and you will cease to be an employee of CRNZ;

(c) you will return CRNZ's property to CRNZ within five (5) working days of your Final Day; and

(d) CRNZ will deposit your final pay (and any holiday pay owing) in accordance with this Agreement, on the next monthly pay cycle following the Final Day.

2.3 You acknowledge and agree that at the end of the Fixed Period (or any earlier termination of your employment) there is no expectation of ongoing employment in this or any other position with CRNZ.

[10] On 22 June 2010, CRNZ provided payroll advice to Mr MacDonald of his salary for the period of employment from 1 April to 31 August 2010 - 22 weeks - and confirmed that his weekly payments were to continue until "final pay" which was to be on 3 September 2010. Mr MacDonald received the last regular payment for his work then, shortly after he had returned to New Zealand from competition in Europe.

Personal grievance raised

[11] In November CRNZ was advised that Mr MacDonald had a problem about the employment. On 8 November his solicitors wrote to the CEO of CRNZ, Ms Paula Kearns, raising a personal grievance on his behalf for unjustified dismissal and unjustified disadvantage. In the letter it was contended that the fixed term of the agreement purportedly created by clause 2 had been invalid as it did not comply with s 66 of the Employment Relations Act 2000. This was claimed to be because the agreement had not stated in writing the way in which the employment was to end or the reasons for the employment ending in that way.

[12] In their letter Mr MacDonald's solicitors advised CRNZ that he had elected to treat the fixed term in clause 2 of the employment agreement as ineffective. The consequence of that election was contended to be that "Mr MacDonald's employment with CRNZ is deemed to be continuous."

Compliance with s 66 of Act

[13] In submissions made during the investigation meeting by counsel Ms Swarbrick, CRNZ accepted that the employment agreement had not complied with s 66. In particular CRNZ accepted that it had not met the requirement under subsection (4)(b) of s 6 for the agreement to state in writing the reasons why the fixed term employment would end in that way.

[14] Further CRNZ accepted that where s 66(4) has not been complied with s 66(6) becomes operative. That subsection provides:

> *(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.*

[15] Clauses (a) and (b) of s 66(6) are I find addressed to alternative situations. This is clear from the contrasting references in the first clause to "the employee" and in the second to "the former employee." I find that the election available under clause (a) may be made by an employee at any time while his or her employment relationship remains in existence. The election under clause (b) is available when the employment relationship has ceased to exist for any reason. At that time the parties may properly be described as former employee and former employer.

[16] In *Wood v. Television NZ Ltd* (7 November 2007, AA439/05) the applicant remained an employee of the respondent at the time she elected to treat the fixed term as ineffective. The Authority held that once Ms Wood had made the election her employer TVNZ could not rely on that term to end the employment.

Continuity of employment relationship

[17] An important question in this case is whether at the time Mr MacDonald communicated his election to CRNZ, on or about 8 November 2010, he was a current or a former employee.

[18] I find from the evidence that by 8 November 2010 the employment relationship between CRNZ and Mr MacDonald had unequivocally ended. Mr MacDonald's lack of challenge or complaint in relation to his employment status reflects the knowledge he had, I find, that from the time he entered into it the employment relationship was intended to be for a fixed term ending on 31 August 2010. While he hoped that after then, subject to him being successful as a coach, the agreement would be rolled-over or renewed, that is not the same as believing the agreement was continuous. Any expectation Mr MacDonald had of continuous employment was not based on any representation or conduct by CRNZ and in my view was not therefore a reasonable expectation.

[19] The knowledge I find Mr MacDonald had about the fixed term nature of his employment came from several sources. Among those was the advertisement he responded to which advised that the coaching roles "will commence March 2010 and will extend through to the end of August." Also the advertisement included under the heading "**Scope of the Roles**" clear advice that the appointee coach would be attending "the World Cups (4 weeks in May) and the World Champs (3 weeks in August)." A reference in the advertisement to CRNZ's Olympic Games aspirations did not in any way imply that the coaching roles were intended to continue until the Games, which are to be held in mid 2012.

[20] Mr MacDonald was paid his final pay shortly after returning from the World Champs held in August 2010. This was in accordance with the advice he had received in June that his last pay would be transferred on 3 September. Leaving aside any legal deficiencies with the document, as a fact the written employment agreement plainly represented that the employment was intended to end on 31 August.

[21] Mr MacDonald's knowledge and understanding of the limited term of his employment is evidenced by messages he sent to and received from Ms Kearns the CEO of CRNZ. On 30 March by email Ms Kearns confirmed to Mr MacDonald the precise start and finish dates of the fixed term as "1 April to 31 August 2010."

Mr MacDonald had requested that confirmation. The payroll advice to him by email of 22 June confirmed the same period of employment. On 27 July by email Mr MacDonald confirmed his knowledge that his employment with CRNZ "finishes on 3 September," the date he had been advised on which his last pay was to be transferred.

[22] After the end of August he was not requested or required by CRNZ to perform any work in the way the parties had agreed under the terms of employment. Although Mr MacDonald received one payment, it was a one-off to reimburse him for attending a meeting of an advisory committee in September. That provides no indication of continuing employment after 31 August. Although Mr MacDonald continued coaching the athletes he had been given charge of under the employment agreement, I find this was by habit and part of his ethic and strong personal commitment to kayaking and the advancement of athletes. As well it was to further his own coaching career but was not because of any requirements under any employment agreement with CRNZ.

[23] Mr MacDonald had also continued coaching on that basis with the expectation, or in the hope, that CRNZ would renew his employment agreement, or would enter into another one with him providing paid employment from 1 September or some later date.

[24] I find that CRNZ did not regard itself as continuing to be the employer of Mr MacDonald after 31 August, apart from making a final payment of salary due for work up to 31 August on 3 September.

[25] Mr MacDonald also acted in the belief that he was no longer employed by CRNZ, at least from early October when he stated or acknowledged on radio and television that he was no longer employed.

[26] I therefore find that whether viewed objectively or subjectively the outward indicators clearly showed that the employment had terminated on or shortly after 31 August, and certainly well before 8 November when Mr MacDonald communicated his election to CRNZ.

[27] I therefore consider that his particular situation is one addressed not by subclause (a) but by subclause (b) of s 66(6). From about 8 November,

Mr MacDonald was a former employee who had elected to treat the fixed term in his former employment agreement as having been ineffective.

Consequences of an election under s 66(6)(b)

[28] It has been strongly argued by Mr Roberts, counsel for Mr MacDonald, that the election by Mr MacDonald had the effect of making the employment relationship with CRNZ continuous as at 8 November.

[29] I do not consider that is correct. Neither does the case law referred to support that view. I find that an election made under s 66(6)(b) does not trigger a revival of a former employment relationship that has earlier ceased to exist for any reason.

[30] I was referred by both Mr Roberts and Ms Swarbrick to the decision of the Employment Court in *Shortland v. Alexander Construction Ltd* [2010] NZEMPC 41. In its judgment at [20] the Court concluded that an employment agreement between the parties had not complied with s 66 of the Act. The Court held:

> *The consequence of that conclusion is that the employment agreement must be regarded as being open ended.*

[31] The next paragraph reads:

> *[21] As the plaintiff's employment was unilaterally terminated by the defendant, it follows that it was a dismissal.*

[32] As I read the decision, the Court viewed the employment agreement as open ended and as remaining so until such time as it was terminated. In *Shortland* it was terminated by the employer purporting to rely on the fixed term, and therefore termination by dismissal was considered to have occurred.

[33] In *Schneller v. Ranworth Healthcare Ltd* (unreported, AC33/07, 5 June 2007), the Employment Court held, at [19]:

> *… if, however, what purported to be a fixed term employment agreement did not meet the statutory requisites, the employee's employment was to be regarded as of indefinite duration and its termination a dismissal amenable to consideration as a personal grievance alleging that it was unjustified.*

[34] Mr Roberts referred to the Authority's observation in the *Wood* case (above), at [79], that an employment of indefinite duration, or open ended employment, "can only be terminated for good cause." It is obvious from the context of its observation

that the Authority was referring to termination by the employer, and it is equally obvious that the Authority meant "justifiably" terminated for good cause. An unjustifiable dismissal is a dismissal nevertheless.

[35] It is also clear from the Employment Court decision in *Yuan Cheng International v Buer* [2006] ERNZ 871, at [60], a case concerning s 66 of the Employment Relations Act, that a dismissal although unjustifiable still has the practical effect of terminating the employment.

[36] Previously in this determination the Authority has held that the employment relationship between CRNZ and Mr MacDonald terminated on or about 31 August. The question of how it terminated, whether by resignation, dismissal, mutual agreement or any other way, remains to be determined as part of the investigation of the personal grievance and other claims raised by Mr MacDonald.

Reason for fixed term employment

[37] During the investigation meeting a challenge was mounted on behalf of Mr MacDonald to the genuineness of CRNZ's reasons for the fixed term employment. From the evidence available so far the issue is an arguable one. There is some evidence from CRNZ's report to its Board delivered on 29 September 2010 that establishing Mr MacDonald's suitability for continuing employment may have been part of CRNZ's thinking behind the fixed term, as well as or instead of availability of funding for continuing his position.

[38] It is not necessary to determine the issue at this stage of the investigation, as the failure to give the reason for the fixed term has the same effect as any lack of genuineness on the employer's part with regard to the reason. Whether there is one or more than one reason why s 66 has not been complied with, the consequence is the same; the employee may elect to have the fixed term treated as ineffective, a consequence realised in this case. As this issue is likely to have relevance to the disposal of the other claims made, it is preferable that the opportunity is retained for further evidence to be received on the issue at the next stage of the investigation.

Determination

[39] From this first stage of the Authority's investigation Mr MacDonald has sought a determination:

- That the fixed term in the employment agreement with CRNZ is ineffective under s 66(6) of the Act;

- That the agreement and the employment relationship continues;

- Ordering CRNZ to comply with the ongoing employment agreement, in particular by paying wages at the rate due under it from 1 September to the date of the determination and beyond.

[40] Given the above findings the Authority declares that the fixed term in the employment agreement was and is ineffective under s 66(6) of the Act.

[41] The Authority declines to declare that the employment relationship was revived by Mr MacDonald's election or remained continuous after 31 August 2010. I find that the employment terminated and has remained terminated. Only the remedy of reinstatement available in a successful personal grievance claim may revive it.

[42] I determine that there is no basis, at present at least, on which an order can be made requiring CRNZ to pay wages to Mr MacDonald after the termination of his employment. He may, however, become entitled to an order of lost wages for any of that period if his personal grievance claim is established and remedies are held to be available to him. That is yet to be investigated and determined in a second stage of this case.

[43] As well as remedies for his grievance claims of unjustifiable dismissal and unjustifiable disadvantage, Mr MacDonald seeks remedies for his claim of unfair bargaining brought under ss 68 and 69 of the Act, and he seeks penalties for an alleged breach of the good faith provisions at s 4 of the Act. Arrangements will shortly be made by the Authority with counsel in the usual way for a resumption of the investigation meeting to hear evidence and submissions in this second part of the investigation.

[44] The parties having now heard a considerable amount of evidence, and no doubt having reflected further on this case, will be in a good position to consider whether further mediation may be the most expeditious and economical way of resolving the employment relationship problem.

Costs

[45] Costs are reserved, pending the final determination of all matters.

Non-publication order

[46] During the course of the investigation meeting on 7 February the Authority considered that the interests of justice required orders to be made prohibiting the publication of the respondent's exhibits numbered 1 and 2 and the applicant's exhibit numbered 17. They contain commercial and other sensitive information.

[47] Pursuant to clause 10 of Schedule 2 of the Employment Relations Act, the Authority orders that the above documents 1, 2 and 17 are not to be published in any form by any person, until further order of the Authority. Any publication that occurred before 7 February may not be repeated in any way.

A Dumbleton
Member of the Employment Relations Authority