

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 118/09
File Number: 5126567

BETWEEN Julie Shortland
Applicant

AND Alexander Construction Limited
Respondent

Member of Authority: Denis Asher

Representatives: Trent Petherick for Ms Shortland
Stuart Webster for the Company

Investigation Meeting Napier, 11 August 2009

Submissions Received By 26 August 2009

Determination: 27 August 2009

DETERMINATION OF THE AUTHORITY

The Problem

- [1] In her statement of problem Ms Shortland said she had been unjustifiably disadvantaged and similarly constructively dismissed: she sought one year's lost income, \$30,000 for humiliation and costs.
- [2] At the investigation in Napier on 11 August, and via her counsel, Ms Shortland advised she was abandoning her claims of unjustifiable disadvantage and that her grievance or problem was that her fixed term

employment agreement was either unlawful or her employment was brought to end before the term set out in that agreement.

- [3] Ms Shortland is legally aided.
- [4] The Company says Ms Shortland was not dismissed but that her employment came to an end in accordance with the relevant provisions of her legitimate fixed term agreement.
- [5] Mediation did not resolve this employment relationship problem.

Background

- [6] Ms Shortland was employed by the Company for four years (from March 2003), commencing in a sole-charge, full-time and permanent receptionist and office administrator position.
- [7] By way of a fixed term employment agreement signed off by the applicant on 23 May 2007 Ms Shortland took up a position of site administrator.
- [8] Clause 3.0 of the agreement provided for the following:

TERM OF AGREEMENT

Fixed Term Individual Employment Agreement

This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The parties agree that this is a fixed term employment agreement. This agreement will commence on Wednesday 6 June, or a mutually agreed date, and will end on completion of the Elephant Hill project. The Employer has genuine reasons based on reasonable grounds for specifying that the employment agreement is to end at this time, namely the end of the Elephant Hill project. The parties also confirm that the Employee has been advised by the Employer when discussing this agreement, the reasons for the employment ending in this way.

(doc 1 in the agreed bundle)

Applicant's Position Summarised

- [9] Ms Shortland alleges her employment was terminated before the project was completed. She also says that she entered into the agreement to take up the fixed term employment agreement because of indications she would have ongoing work.
- [10] It is claimed on the applicant's behalf that the fixed term agreement was illegal in that, amongst other things, it failed to set out the reasons for the end of that employment (s. 66 (4) and (6) of the Employment Relations Act 2000).
- [11] In the alternative, it is argued the project was not complete at the time of her dismissal.
- [12] Ms Shortland also believes that, at the time of the project's completion, because of her relevant qualifications, commitment and loyalty to the Company she should have been redeployed into another position. A health and safety position that would have been suitable for the applicant was offered to another employee despite that person's ill-health and impending retirement.

The Company's Position Summarised

- [13] Amongst other things the Company says that Ms Shortland freely entered into a fixed term agreement: no duress was applied.
- [14] The fixed term agreement met the requirements of s. 66 of the Act.
- [15] The Company says that, like most projects, it 'finished' or was completed at various stages and the work was largely done at the time it terminated Ms Shortland's employment.
- [16] Alternatively, the Company says Ms Shortland's employment was justifiably terminated by way of the redundancy provision set out at clause 16 in the agreement.
- [17] The applicant's health records show that her problems existed separate from any effects her employment may have had, which are any way denied.

Discussion and Findings

[18] I find in favour of the Company's position for the following reasons.

[19] I do not accept that the fixed term agreement breaches s. 66 of the Act. I am satisfied it clearly, if clumsily, meets the requirements of the Act. In particular it sufficiently reflects the employer's genuine reason for entering into a fixed-term, namely that the employment was linked to a specified construction project. It thereby identified both a point in time and a reason for the termination of the fixed term agreement.

[20] It is also apparent that Ms Shortland entered into the agreement clearly appreciative of the fact that it was for a finite term: her email to the Company sometime in December 2007 reflects that understanding:

*Unfortunately the time is looming for this wonderful project to draw to a close and I shall have the daunting task of looking for new employment **according to my contract.***

As people will no doubt ring you I would request that no other of your administration staff have any input into whoever may ring. ...

(emphasis added, page 11 of the agreed bundle)

[21] Properly, the Company assured Ms Shortland there would be "*no problem re the reference bit (which I assume is what you are referring to)*" (above) and went on to encourage the applicant to "*... make enquiries at places like Pan Pac, McCains and Heinz Watties now though, in case something pops up between now and the end of the project ...*" (above).

[22] I do not doubt that Ms Shortland was keen to carry on her employment with the Company, preferably in similar project work: however, as no alternate employment was available at the time the Company was within its rights to terminate her employment.

[23] Much evidence was offered by the respondent during the investigation as to when the Elephant Hill project was completed. As it happens, the Company is still undertaking remedial work on the project, but it is entirely different work from that being done at the time of Ms Shortland's employment and would not justify her ongoing employment.

- [24] Ms Shortland believes the project came to an end “*several months*” (oral evidence) after her termination date, of 2 May 2008. However, the Company says Ms Shortland’s work was taken over by the project manager and the site foreman as it had diminished to the point where her employment could no longer be sustained. Daily correspondence, one of the applicant’s tasks, had shrunk from 50/60 items to 4/5 by the time Ms Shortland was terminated. It also says completion took place via several stages, with the project being progressively handed over to the client: the client had access to all buildings by December 2007, site management was transferred back to the respondent’s main office on 2 May 2008, and practical completion was effected in July 2008. Compliance took place the following month and the release of defect liabilities was as recent as last month.
- [25] There is no evidence to challenge the Company’s claims of Ms Shortland’s work coming to a close and the project winding down.
- [26] There is no evidence of Ms Shortland enjoying undertakings of ongoing employment; there is similarly no evidence of other employees in similar situations being kept on when the applicant was let go.
- [27] I am satisfied that Ms Shortland’s employment came to an end consistent with the terms of her fixed term employment agreement, i.e. the project had come to an end.
- [28] In the alternative, I am satisfied that Ms Shortland – consistent with other terms in her employment agreement – was terminated justifiably for redundancy. Given Ms Shortland’s appreciation of the fixed term nature of her employment, and the notice that accompanied her termination, I do not accept there is any procedural fault such as to justify compensation for hurt.
- [29] What is clear is that Ms Shortland was very keen to carry on her employment in project duties – consistent with the terms of a genuine fixed term employment agreement – but that the Company was under no obligation to employ her past the completion of the contracted project.
- [30] I repeat my observation to Ms Shortland made during the investigation: I do not doubt for a moment that the applicant experienced the ending of her

employment as deeply disturbing but – and this is my formal determination – the Company in no way unjustifiably terminated Ms Shortland's employment.

Determination

[31] The applicant's claims do not succeed.

[32] Costs are reserved. Some observations are appropriate. Were it not for the fact that Ms Shortland is legally aided she would be exposed to greater than usual costs because of the unnecessary costs the Company has been put to in defending its position. Clarification of Ms Shortland's claims could and should have been put to the respondent well in advance of the investigation. No conscionable reason was advanced to account for the delay until the investigation in the applicant's claim and her remedies being substantially revised. Such delay is as grossly unfair to the parties as it is to the tax payer.

Denis Asher

Member of the Employment Relations Authority