

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Gillian Paulin (First Applicant)
AND New Zealand Public Service Association (Second Applicant)

AND Southland District Health Board (Respondent)

REPRESENTATIVES Phirak Appleton, Counsel for the Applicants
Janet Copeland, Counsel for Respondent

MEMBER OF AUTHORITY Paul Montgomery

INVESTIGATION MEETING 5 July 2005

DATE OF DETERMINATION 22 December 2005

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The first applicant, Mrs Paulin, claims she has been unjustifiably disadvantaged in her employment with the respondent. She seeks an order from the Authority that her status is that of a *permanent* employee with its associated benefits. Further, she seeks compensation of \$15,000 under section 123 (c)(1) of the Employment Relations Act 2000 *for distress and unfair treatment* by the respondent.

[2] The second applicant, the PSA, claims that the respondent has breached its contractual obligations contained in the collective employment agreement and seeks a penalty of \$5000 from the respondent in respect to that breach.

[3] Both applicants seek costs.

[4] The respondent says that apart from specific periods when Mrs Paulin was engaged on fixed term agreements, she has remained a valued member of the respondent's casual pool of administrative workers. The respondent also denies it has disadvantaged the applicant, nor, it says, has it breached the terms of the collective agreement. Accordingly, it declines to grant the remedies sought by either applicant.

[5] The parties attempted to resolve their differences in mediation but were unable to achieve that end.

What caused the problem?

[6] Mrs Paulin was originally employed in or about November 2001 as a casual administrative employee. Since that time that applicant's work pattern has become regular and consistent and that regularity of work is such that Mrs Paulin claims she has been working eight hours a day for five

days a week. This forms the basis of her claim that by reason of the regularity of hours she has been employed, her status is correctly that of a permanent employee.

[7] The respondent says that following her engagement on or about 5 November 2001 Mrs Paulin was appointed to the position of casual administrative officer in the medical records department. The terms of that appointment are set out in a letter dated 23 October 2001 which confirms that the appointment was on an *as and when required basis*. The respondent's records show that in the period from November 2001 to December 2003 the applicant worked on such a basis in 13 different departments at the hospital. The respondent says that it was not uncommon for Mrs Paulin to work eight hour days but points out that on other occasions she worked as few as two hours a day as the requirements in the department dictated.

[8] In mid-December 2003 the applicant was appointed to the position of part time administration officer in the medical imaging department to assist that department moving to a new structure and pending a review of the medical imaging department itself. The documentation indicates that this fixed term temporary agreement began on 15 December 2003 and was to finish no later than 10 December 2004.

[9] Around 16 April 2003 Mark Ryan, the PSA organiser, submitted a request to the respondent for clarification as to Mrs Paulin's employment status. In reply the Board stated that after reviewing the situation Mrs Paulin was a casual employee however, they acknowledged that the applicant did a considerable number of hours but indicated that this was in several different departments. On 22 October 2003, a meeting was held to discuss whether the applicant was being paid correctly and whether she was a casual employee in the light of the hours she was working. On 25 May 2004, a further meeting was held and it was decided that Mrs Paulin's service would be recognised from November 2001, that the applicable rate of pay would be as the PSA interpretation of the collective agreement and the PSA was advised that the applicant was now in a temporary position on fixed term arrangements. It was at this point that the PSA alleged that such a temporary appointment breached the collective agreement.

The investigation meeting

[10] At the investigation meeting the Authority heard from the applicant herself and from Mark Ryan, the PSA's regional organiser.

[11] For the respondent I heard from Giri Subramaniam, the human resources director, Faye McLeod, human resources advisor, Bruce Miller, a former human resources manager, and Deborah Martin, a former human resources advisor to the respondent.

[12] All witnesses were open and direct in their response to questions and I record the Authority's thanks for the orderly manner in which the investigation was able to proceed.

Discussions and analysis

[13] Turning to the alleged breach first, clause 6.5 of the collective agreement states;

6.5 Temporary Employment Contracts

(a) Temporary employment agreements should only be used to cover specific situations of a temporary nature, eg to fill a position where the incumbent is on study or parental leave, or where there is a task of a finite duration to be performed. Under normal circumstances a temporary employment agreement shall not exceed a duration of 12 months unless there are exceptional circumstances. Where these

exceptional circumstances occur, the employer shall prior to advertising notify the NZPSA/NZNO.

(b) *Where a position has a termination date specified in the agreement then the appointment must not be extended beyond the original expiry date, unless by the mutual agreement of the parties due to a need to extend the limited time period for completion purposes.*

(emphasis is mine)

[14] The PSA says this section of the agreement imposes an obligation to consult with the Union prior to advertising a fixed term temporary position. In addition it argues that the overarching principle of consultation required the respondent in this particular case to undertake a consultative engagement with the Union on behalf of the applicant.

[15] When I reviewed the three fixed term agreements undertaken by Mrs Paulin it is clear to me that at the time of advertising or the time of proposing such a fixed term arrangement to the applicant, none was intended to exceed the 12 month requirement in the above clause.

[16] While I have some empathy for the PSA's view that consultation or, to use Mark Ryan's phrase, *keeping us in the loop* may have been desirable, no such obligation is imposed by this clause of the collective agreement.

[17] I think it a fairly long bow to draw to allege, even as a fall-back position, that the respondent is guilty of breach of section 4 (1)(a) of the Employment Relations Amendment Act 2004.

[18] Turning now to the allegation that the applicant was unjustifiably disadvantaged in her employment by the actions of the respondent, there seems to be no argument between the parties that Mrs Paulin began her employment with the Board as part of the small pool of casual workers. The first fixed term agreement in the medical imaging department was from 15 December 2003 through until 10 December 2004. It is apparent to me that this was to cover for a previously permanent position but one which would be subject to the review planned for that department. Mrs Paulin was offered this work not because the position had been disestablished, but because the certainty surrounding the permanence of the position was in question.

[19] The second fixed term arrangement which was to cover sick leave and annual leave for three staff members was between 7 February 2005 until 4 March 2005. The third was from 7 March until 1 April 2005 and was to cover annual leave of existing staff.

[20] I have studied each of the letters of offer made to the applicant in relation to these appointments and am clear in my own mind that regardless of the hours worked in the period between these fixed term arrangements, Mrs Paulin was in no doubt that her employment reverted to an *as and when required basis* when each assignment ceased. I also am of the view that in each of the three fixed term arrangements, the respondent had valid reasons for covering the tasks required under fixed term arrangements and those arrangements comply with section 66 of the Act.

[21] There was over the time some discussion regarding wage arrears and entitlements but I accept the evidence of Mr Ryan who told the Authority that all issues regarding back pay were resolved between the parties by May 2004.

[22] I have also considered Mrs Paulin's view that were she to have refused work when employed on a casual basis the likelihood was that she would not be asked again. It is a perhaps justifiable fear however, given the modest size of the casual pool and the high regard in which Mrs Paulin and her skills were held in various departments, she may have misread the situation.

[23] I want to acknowledge the assistance of counsel for the parties in the detailed and focused submissions provided to the Authority. I have taken them into account and have followed through the references to the appropriate precedents as set out in those submissions.

Determination

[24] I return to the issues as set out earlier in this determination. I find that the respondent was not in breach of its obligations under the collective employment agreement and I agree with Ms Copeland's submission that this a matter of the second applicant misreading and misapplying this clause.

[25] Further, I find that the actions of the respondent in relation to Mrs Paulin do not constitute a breach of the good faith obligations imposed on the employer by section 4 of the Employment Relations Act 2000.

[26] I find that Mrs Paulin was not unjustifiably disadvantaged in her employment by the actions or inactions of the respondent. For the sake of completeness I record that I understand Mrs Paulin's strong desire to obtain a permanent position with the respondent however, all permanent positions need to be funded appropriately and where such funding is not in place the respondent is unable to offer such permanence. No amount of hours worked for an employer when employed on an *as and when required* basis automatically convert to permanent tenure.

[27] I dismiss the allegations of breach made against the respondent.

[28] I find that Mrs Paulin does not have a personal grievance and that I am unable to help her further.

Costs

[29] Costs are reserved. Counsel are invited to attempt to resolve this issue between themselves and in the event that that is not possible counsel for each party is to file a memorandum on behalf of their respective clients. Submissions are to be lodged simultaneously with the Authority and served on the other party on or before 5 pm, Friday, 10 February 2006.

Paul Montgomery
Member of Employment Relations Authority