

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 99/07
5052410

BETWEEN	FLOYD RUDOLPH First Applicant	
	SOUTHERN GOVERNMENT UNION INC Second Applicant	LOCAL OFFICERS
AND	CHRISTCHURCH COUNCIL Respondent	CITY

Member of Authority: Paul Montgomery

Representatives: Peter Lawson, Advocate for Applicants
Susan Hornsby-Geluk, Counsel for Respondent

Investigation Meeting: 11 April 2007 at Christchurch

Determination: 9 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The first applicant, Mr Rudolph, claims he was subjected to unjustified disadvantage and later was unjustifiably dismissed from his employment with the respondent. He seeks compensation of \$10,000 for hurt and humiliation arising from his alleged grievance.

[2] The second applicant (the Union) alleges two breaches of the Collective Employment Agreement (the CEA) by the respondent. These are, that at no time was the Union given notice of impending redundancy of Mr Rudolph and that the respondent has acknowledged that no such prior notice was given. Further, the Union says Mr Rudolph was given no notice of his redundancy in 2004 when the

restructuring took place which saw the position held by the first applicant disestablished.

How the problem arose

[3] Mr Rudolph was first employed by the respondent as a part-time pool lifeguard in 1998. Mr Rudolph later applied for, and was appointed to the permanent full-time position of Information Officer-Meter Reading in the City Council's Water and Waste Unit effective from 3 April 2000. At that time there were two full-time Information Officers responsible for both reading water meters and sampling trade waste.

[4] In May 2004 the respondent considered the options for changing the manner in which water meters were read. One of the options considered was to contract the meter reading function out to another organisation. The two Information Officers concerned and the Union were consulted about the options on a number of occasions. A meeting was held with the two employees on 5 May 2004, the Minutes of that meeting being provided to the Union. There was a meeting with the Union on 11 May 2004 which resulted in the parties agreeing the reorganisation process to be followed.

[5] Following further discussions with the two employees and the Union, the first applicant was advised on 2 July 2004 that the Information Officer position was being disestablished. The letter discussed possible options including redeployment for Mr Rudolph. Both employees were invited to apply for a new position of Field Support Officer, which was created for a fixed term of 18 months. Both employees and the Union were told on 20 July 2004 that redeployment and redundancy were options upon the expiry of the new fixed term Field Support Officer position.

[6] On 24 August 2004 the respondent informed the two Information Officers that the disestablishment of their positions had been confirmed and advised that the new fixed term Field Support Officer position had been created. Both were provided with the position job description.

[7] The respondent says both were told that the reasons for the fixed term were to support the new water meter reading contract as well as the trade waste and microbiological sampling programme.

[8] Mr Rudolph applied for, and was appointed to, the fixed term Field Support Officer position with effect from 1 November 2004. Both Mr Rudolph and the Union were informed of this on 1 October 2004.

[9] The Council wrote to Mr Rudolph on 4 and 5 October 2004 formally offering him the new position. The letters confirmed that Mr Rudolph's current contractual terms and conditions would continue, and that he would retain his entitlement to redundancy compensation. In relation to the redundancy issue the letter stated:

In the event that you are unable to secure an alternative position with the Council by the end of the fixed term period, 5 May 2006, you will receive a redundancy payment.

[10] Although the position of Field Support Officer required the appointee to hold a New Zealand Certificate of Science or an equivalent tertiary qualification, the respondent waived that requirement for Mr Rudolph due to the fixed term nature of the position.

[11] Towards the end of 2005, the Council began to review the viability of an expanded trade waste sampling programme and to assess both the nature and the demand for trade waste sampling services. As a result of that review, the Council decided to establish the new permanent position of Trade Waste Sampling Technician following the expiry of the fixed term Field Support Officer position. The new Trade Waste Sampling Technician role differed from that of the Fixed Term Field Support Officer role in that the new role focused primarily on the sampling and chemical analysis of trade waste, and had no duties involving meter reading. Although the new position was graded lower than the Field Support Officer role, it required a higher level of technical skill. A further difference between the two roles was the fact that the Trade Waste Sampling Technician was a permanent position.

[12] Because of the nature and extent of these differences between the two positions, Mr Rudolph was not directly appointed to the new role. Mr Rudolph's Manager told him on 16 March 2006 that the Field Support Officer position would conclude on 5 May 2006 and that Mr Rudolph should apply for the new position if he wished. Mr Rudolph and the Union met with the Council on 24 March 2006 and it was agreed that the Council would supply further information about the new technical role.

[13] This information was duly provided and the Union was told on 29 March 2006 that the new role would be advertised later that week. In response to this information, the Union wrote asserting that Mr Rudolph should be offered the position and, if he declined it, he should be offered redeployment or redundancy compensation. Mr Rudolph was later told that he still needed to apply for the position if he wanted to, and that in fact, he undertook and completed.

[14] As the day on which Mr Rudolph's employment as a Field Support Officer was to end drew near, his Manager reminded him that his fixed term employment would terminate and that there would be a farewell function for him on his final afternoon. On 4 May 2006 the Union advised the Council that until it was determined whether Mr Rudolph had ongoing employment, it was not appropriate to hold such a function nor to commence the redundancy process.

[15] Mr Rudolph ended employment with the Council on 5 May 2006 in accordance with the terms of his fixed term agreement. The appointment process for the new technical position was completed on 10 May 2006 and Mr Rudolph was not successful in obtaining it. He was informed by letter of that outcome and his redundancy compensation was paid on 10 May 2006.

[16] The letter appointing Mr Rudolph to the position of Field Support Officer which is dated 5 October 2004 is particularly relevant. It makes clear that the position is for a fixed term and that the appointee's employment will conclude on 5 May 2006. It also states that Mr Rudolph will continue to be covered by the terms and conditions set out in the CEA. Further, it sets the Grade, hours of work, salary and the locations of work for the role and it preserves Mr Rudolph's entitlement to redundancy compensation if he is unable to secure another Council position by 5 May 2006. As part of the appointment process, the first applicant was required to sign and return a copy of the letter to the respondent acknowledging his acceptance of the terms as set out.

[17] The Union's claim is that Mr Rudolph was a permanent employee in a fixed term role. There is no dispute between the parties that he was a permanent employee up until 1 November 2004. The reasons for the establishment of the fixed term arrangement were canvassed with both the first applicant and the Union and are not in dispute between the parties.

The issues

[18] In the course of a pre-investigation teleconference, the representatives for the parties undertook to prepare an agreed statement of facts and a list of issues. Both have been of considerable assistance. The issues the parties agree are to be determined are:

Mr Rudolph's employment status

- In applying for and accepting the appointment to a fixed term position of Field Support Officer in October 2004, did Mr Rudolph change his employment status with the Council from that of a permanent employee to that of a fixed term employee, with a right to a deferred redundancy compensation payment?

Termination of Mr Rudolph's employment on 5 May 2006

- Was the termination of Mr Rudolph's employment on 5 May 2006 by operation of a fixed term agreement; and
- Did the arrangement entered into between the parties on 4 October 2004 constitute an agreement that the payment of redundancy compensation would be deferred until the expiry of the fixed term agreement?

Compliance with the Collective

- Did the change management (clause 35) provision in the CEA apply to the creation of the Trade Waste Sampling Technician position and the termination of Mr Rudolph's employment on 5 May 2006; and
- Did the reorganisation (clause 36) provision in the CEA apply to the creation of the Trade Waste Sampling Technician position and the termination of Mr Rudolph's employment on 5 May 2006?
 - If the Authority finds that these clauses were applicable, did the Council comply with them?
 - If the Council did not comply with these clauses, did this failure unjustifiably disadvantage Mr Rudolph?

- If the Authority finds that Mr Rudolph's employment **was not** terminated on 5 May 2006 by operation of a fixed term agreement, did the redundancy provisions of the CEA apply to this situation?

- If so:
 - Did the Council provide notice to the Union that he was surplus and the date on which he needed to be discharged, at least two weeks prior to giving Mr Rudolph notice of termination, and if not, was this in breach of clause 36 of the CEA; and

 - Did the Council give Mr Rudolph four weeks notice of the termination of his employment, and if not was this in breach of clause 36 of the CEA; and

 - Was the Council justified in withholding payment of the redundancy compensation to Mr Rudolph upon termination of his employment on 5 May 2006 until it had decided whether he would be offered the position of Trade Waste Sampling Technician; and

 - If the Authority finds that the Council failed to comply with the notice of redundancy and redundancy compensation requirements of the CEA, was Mr Rudolph unjustifiably dismissed or unjustifiably disadvantaged?

- If the Authority finds that the Council failed to comply with either the change management (clause 35) in the CEA or the reorganisation (clause 36) provision in the CEA (including that part relating to notice of redundancy) was such a failure to comply of a nature serious enough to warrant the imposition of a penalty?

The test

[19] The appropriate test in this case is set out in relation, at least to the personal grievance claim of the first applicant, in s.103A of the Employment Relations Act 2000.

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and

how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[20] The test to be applied in respect of the claims of the second applicant is set out in s.4 of the Act:

4. Parties to employment relationship to deal with each other in good faith (1) *The parties to an employment relationship specified in subsection (2) –*

- (a) *Must deal with each other in good faith; and*
- (b) *Without limiting paragraph (a), must not, whether directly or indirectly, do anything –*
 - (i) *to mislead or deceive each other;*
 - (ii) *that is likely to mislead or deceive the other.*

[21] Suffice it to say that subsection (2) covers the relationship between the parties involved in these matters.

The investigation meeting

[22] At the investigation meeting the representatives from each party presented and spoke to their submissions. As a result of the joint preparation of a summary of agreed facts and isolation of the issues the parties wanted the Authority to determine, considerable amount of time was saved. The Authority expresses its appreciation to both representatives for the pre-investigation meeting work which enabled the hearing to remain tightly focused around the issues.

Analysis and discussion

[23] There is no need to traverse all the documents put before the Authority as the parties are thoroughly familiar with them. I will refer only to those upon which I have relied in reaching my determination.

[24] The letter of 5 October 2004 from the Council to Mr Rudolph is significant in that it makes totally clear the terms of his acceptance of the role of Field Support Officer in the City Water and Waste Unit. Significant sections of the letter are:

This position is for a Fixed Term to establish the viability of an expanded Trade Waste Sampling Programme. Your employment for

this position will commence on 1 November 2004 and conclude 5 May 2006.

The letter continues

As previously discussed and communicated to you in writing on 4 October 2004, as a consequence of your current position being disestablished, (Information Inspection Officer), all your current terms and conditions of employment will be retained, including entitlements to redundancy. Consequently, in the event that you are unable to secure an alternative position with the Council by the end of the Fixed Term period, 5 May 2006, you will receive a redundancy payment. The amount of the redundancy will be paid at the rate specified in the Christchurch City Council Collective Agreement current at that time. Your redundancy entitlement will include the period of service with the Council up to and including 5 May 2006.

[25] The first applicant received the letter and as requested, signed and returned a copy acknowledging his acceptance.

[26] At the time this letter was sent and signed by the first applicant, there had been meetings with the Union and with Mr Rudolph. At no time until March 2006 did either applicant question the content of the respondent's letter to Mr Rudolph, nor did they question the fixed term nature of the Field Support Officer role.

[27] The letter makes it clear that although this is a fixed term position, Mr Rudolph's service in the new role will include his service with the Council *up to and including 5 May 2006*.

[28] In respect to fixed term employment, clause 17 of the CEA sets out, among other things:

Where a fixed term employee is transferred to the permanent staff the time spent as a fixed term employee will be counted towards service related benefits.

A fixed term employee is not a permanent employee, and is not entitled to redundancy compensation.

[29] Looking at the timing of the redundancy payment made to Mr Rudolph, it appears the Council were ensuring they were acting in a consistent way with the first term I have quoted above. Namely, where an employee has been a fixed term employee and who later transfers to the permanent staff, his or her time as a fixed term employee will be include in service related benefits. It is, if you like, continuing

the benefit of redundancy compensation to Mr Rudolph although the Council was not strictly speaking obliged to do so. I believe that goes to the respondent's credit.

[30] I think it also significant that in relation to Mr Rudolph's appointment, the Union received copies of the key emails and correspondence relating to the matter and a copy of the appointment letter of 4 October 2004 was sent to Mr Bruce of the Union.

[31] The CEA at clause 3 defines permanent staff to be *all staff other than those appointed on a fixed term or casual basis*. Counsel for the respondent submitted that the agreement therefore contemplates that three different categories of employee are included within its coverage:

Those appointed on a fixed term basis, those appointed on a casual basis, and everyone else (who are considered to be "permanent").

[32] There is no doubt that Mr Rudolph was a permanent employee up until 1 November 2004. In accepting the position of Field Support Officer, Mr Rudolph, aware that the position was for a fixed term, must have been satisfied with the terms and conditions as set out in the 5 October letter requesting his signature. It appears to me that counsel's submission that the view adopted by the second applicant that Mr Rudolph was a *permanent employee in a fixed term role* is legally, conceptually and factually wrong, seems accurate. The letter points out quite clearly that if Mr Rudolph is unable to secure an alternative position with the Council by the end of the fixed term agreement, then he will receive redundancy compensation.

[33] Given the fact that the letter of 4 October 2004 from Jane Parfitt, was copied to Mr Bruce at the Union, the opportunity presented itself, if there was any dispute over Mr Rudolph's employment status, to address it without delay.

[34] It is significant the Mr Rudolph continued to be covered by the CEA and his status under that agreement appears to have changed from being a permanent employee to being a fixed term employee. I also think it relevant in this context that it was foreseeable to all involved in the appointment of the first applicant to the Field Support Officer role that that role would have a limited duration. In such circumstances, I see no need to notify the Union of the expiry of the fixed term agreement. The date of its demise was set out in both the letters of 4 and 5 October 2002.

The Determination

[35] Returning to the issues as set out above:

- I find that in accepting the appointment to the fixed term position, Mr Rudolph's employment status changed from that of a permanent employee to a fixed term employee.
- I find that while he had no entitlement to have his fixed term service included in the calculation of his redundancy compensation under the CEA's terms, the respondent undertook to do that and fulfilled that undertaking.
- I find the termination of Mr Rudolph's employment with the respondent came about by the effluxion of time and for no other reason.
- I find the arrangement made between the parties in respect of the Field Support Officer position constituted an agreement that the payment of redundancy compensation would be deferred until the expiry of the fixed term.
- I find the change management provisions of the CEA were not breached by the respondent. The position of Field Support Officer was, from its inception, a fixed term position and was not *disestablished*. Mr Rudolph could have had no expectations of ongoing employment after 5 May 2004 unless he could be redeployed or was the successful candidate for the newly established Trade Waste Sampling Technician position.
- I find the reorganisation provisions of the CEA were not applicable to Mr Rudolph's situation as this was neither a redundancy nor a reorganisation giving rise to disestablishment.

[36] The first applicant does not have a personal grievance and the Authority is unable to assist him further.

[37] The second applicant's applications for a breach of the CEA are dismissed.

Costs

[38] Costs are reserved. The parties are to attempt to resolve this issue between themselves. If that cannot be achieved then leave is reserved to have the Authority fix costs.

Paul Montgomery
Member of the Employment Relations Authority