

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 245  
5295023

BETWEEN                      AILSA MURRAY  
   Applicant  
  
AND                                FULLERS BAY OF ISLANDS  
   LIMITED  
   Respondent

Member of Authority:        Alastair Dumbleton  
  
Representatives:              Clare Abaffy, counsel for Applicant  
   Elizabeth Coats, counsel for Respondent  
  
Submissions Received        13 January, 3 February and 8 March 2011  
  
Determination:                9 June 2011

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**DETERMINATION OF THE AUTHORITY - NO 2**

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**Employment relationship problem**

[1]     In a determination dated 17 November 2010 (under AA485/10) a dispute about the interpretation, application or operation of the parties' employment agreement was resolved by the Authority.

[2]     It gave a declaration that in clause 18 of the 2008 Fullers Bay of Islands Ltd Collective Employment Agreement (CEA) in using the term "seasonal employee" the union, employee and employer parties had intended "seasonal" to refer to the period from the beginning of October through until the end of April each year. That period, over spring, summer and autumn, has generally been regarded as the high season of the employer, Fullers, and the parties had intended "seasonal employee" to mean a person employed during that time, as Mrs Murray had been.

[3]     When she applied to the Authority initially Mrs Murray sought to have her employment relationship problem with Fullers resolved with an award of

compensation and reimbursement of lost wages as remedies for a personal grievance claim of unjustified dismissal. She also claimed that Fullers had acted in breach of its obligations of good faith owed to her.

[4] The resolution of the grievance claim was deferred until the dispute about the interpretation of “seasonal employee” had been resolved and the parties had had an opportunity to reach settlement of all claims. As that has not occurred the Authority must now consider the grievance claim and any others made by Mrs Murray.

[5] The remedies sought by her were reimbursement of lost wages, pursuant to s 123(1)(b) of the Employment Relations Act 2000, and compensation for humiliation and distress, pursuant to s 123(1)(c)(i) of the Act. Later she added the remedy of compensation for loss of expected benefit pursuant to s 123(1)(c)(ii).

[6] No penalty and no damages for breach of the employment agreement appear to have been claimed, although the allegation of breach has been made. I consider that a claim for damages is appropriately covered by a claim for compensation for loss of expected benefit. Every claim for a penalty must be brought within twelve months of the alleged breach. As the breaches of which there has been evidence in this case occurred in late 2008 and early in 2009, and as the claim was not brought until June 2010, any claim for a penalty is in any event time barred.

[7] In relation to her claim of unjustified dismissal, Fullers submits that Mrs Murray was employed as a casual under the employment agreement and was not dismissed. Clause 18.1 of the CEA, which the Authority has now interpreted, expressly provides for a “seasonal employee” to be employed on a “casual basis.”

[8] I find that Mrs Murray was employed under clause 18 of the CEA on an engagement by engagement basis, for either one or more roster period or on a casual basis. She was not tied to work for Fullers at any time and was free to decline any offer of engagement. Her employment began and ended when she covered either the absence of a permanent employee or, because of seasonal demand and/or special circumstances, she was needed to complement the existing Fullers workforce.

[9] It has not been suggested and there is no evidence that Mrs Murray was ever dismissed during a roster period or while she was part way through performing casual work. I find therefore that Mrs Murray was not dismissed at any time by Fullers. Her

last engagement terminated by mutual agreement under the casual employment arrangement accepted by the parties.

[10] As there was no dismissal there cannot be a personal grievance for unjustified dismissal. No remedies may be awarded therefore in relation to that particular claim.

[11] Although Mrs Murray's employment and performance of it was limited to the duration of the casual engagement or to the period of roster for which she was to work, she had subsisting rights between engagements as a casual or under a roster but any infringement of those rights did not amount to a dismissal in the circumstances. There could therefore be no unjustified dismissal and that claim must therefore fail.

[12] While Mrs Murray's employment terminated at the end of each engagement as a seasonal employee, it was still possible for any condition of employment that survived that termination to be affected to her disadvantage by an unjustifiable action of Fullers. Section 103 of the Act, in providing for various types of personal grievance, expressly includes at ss (1)(b) such action when taken by an employer after employment has ended and where a condition of employment survives the termination.

[13] Evidence was given to the Authority that on two occasions in particular Fullers did not observe the requirements of clause 18.6 of the CEA, which continued to apply to Mrs Murray between casual engagement or employment for roster periods.

[14] The first occasion was in about November 2008 when a boat skipper, Mr Aaron Kerr, needed time off work. To fill in for him a former employee of Fullers who had left and gone to work for another company was brought back. Mrs Murray I accept was not contacted by Fullers and asked whether she wished to provide this cover either on a casual basis or for the roster period of Mr Kerr's leave.

[15] I accept therefore there is evidence that Fullers breached its undertaking at clause 18.6 of the CEA to divide, as far as was practicable, seasonal work among existing seasonal employees and, wherever possible, to give preference to long serving employees such as Mrs Murray. She believes that it was not the first time this had happened.

[16] The second occasion was in early April 2009 when Mrs Murray was contacted by a skipper and asked if she would cover for him. She said she agreed but had then

been called back by the skipper to say that Fullers had told him he could not use Mrs Murray as she was not on a company list of people available for that purpose. The evidence about the April 2009 occasion is not as strong as that relating to the November 2008 occasion.

[17] Shortly after the second occasion, on about 8 April 2009, Mrs Murray spoke to Fuller's General Manager Mr Charles Parker about her employment status with the company. He followed up the conversation with a letter to Mrs Murray in which he described her as a "casual" employee. Referring to their earlier conversation he said:

*During our conversation you suggested that you were "not allowed" to work on a number of occasions in the past twelve months, and in particular last weekend. The reason you were not offered work was:*

- (a) *You are not considered current on any vessels, and*
- (b) *Priority is given to finding work for seasonal staff ahead of casual employees.*

*It appears that we have not used your services at all in the last twelve months. This combined with the fact you are no longer current on any of our vessels, and it is unlikely you will be required in the next twelve months, means that Fullers wishes to advise that we have decided to no longer keep you on our records as a casual employee and will accordingly remove you from the payroll system.*

*Fullers Bay of Islands is hugely appreciative of the long years of service you have provided to the company as a casual employee and we wish you well for the future.*

[18] There is therefore some evidence, although not as strong as the evidence in relation to the first occasion, that on the second occasion there was a breach of clause 18.6 of the CEA, in that casual work available at the beginning of April may not have been equitably divided to allow Mrs Murray to share in it and she may not have been given the preference she was entitled to as a "long-serving employee."

[19] Was a personal grievance raised, and raised within 90 days, in relation to either the first or second occasion where clause 18.6 may have been breached? A grievance was raised on behalf of Mrs Murray by her union, the NDU, in a letter to Mr Parker dated 21 May 2009. That grievance was expressed to be "unjustifiable dismissal." The NDU's letter referred to the advice Mr Parker had given in his 19 April letter that Fullers would no longer be offering employment to Mrs Murray because she was considered to be a casual, and also because there was no obligation to offer her employment and priority was given to finding work for seasonal staff

ahead of casual employees. A further reason given by Mr Parker's was that Fullers did not consider Mrs Murray to be current on any vessels.

[20] In May 2009 when the NDU raised the grievance more than 90 days had elapsed since the occasion at the end of November 2008 when Fullers had brought in a former employee to cover for a skipper on leave but without asking Mrs Murray if she would do the work. The NDU's letter cannot therefore be considered as having raised any grievance about that first occasion, whether in relation to the contended dismissal or to disadvantage, within the time period of 90 days required by s 114 of the Employment Relations Act.

[21] In final submissions counsel Ms Abaffy made reference to s 122 of the Act which provides that the nature of a personal grievance may be found to be of a different type from that alleged.

[22] I do not think that assists in this case, as there is still the requirement for any grievance to be raised within 90 days. I am satisfied that no grievance was raised about the occasion in early April 2009 when Mrs Murray was not called back in to work, although it appears to have been the subject of discussion between Mrs Murray and Mr Parker. The NDU's letter of 21 May does not refer to the second occasion and there is no evidence that what Mrs Murray said in conversation to Mr Parker about that occasion a week afterwards raised a grievance in relation to it.

[23] The NDU's letter refers only to the first occasion as being one where Fullers "gave casual work to an employee of a rival company rather than contact Ailsa," in respect of which as remedies the union requested:

1. *That Ailsa's employment is reinstated and the company offers her employment in accordance with Section 18 of the collective agreement.*
2. *That Fullers Bay of Islands pays her \$6,000 compensation for humiliation and injury to feelings.*

[24] Those remedies were sought in relation to a contended grievance of unjustifiable dismissal rather than unjustifiable disadvantage.

[25] In any event, as considered to be the case by the Authority in its earlier determination, the view that Mr Parker seemed to have of clause 18 gave rise to a dispute between the parties about the interpretation application or operation of the

2008 CEA. In so far as Mrs Murray was not immediately reinstated by Fullers as a seasonal employee under clause 18, the actions of Fullers were derived solely from the interpretation or disputed interpretation of the CEA. Section 103(3) of the Act excludes such actions from becoming the subject of a personal grievance.

[26] A further matter that would need to be taken into account if the Authority reached the point of considering whether to award remedies to Mrs Murray for a personal grievance of any kind, was the offer Fullers eventually made to reinstate Mrs Murray to the CEA. There was no trickery in that offer but it was rejected by Mrs Murray, who contended that it had been unnecessary to make the offer as she had always remained on the CEA. That view was inconsistent with the claim that she had been dismissed.

[27] Mrs Murray refused to sign the CEA when it was offered to her and I find she must carry some blame for the situation giving rise to her claim that she was unjustifiably dismissed.

### **Determination**

[28] In the circumstances for the above reasons I find that Mrs Murray does not have a personal grievance of any kind and has no entitlement to any other remedies available under the Act.

### **Costs**

[29] Counsel will be aware that where a dispute about interpretation is the sole or predominant issue in an employment relationship problem the Authority usually decides that costs will lie where they fall. If however an application for costs is to be made by Fullers it must be filed within 14 days of the date of this determination and Mrs Murray shall then have a further 14 days to respond to it.

A Dumbleton  
**Member of the Employment Relations Authority**