Determination Number: WA 19/07
File Number: 5038582

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Wanita Anne Rarere (Applicant)
AND	Electrotech Controls Limited (Respondent)
REPRESENTATIVES	David Oliver for Applicant Matthew Lawson for Respondent
MEMBER OF AUTHORITY	G J Wood
INVESTIGATION MEETING	12 December 2006
FURTHER SUBMISSIONS	Received by 10 January 2007
DATE OF DETERMINATION	2 February 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. The applicant, Ms Wanita Rarere, claims that she was unjustifiably dismissed and/or unjustifiably disadvantaged in her employment after she declined to continue in the respondent's (Electrotech) employment as a casual, after Electrotech had been notified that she had completed her apprenticeship. Ms Rarere considered that she was entitled to continue in employment under an indefinite term.

2. Ms Rarere also seeks remedies for breaches of good faith by Electrotech, including Electrotech creating a legitimate expectation of renewal or continuation of employment following her apprenticeship, which Electrotech did not act upon.

3. Ms Rarere further claims Electrotech failed to offer her subsidised medical insurance as required by the employment agreement, failed to return to her a CD rom she owned and did not pay her a vehicle allowance for travel beyond Electrotech's premises.

4. Her claim for an unlawful deduction from her final pay was withdrawn subsequent to the investigation meeting.

5. Electrotech denies each of Ms Rarere's claims.

The Facts

6. Electrotech operates in the electrical engineering and project work and development industry, employing about 140 employees. Ms Rarere was employed by Electrotech from 8 January 2001 as an electrical apprentice. She was employed under a rolling series of fixed term agreements. The agreements were complicated by different provisions as to term between her individual employment agreements and the core apprentice electrical employment agreement, which also applied to Ms Rarere.

7. The different provisions related to the expiry of the agreements. The individual employment agreements were annual agreements ending on 30 June each year, as were the core employment agreements. The latter, however, also provided that Ms Rarere's employment with Electrotch would be terminated automatically at the expiry of 8,000 hours work or proof of completion of the National Certificate in Electricial Engineering (Level 4), whichever was earlier. There were, therefore, inconsistent provisions within the agreements applying to Ms Rarere.

8. At the end of June each year when the contracts purportedly came up for renewal, no discussions were held with Ms Rarere about why her employment needed to be fixed term, either year-by-year or for the duration of her apprenticeship.

9. The Managing Director of Electrotech, Mr Richie Richards, gave evidence that the term of employment was agreed to be the term of the apprenticeship, but that is not what the individual employment agreements stated, and as these were drafted by Electrotech and were inconsistent with s.66 of the Employment Relations Act (as discussed below), any confusion that subsequently arose is the responsibility of Electrotech.

10. On the other hand, I am satisfied from the evidence of Mr Richards and Mr Dave Anderton, the Human Resources Manager, that all apprentices are informed that their employment is part of a training arrangement and there is no guarantee that an

apprentice will continue to be employed by Electrotech at the end of their apprenticeship. I do not accept, simply because Ms Rarere cannot recall this event some six years later, that it did not occur. Thus Ms Rarere could have had no legitimate expectation of ongoing employment with Electrotech once her apprenticeship agreement had concluded on the basis of representations made by Electrotech.

11. After Ms Rarere had been employed for three months, she was required by the individual employment agreement to be offered subsidised medical insurance through Electrotech. This did not occur until April 2003. Around that time, she loaned a CD rom to fellow apprentice and that was never returned. I do not accept that Electrotech has to take responsibility for the actions of that apprentice.

12. From 30 March 2005, Ms Rarere was required to report for work at the contract site. She had previously reported to work at the Napier base and then been transported by Electrotech. She therefore seeks vehicle allowances for the extra travel required.

13. While there were no problems with Ms Rarere's work at Electrotech, many apprentices made quicker progress than Ms Rarere in completing the necessary work for their National Certificate in Electrical Engineering (Level 4) and did so before their 8,000 hours was up. Others, unlike Ms Rarere, had also completed the trade exam held twice yearly, which is required to be passed before a person can take up a position as a tradesperson. Thus, unlike others, Ms Rarere's 8,000 hours were completed in early April 2005, before Electrotech had been notified that she had met her Level 4 apprenticeship training requirements and before she had passed the tradesperson registration exam.

14. Despite the 8,000 hours being the figure for the automatic expiry of the employment agreement, no discussions were held with Ms Rarere about that event and she simply continued on in Electrotech's employment.

15. Ms Rarere gave evidence, which I do not accept, that she was told in May by a manager, Mr Steve Pardoe, that her employment would continue at the end of her apprenticeship. Mr Pardoe stated that he did not tell Ms Rarere any such thing. I accept that he had no authority to do so and therefore would not have said such a

thing. This is similar to Ms Rarere's claim that all apprentices continued doing their employment with Electrotech at the end of their apprenticeship, which was shown to be incorrect at the investigation meeting.

16. On 30 May, the Industry Training Board wrote to both Ms Rarere and Electrotech informing them that Ms Rarere had completed the requirements of the apprenticeship.

17. Upon receipt of the letter, Mr Anderton met with Mr Richards to discuss Ms Rarere's future with Electrotech. Mr Anderton was concerned that Ms Rarere did not intend to sit the trade exam until November, when there was an exam in June that she could have sat had she wanted. In Electrotech's view, the employment agreement had come to an end and it decided that Ms Rarere's employment would be ended, but that she would be offered a job as an electrical trade assistant until she sat and passed the exam for trade registration, hopefully in November. That offer was, however, to be on a casual rather than permanent employment basis.

18. Mr Anderton met with Ms Rarere accordingly on 21 June. I accept Mr Anderton's evidence that he told Ms Rarere that she was being given notice of termination of her employment because her apprenticeship contract had been completed and that she was to be given a month's notice. I accept, on the basis of my preference for Mr Anderton's evidence to that of Ms Rarere, that she said that she had been expecting that. Mr Anderton told her that she could apply for a job with Electrotech but that it would have to be as a trade assistant. Mr Anderton responded to the question as to whether she should apply for other jobs by saying that it may be of assistance. Ms Rarere replied that she had already had a couple of taps on the shoulder. Ms Rarere claims now that that comment was merely bravado.

19. A letter of termination dated 21 June was then sent as follows (verbatim):

> *"With regard to your Apprenticeship agreement, you have now served your 8000 hours (and an extension to allow for the additional time given to complete some levels) and the employment contract is now terminated.*
> *To that end we now give you one month's notice of termination of employment under clause 18.1 of your employment agreement, giving a final day of July 22nd 2005.*
> *I have enclosed an application for employment should you wish to apply for a position. The position would have to be inline with the qualifications you have*

achieved, e.g. Trade Assistant, if you had not completed your (Certificate in Electrical Engineering Level 4) Registered Electricition if completed everything. We can not guarantee a position but will look at it in light of our current employment requirements and other applicants we may have."

20. On 7 July, Ms Rarere applied for casual employment as a trade assistant. On 12 July, Ms Rarere met Mr Anderton in his office and was told that she would be offered a temporary employment agreement until her exams in November, at the same rate of pay, with her insurance and sick leave continuing on the same basis as before. Ms Rarere's holiday pay was to be paid out on 22 July, however. Ms Rarere was very concerned about the offer of employment and sought independent advice.

21. My determination of 21 July 2006 on the 90 day issue covers the events that occurred subsequently and so I therefore do not repeat them here. It is sufficient to note that Ms Rarere went on sick leave from 18 July never to return. She also never uplifted the formal offer of temporary employment, which I accept was put in her cubbyhole by Mr Anderton soon after the conversation of 12 July.

22. Despite two attempts at mediation, the parties have been unable to resolve the issues between them. It therefore falls to the Authority to make a determination.

Credibility

23. There can be no certainty of what occurred in events several months or years old. The Authority is required to determine the facts wherever there is a dispute on the balance of probabilities, i.e. what is more likely to have occurred than not. In this case, I have been greatly assisted by the documentation provided by the parties, but where documentation is not sufficient to determine disputed matters, I have not had sufficient confidence in Ms Rarere's evidence to be satisfied that her claims are valid. That is not to suggest that Ms Rarere was lying in her evidence but rather, given the passage of time and the depressed state she has been in since her dismissal, I believe that she is more likely than not to be mistaken in her recollection over the events compared to other witnesses.

The Law

24. Under the Employment Relations Act, even before the amendments of 2004, the legislature required, under s.66, certain conditions to be met before a fixed term employment agreement could be effective. In particular, there is a requirement under s.66(2)(b) for an employer to advise, in advance, the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way. At the relevant time here the advice did not need to be in writing.

25. In *Norske Skog Tasman Ltd v. Clarke* [2004] 1 ERNZ 127, the Court of Appeal held at para.[52] that:

> *"… we consider that in s66 the phrase 'advise … of' has a meaning which is equivalent to 'give … notice of'. So it is sufficient to comply with ss66(2)(b) if the employer brings the relevant reasons to the attention of the employee. We would likewise accept that a failure by an employee to take on board those reasons, perhaps because they are set out in a written document which he or she has been given but has chosen not to read, does not mean that the employer has failed to comply with s66(2)(b)."*

26. The Court of Appeal went on to find that the provision as to termination of a fixed term agreement is ineffective when the conditions of s.66(2)(b) have not been satisfied.

27. The issue of what occurs when a fixed term employment agreement expires, yet an employee continues on in employment, is dealt with in *Varney v. Tasman Regional Sports Trust* unreported, Goddard CJ, CC15/04, 23 July 2004. At para.[40] ff the Court held:

> *"[40] If the defendant is right and the original year of employment was a fixed term employment the fixed term employment came to an end on 9 April 2002.*
>
> *[41] If so, what was the basis of the plaintiff's employment on and after 10 April 2002? The answer can only be that it was an employment on the same terms but indeterminate in duration. If that further employment was to be a fixed term employment, it was necessary for the employer again to have genuine reasons based on reasonable grounds for specifying that the employment was to end in that way and the employer had to tell the employee when or how the employment would end and the reasons why it would end that way. These things had to be followed by an agreement in terms of s66(1) of the Employment Relations Act 2000 that the employment would end on 30 June 2002. In fact, it came to an end on 28 June 2002 presumably because that was a Friday. There is no evidence of agreement by the plaintiff that the employment would end on either date. …*

> *[42] This results in a conclusion that, at the very least, the employment was not a fixed term employment between 9 April 2002 and 28 June 2002. The employment was terminated summarily on 28 June 2002. That termination has not been shown to be justified.*
>
> *[43] The position before 9 April 2002 may not matter greatly but the following can be said. The expiry of the fixed term employment on 9 April 2002 was waived by the employer. This should not surprise the defendant as employers have accepted that where they resort to fixed term employment the agreements must state that the employment will end on a particular date, at the end of a particular period, or on the occurrence of a specified event including the conclusion of a specified project. It is further generally understood by employers that the employment can continue only if a fresh contract to similar effect or to other effect is entered into. This was a feature of the contracts in* NZ Food Processing IUOW v ICI (NZ) Ltd *[1989] ERNZ Sel Cas 395, and was also on the facts at the heart of the employer's concern in* Smith v Radio i Ltd *[1995] 1 ERNZ 281 to reach a new agreement before the expiry of the old term and to ensure that the employee in the case should not work or even enjoy paid holidays beyond the expiry date. If a fixed term employment is allowed to drift on, the nature of the continuing employment is then always going to be problematic. As I said in* O'Neill v Victoria University of Wellington *unreported, 11 December 1996, WEC 82/96 at p4:*
>
> > 'A fixed term contract ceases to be such if the employment continues beyond the term unless it is replaced by another fixed term contract voluntarily made with the freely given informed consent of both parties.' "

28. In relation to remedies, the Court held as follows:

> *"[46] In relation to the remedy of reimbursement of remuneration lost as a result of the personal grievance, it is important to note that this is an exceptional case because if the defendant had not treated the plaintiff's employment as expired, it would certainly have made her redundant to make way for the full time employee who was appointed as from 19 August 2002. Not only was this redundancy inevitable but the consultation with the plaintiff was, for all practical purposes, complete. She had been offered the full time position and had declined it without any qualification as completely out of the question for her in her personal circumstances. That being so, all obligations of fairness had been discharged by the defendant. If she had not been dismissed unjustifiably on 28 June 2002 she could have been dismissed justifiably on due notice by 19 August 2002 (when the new position was filled) and certainly would have been. Accordingly, the loss of income attributable to her personal grievance is limited to the intervening period of 7 weeks and holiday pay thereon."*

Determination

29. It is highly arguable whether the complicated series of fixed term agreements presented by Electrotech to Ms Rarere were effective in terms of s.66 of the Act. It is not necessary to determine this matter, however, because of the effect of Electrotech's decision to continue Ms Rarere's employment without any formal

agreement, in writing or otherwise, once her 8,000 hours were up. Thus, in accordance with *Varney*, Ms Rarere's employment then altered to employment of an indefinite duration, but subject to all the same previous terms and conditions of employment.

30. While, as in *Varney*, it could be argued that Ms Rarere's employment as an apprentice electrician would have been terminated by redundancy anyway as she was no longer an apprentice, the fact remained that Electrotech was prepared to continue employing Ms Rarere as a trade assistant, at least until she became a registered electrician, at which time her employment would also have continued. This therefore distinguishes *Varney* in terms of remedies, as discussed below.

31. Thus, while I accept that Electrotech was acting with good motives to try and continue Ms Rarere's employment, the fact that as a result of her continued employment for several months beyond the term fixed by Electrotech, she was entitled to ongoing employment in any event, meant that it was reasonable for Ms Rarere to decline to continue with Electrotech as a casual employee, after having been given notice of termination of her employment as an apprentice. In this regard, I accept that Ms Rarere was very upset about her treatment by Electrotech and as she correctly believed (although for the wrong reasons) that she was entitled to not be treated as a casual, her resignation constituted an unjustified constructive dismissal.

32. The reason the dismissal was unjustified was because she should not have been required to apply for a position as a casual. Her employment was of indefinite duration. This is a significant matter for any employee.

33. This set of facts can also constitute an unjustified action to Ms Rarere's disadvantage as, in law, her security of employment was wrongly diminished. Whether classified as an unjustified dismissal or an unjustified action, however, the remedies are the same.

Remedies for the Unjustified Action/Dismissal

34. Ms Rarere seeks lost wages for the whole of the period between her leaving work and the date of the investigation meeting, despite commencing a full time engineering

fabrication and welding course in February 2006. Ms Rarere did apply for three positions in August 2005 but was unsuccessful with each application.

35. I do not accept that Ms Rarere has made sufficient efforts to mitigate her loss in the period since July 2005. She has only applied for three jobs, despite the wide availability of work in the Hawkes Bay region. She has also not completed her registration in order to become a fully qualified electrical trades person, which would have enhanced her employability.

36. I accept that Ms Rarere has had health difficulties since these issues with Electrotech were raised. Her medical records, however, indicate that she had no medical treatment between July and December 2005. Thus while I accept that it did take Ms Rarere some time to get over the difficulties she suffered at Electrotech, I am not prepared to exercise my discretion, in all the circumstances of this case, to award lost remuneration in excess of three months. Three months pay equates to 13 weeks remuneration and constitutes $8,482.15 gross.

37. I do not consider there have been any contributory actions by Ms Rarere as it was reasonable for her not to take up the offered position as a casual employee, for the reasons given above.

38. Ms Rarere is also entitled to compensation for the way her employment ended. While she may not have been correct about the reasons why she should have been treated as an employee employed on a term of indefinite duration, she was in fact correct that it should have continued on the same conditions. Her medical records show she suffered greatly. I find that compensation of $7,000 is appropriate in all the circumstances.

39. I do not accept that any penalty should be applied for any breaches of good faith. No penalties apply for breaches of s.66 and no misleading statements were made by Electrotech towards Ms Rarere.

Breaches of Employment Agreement

40. As noted above, Electrotech has no responsibility to Ms Rarere for the return of her CD rom, which she loaned to another employee.

41. Her claim for unlawful deductions from her final pay has been withdrawn.

42. I do not accept that Ms Rarere was entitled under the employment agreement to be paid travel allowance for going out to work on sites. Rather I accept Mr Richard's evidence that travelling allowances are not paid to workers who work on particular work sites around the region, but rather for work-related travel from the site where the workers are working.

43. Ms Rarere should have been given the benefit under the medical scheme after three months rather than two years employment. She claims $1,124 to cover medical, dental and optometry claims made in the relevant period.

44. I accept that this is a lost benefit that resulted directly from Electrotech's failure to offer her the medical insurance scheme. Although there can be no certainty that Ms Rarere would have taken the more expensive option which covered the expenses she incurred for medical and dental bills, I accept that she would have made the same decision in 2001 had it been offered to her as she did in 2003. Thus it is reasonable to conclude that these expenses would have been met by the insurance scheme. Against this sum must be offset contributions to the scheme that Ms Rarere herself would have had to have made of $184.08.

45. I therefore conclude that as a result of the failure by Electrotech to meet its contractual arrangements, Ms Rarere has suffered damages in the sum of $939.92.

Conclusion

46. I have found that Ms Rarere was unjustifiably constructively dismissed/ disadvantaged by Electrotech and that Electrotech breached her employment agreement by not offering her subsidised medical insurance after the first three months of her employment. I have dismissed her claims based on legitimate expectation and for penalties. I have also dismissed her claims for travel allowances and compensation for the loss of a CD rom.

47. I therefore order the respondent, Electrotech Controls Limited, to pay to the applicant, Wanita Anne Rarere, $7,000 in compensation under s.123(1)(c)(i), $8,482.50 gross in lost remuneration and damages of $939.92.

Costs

48. Costs are reserved.

G J Wood
Member of the Employment Relations Authority