

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 395/10  
5294985

BETWEEN                      JAMES TIMMIS  
   Applicant  
  
AND                                BENEFITZ DMA LIMITED  
   Respondent

Member of Authority:      Rachel Larmer  
  
Representatives:            Clive Bennett, Counsel for Plaintiff  
   Aidan Bennett, Advocate for Respondent  
  
Investigation Meeting:     12 August 2010 at Auckland  
  
Determination:              01 September 2010

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**DETERMINATION OF THE AUTHORITY**

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- A. James Timmis has a personal grievance for unjustified dismissal and is entitled to remedies in resolution of his employment relationship problem.**
- B. Benefitz DMA Limited is ordered to pay Mr Timmis:**
- **\$40,000 for lost remuneration pursuant to s128 of the Employment Relations Act 2000;**
  - **\$10,000 pursuant to s123(1)(c)(i) of the Act.**

**Employment relationship problem**

[1] James Timmis has raised a personal grievance for unjustified dismissal. He says Benefitz DMA Limited (“BDL”) told him that he was a fixed term employee and insisted that his employment had to end on 23 December 2009. Mr Timmis believed he was a permanent employee, and he communicated that to BDL.

[2] BDL denies there was a dismissal. It says Mr Timmis was a fixed term employee, and his employment ended on 23 December 2009, when his fixed term engagement expired.

### **Issues**

[3] The matters for determination are:

- (a) Was there a valid fixed term employment agreement?
- (b) If not, was Mr Timmis unjustifiably dismissed?
- (c) If dismissal was unjustified, what (if any) remedies should be awarded?

### **Facts**

[4] BDL started as a small advertising agency and over a number of years developed its expertise by adding additional services, to the extent that it is now a diverse business. It employs graphic designers, web designers, and it has manufacturing capacity. It also has a printing division and can print (among other things) business cards, brochures, billboard skins, and magazines.

[5] The signage part of BDL's business was added about three years ago and it has actively sought to develop it since then. As part of that, Mr Bennett decided to employ Mr Timmis. Because of the uncertain economy, BDL saw this as "*a bit of a gamble*", so offered him fixed term employment only. Mr Bennett said that if the economy had been normal, then he probably would have employed Mr Timmis as a permanent employee.

[6] Mr Timmis commenced employment on 9 April 2009 with BDL as a Signage Production Supervisor. He was interviewed and employed by BDL's Managing Director, Aidan Bennett, who says that he made it clear when offering employment that it was for three months only "*to see how things went*". Mr Timmis says he thought that meant he was employed on a three month trial, so BDL could see whether he was suitable for permanent employment, not that he was employed as a fixed term employee.

[7] Mr Timmis was not given a written Individual Employment Agreement (“IEA”) until 11 days after he had started work. The IEA given to him on 20 April 2009 stated he was “*to be employed by the employer from the commencement date for a three month period to 9 July 2009*”.

[8] Notwithstanding this purported end date, Mr Timmis’ employment continued past 9 July 2009. Mr Timmis said that he thought his continued employment meant he was now a permanent employee he signed up for a 12 month fixed term lease on a three bedroom rental property, which he would not have done if he had thought he was a fixed term employee.

[9] Mr Bennett accepted that no new IEA was entered into and that Mr Timmis’ employment continued after 9 July 2009 in the same way it had previously. However, he said that from 10 July 2009 Mr Timmis “*remained a fixed term employee on a month to month basis*”. Mr Bennett said he told Mr Timmis during a staff meeting (with other staff present) in June that he wanted to keep him on but could only do that on a month to month basis because of uncertainties with the economy.

[10] Mr Timmis did not recall any such discussion. He agreed there was a meeting in June to discuss the state of the sign shop, but he does not remember his role being discussed. He said the focus of that meeting was on how the sign shop was going and what BDL expected staff to do to in order to boost business and productivity.

[11] In October the company decided to update all of its employment agreements, and Mr Bennett said he used that opportunity to set an end date of 23 December 2009 for Mr Timmis’ employment. He said he did not choose 23 December 2009 for any particular reason, other than it was convenient to the business. He denied it was to avoid paying Mr Timmis statutory holidays over the Christmas/New Year period.

[12] Mr Bennett’s evidence was that:

*“I had not made any decision at that point to end his employment on 23 December 2009. My intention was to do the best by him, I was aware of his personal circumstances, that he was the bread winner and had children. My intention in October was to give him employment until the end of the year and then assess whether we could keep him on at that point.”*

[13] On 16 October 2009 Mr Timmis was presented with a letter and accompanying updated IEA. The letter stated “*This is a contracted role from 9 April to December 23rd 2009.*” The updated IEA stated that: “[...] *the initial term of this contract will be for the period detailed on the signed covering letter of this contract. [...] If contracted period not detailed/applicable, then the role is permanent.*”

[14] Mr Timmis was surprised and very concerned about the end date. He took advice from the Department of Labour Helpline, which confirmed his view that he was a permanent employee. He was told not to sign the new IEA without deleting the end date clause.

[15] Mr Timmis expressed concern about his employment status and the end date to Mr Bennett, who replied via email on 9 November 2009 urging him to sign the updated IEA, stating: “*The dates will just be extended/excluded all going well.*”

[16] Mr Bennett says he did not receive a signed updated IEA back.

[17] On 16 November 2009 Mr Timmis was called to see Mr Bennett, and presented with a letter stating:

*“Further to your initial employment contract (dated April 20th 2009) and my subsequent extension of this contract on a monthly basis, as agreed, and more recent advice that this would extend through to Christmas, this letter serves to confirm that we will not be renewing your contract beyond the stated December date (in the revised but unsigned contract).”*

[18] Despite Mr Timmis expressing his view that he was a permanent employee, BDL insisted that he was employed “*on a fixed term contract*” and that it was entitled to end his employment on 23 December 2009. Mr Timmis’ request to extend his employment through to the end of January 2010, on the basis he would not be able to get work over the Christmas period, was rejected.

### **Was there a valid fixed term employment agreement?**

[19] An employer and employee may agree to end the employment relationship on a specified date, at the close of a specified period, on the occurrence of a specified event, or at the conclusion of a specified project without that constituting a dismissal, provided the various requirements set out in s66 of the Act have been complied with. The ending of a valid fixed term engagement does not amount to a dismissal, because

the employment ends due to the expiry of the fixed term, rather than as a result of any action taken by the employer.

[20] Section 66 of the Act sets out each of the requirements that must be met in order for there to be a valid fixed term agreement. It provides:

## **66 Fixed term employment**

- (1) *An employee and employer may agree that the employment of the employee will end –*
  - (a) *at the close of a specified date or period; or*
  - (b) *on the occurrence of a specified event; or*
  - (c) *at the conclusion of a specified project.*
- (2) *Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must –*
  - (a) *have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
  - (b) *advise the employee of when or how his employment will end and the reasons for his or her employment ending in that way.*
- (3) *The following reasons are not genuine reasons for the purposes of sub-section (2)(a):*
  - (a) *to exclude or limit the rights of the employee under this Act;*
  - (b) *to establish the suitability of the employee for permanent employment;*
  - (c) *to exclude or limit the rights of an employee under the Holidays Act 2003.*
- (4) *If an employee and employer agree that the employment of the employee will end in a way specified in sub-section (1), the employee's employment agreement must state in writing –*
  - (a) *the way in which the employment will end; and*
  - (b) *the reasons for ending the employment in that way.*
- (5) *Failure to comply with sub-section (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and employer.*
- (6) *However, if the employer does not comply with sub-section (4), the employer may not rely on any term agreed under sub-section (1) –*
  - (a) *to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or*
  - (b) *as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.*

*Requirements to be met before fixed term agreed upon*

[21] Before the parties agreed on the fixed term engagement, the key elements of s66 which had to be met for the purposes of this case are;

- a. BDL must have had a genuine reason, based on reasonable grounds, for using a fixed term (s66(2)(a));
- b. BDL must have advised Mr Timmis of when or how his employment would end and the reasons for it ending that way (s66(2)(b));
- c. Mr Timmis' IEA must have recorded;
  - i. the way in which his employment will end (s66(4)(a)); and
  - ii. the reasons for it ending in that way (s66(4)(b)).

[22] If all of the above requirements have not been met, then there will be no valid fixed term engagement.

[23] In addition, if the IEA does not record the way in which Mr Timmis' employment will end and the reasons for it ending that way, as is required by s66(4), then, in accordance with s66(6)(b), BDL cannot rely on the expiry of the fixed term to have ended Mr Timmis' employment. That would mean he was dismissed, so the onus would then be on BDL to justify his dismissal.

*Did BDL have genuine reasons, on reasonable grounds, for using a fixed term?*

[24] No reason for the fixed term is recorded in the offer letter or IEA.

[25] Mr Bennett told me that the fixed term was necessary because of ongoing financial and economic uncertainty. He accepted that this was a general rather than specific concern. He said he told Mr Timmis he was offering fixed term employment "*to see how things went*".

[26] I find that the use of a fixed term to “*see how things went*” was not a genuine reason as required by s66(2)(a). It appears that a fixed term was used to establish Mr Timmis’ suitability for permanent employment and/or to enable BDL to limit the protections available to him under the Act. Both of these reasons are prohibited by s66(3)(a) and (b) of the Act.

[27] The Court in *Canterbury Westland Free Kindergarten Association v. New Zealand Educational Institute* [2004] 1 ERNZ 547 held that the genuine reasons required by s66(2)(a) could not be exploitative or improper. Even if I am wrong about BDL’s reasons being contrary to s66(3), I would still find that Mr Bennett’s stated reason of financial and economic uncertainty was not a genuine reason for using a fixed term.

[28] Mr Bennett admitted that he had not done any business case modelling or financial analysis before determining that a fixed term engagement was necessary or appropriate. This was not a situation in which a position was only funded for a limited period of time, or in which Mr Timmis was engaged to perform a specific work of limited duration, or to meet a particular customer order.

[29] BDL was not in any special situation that many employers throughout New Zealand are not also facing. It would be circumventing the protections in the Act if employers could use generic concern about the uncertain economic climate and world-wide financial difficulties as a genuine reason for engaging fixed term instead of permanent employees.

[30] I consider that this case is analogous to *Terson Industries Ltd v Loder* (2009) 6 NZELR 545, in which the Court rejected as a genuine reason the employer’s potential desire to change the employee’s role in future, on the basis employment processes (other than termination of employment) were available to address that. Changes to BDL’s future staffing requirements could be dealt with by BDL renegotiating terms and conditions or embarking on a restructuring and redundancy process. There was no need for BDL to use a fixed term unless it intended, as I have found it did, to limit Mr Timmis’ rights under the Act.

[31] I also find that the use of a fixed term in this case was improper. Mr Timmis was not employed to work on a separate or discrete piece of work or project that was of limited duration. The reality was that the work he was doing was ongoing. BDL

obviously had a constant need for the work he was doing because it employed him up to 23 December 2009, and then on 19 January 2009 took on Luc Verstraeten to do a job that appeared, from the evidence I heard, to be substantially similar to what Mr Timmis had been doing. I also note Mr Bennett's evidence, that up until 16 November 2009, his intention had been to keep Mr Timmis on.

[32] I find that s66(2)(a) has not been complied with.

*Advice on when/how employment will end and reasons for it ending*

[33] There was no evidence before me that Mr Timmis had been advised when or how his employment would end and the reasons for it ending that way. Nor was this information contained in the IEA he was presented with on 20 April 2009.

[34] Mr Bennett accepted that Mr Timmis was never advised when his employment would actually end until he was handed the letter of 16 November 2009.

[35] I find that BDL did not advise Mr Timmis when or how his employment would end and the reasons for it ending that way, before the parties entered into the employment relationship.

[36] I find that s66(2)(b) has not been complied with.

*Employment agreement to record way employment will end and reasons for it ending*

[37] Section 66(4) requires the employment agreement to state in writing the way in which the employment will end and the reasons for it ending in the way specified. This did not occur, so BDL is unable to comply with s66(4)(a) or (b).

[38] I find that, even if BDL had been able to establish a genuine reason for using a fixed term, its failure to comply with s66(4) is fatal to its case. Accordingly, I find there was no valid fixed term agreement or employment.

**Effect of continued employment**

[39] Even if BDL had been able to establish compliance with s66(2) and s66(4), because it allowed Mr Timmis' employment to continue on past 9 July 2009, it waived the expiry of the fixed term. This meant that Mr Timmis' employment continued on the same terms but was indeterminate in nature (see *Terson v Industries*

*Ltd v Loder* (2009) 6 NZELR 345; *Varney v Tasman Regional Sports Trust* CC 15/04, 23 July 2004; *Electrotech Controls Ltd v Rarere* [2007] ERNZ 586).

[40] If BDL had wanted to engage Mr Timmis on a series of one month fixed term engagements, it still had to comply with the requirements of s66 for each separate new engagement, in order for there to be a valid fixed term that BDL could rely on to end his employment without that amounting to a dismissal.

[41] BDL was required to generate a new fixed term IEA for Mr Timmis, it could not simply roll over the initial IEA, because s66(4) requires the employment agreement which covers the new fixed term engagement to state the way in which employment will end and the reasons for it ending that way. Reliance on the IEA dated 20 April 2009 would not have been compliant with s66 in terms of any new fixed term engagements.

[42] I have already held that Mr Timmis was not a fixed term employee because his initial engagement did not comply with s66 of the Act. Even if there had been a valid fixed term, from 10 July 2009 Mr Timmis would have been entitled to elect to be treated as a permanent employee because his employment continued past the purported termination date and therefore became of an indefinite duration.

### **Was Mr Timmis unjustifiably dismissed?**

[43] BDL is not entitled to rely on the expiry of the purported fixed term to end Mr Timmis' employment. Pursuant to s66(6) Mr Timmis is entitled to elect to treat the termination date of 23 December 2009 contained in the unsigned IEA dated 16 October 2009 as having been ineffective to end his employment.

[44] Mr Timmis has been clear from the outset that he considered himself to be a permanent employee, and I find that was legally the case. BDL did not seek to justify his dismissal. Mr Bennett confirmed in his evidence that this was not a redundancy scenario. That view is supported by BDL's employment on 19 January 2010 of Mr Verstraeten.

[45] BDL was not justified in terminating Mr Timmis' employment by handing him a letter on 16 November 2009 advising him that his employment would end on 23 December 2009.

[46] I find that Mr Timmis' dismissal was unjustified.

## **Remedies**

### *Mitigation*

[47] Mr Timmis has a duty to mitigate his loss and he gave evidence of the extensive steps he had taken to do so.

[48] This included applying for a number of advertised positions, reviewing the TradeMe website, signing up with recruitment agents such as Kelly Services and Red Consulting Group, attending recruitment opportunities referred to him by WINZ, and cold calling people that he had worked with previously. He also went through the telephone book to identify other businesses that were unknown to him but which he thought he may be able to obtain employment with. He then either visited these businesses or sent his CV to them.

[49] Mr Timmis registered his details on My Job Space and applied for a couple of positions that were advertised. He signed up on the Seek website and would review that regularly. He also reviewed the New Zealand Herald and the local North Shore paper each day. He did not restrict himself to signwriting jobs but looked for any work at all, including labouring. Mr Timmis also advertised his services as a wedding photographer, but did not receive any income from that.

[50] Mr Timmis did not obtain any work until 1 February 2010 when he secured casual work as a Storeman with Seacrest Ltd. From 19 July 2010 this turned into ongoing work of at least 20 hours per week.

[51] Mr Bennett suggested that Mr Timmis did not properly mitigate his loss because he turned down a retraining offer in mid January 2010. The circumstances of this retraining offer arose because one of BDL's employees, who was employed as a digital operator, had returned to China for the Christmas and New Year period but not made it back to New Zealand. This person told BDL he was having problems with his immigration documentation, and thought he might not be back until February 2010.

[52] As a result, when Mr Timmis attended BDL to collect some paperwork, Mr Bennett offered him the opportunity to retrain as a digital operator. No terms or

remuneration were discussed, although Mr Bennett did indicate it would pay less than what Mr Timmis had previously been earning.

[53] Mr Timmis and his wife both gave evidence that they were concerned that it was not a real job offer. There was no salary discussed, there was no employment agreement or position description provided, or any detail given about the proposed new role. They said that while they both considered the offer, they concluded that because Mr Timmis was the sole income earner for the family, it was more important for him to find permanent employment.

[54] They were also both very concerned that they might end up in the same situation they had been in before Christmas, with Mr Timmis suddenly finding himself out of work. Mr Timmis' evidence was that he had lost trust in BDL because of the way he had been treated, so was not confident that BDL would treat him in accordance with his legal rights, so he did not feel able to return to work for them. Mr Timmis and his wife were also concerned, because there was no discussion about why this role had suddenly become available, and there was no certainty of ongoing work.

[55] When I asked what sort of a role the digital operator was, Mr Bennett said that he was not clear on whether it was a fixed term or permanent role because "*they had not got to that stage yet*".

[56] I find that decision to turn down the retraining offer was reasonable and did not break the chain of causation in terms of ongoing lost remuneration.

#### *Contribution*

[57] I find that Mr Timmis' actions did not contribute towards his grievance and that there is no conduct which would require a reduction in remedies pursuant to s124 of the Act. Mr Bennett described him as a good worker and was happy to offer him a retraining opportunity in mid January 2010.

#### *Lost Remuneration*

[58] Since his dismissal on 23 December 2009 up to 17 August 2010, Mr Timmis has only earned a total of \$1,393.46. All these earnings have been with his new employer Seacrest Limited ("Seacrest").

[59] Up until 1 July 2010 Mr Timmis worked 23.75 hours and earned a total of \$487.36 net as a result of casual work he obtained with Seaquest. From 19 July 2010 he obtained ongoing work with Seaquest for 20 hours per week at the rate of \$16.80 gross per hour. He worked a total of 70.5 hours and earned \$906.10 net from 1 July 2010 until 17 August 2010.

[60] It is clear that Mr Timmis has an ongoing future loss because his new job pays less than his previous one. He has claimed lost remuneration from the date of his dismissal on 23 December 2009 until the date this matter is resolved.

[61] Section 128(3) of the Act gives me the discretion to award more than three months' lost remuneration. When exercising this discretion, I considered whether Mr Timmis was likely to have lost his employment with BDL for some other reason, and concluded that was unlikely. Mr Bennett described him as a good worker with a good record and there were no issues with his performance, attendance, or attitude.

[62] Mr Timmis' evidence, which was supported by his wife, was that he loved his job and enjoyed the company of his colleagues. When offered the option of being paid in lieu or working out his notice, he elected the latter, because he enjoyed going to work for BDL.

[63] I have also considered whether Mr Timmis was likely to have been made redundant and conclude that would have been unlikely. Mr Bennett said that Mr Timmis was the only person that BDL had let go since the recession had started and that, although he could make more money for the business by employing less staff, "*making staff redundant was not my style*". He also said BDL's financial position had significantly improved, with its prior losses having now been turned into a six figure profit.

[64] I am also aware that BDL employed Luc Verstraeten on 19 January 2010, who Mr Timmis believed was doing his job. Mr Timmis referred to the similarity in their business cards. His old business card described him as *Production Co-ordinator* and Mr Verstraeten's business card described him as *Signage Production Co-ordinator*. Mr Bennett maintained that Mr Verstraeten's position was different because he was a "*tradesman*". However, when his actual duties were examined during the investigation meeting I was satisfied that he did appear to be doing the same type of work Mr Timmis had been doing. I therefore find that BDL clearly had a continuing

need for work which was the same or substantially similar to the work Mr Timmis had been doing before his dismissal.

[65] I find that Mr Timmis should be compensated for his actual loss. I consider an award of \$40,000 gross, being the equivalent of 8 months lost remuneration is appropriate.

[66] I order BDL to pay Mr Timmis, within one month of the date of this determination, \$40,000 pursuant to s128(3) of the Act.

#### *Hurt and humiliation*

[67] The applicant has claimed \$10,000 pursuant to s123(1)(c)(i) as compensation for humiliation, loss of dignity, and injury to feelings.

[68] The written statements provided by Mr Timmis and his wife set out the significant detrimental impact his dismissal had on the family and their finances. They both expanded on this in their oral evidence.

[69] Because they had believed Mr Timmis' employment was permanent, they had committed to a 12 month fixed term rental in Gulf Harbour. When Mr Timmis lost his job they were unable to pay their rent, even with a WINZ accommodation supplement. They had no choice but to break the fixed term tenancy (losing their bond of \$1500) and move into cheaper accommodation. This resulted in them moving their family into a leaky building, which requires them to run a dehumidifier all day. They specifically chose to live in a leaky building because of their dire financial situation and because they were given cheap rent.

[70] Mr Timmis had his laptop computer, which he had purchased on hire purchase, repossessed by Flexirent and referred to debt collectors, thus adversely affecting his credit record. He had to get a loan from Instant Finance to cover some of the cost of the bond money that he lost as a result of breaking the fixed term tenancy. He has had to borrow from WINZ to pay school fees and essentials such as uniforms and stationery. Mr Timmis was very upset that his children were unable to participate in school activities because they could not afford any extra costs. Mr Timmis has also borrowed money from family members to help with day to day living expenses.

[71] Mr Timmis' family was reliant on his income. Mr Timmis and his wife described how they were unable to buy Christmas presents for their children because he had lost his job, which was very distressing. The small amount of holiday pay he received resulted in him being subjected to a stand-down period from WINZ before he could claim the unemployment benefit. This left them without any income over the Christmas period and they survived on the generosity of extended family members.

[72] Mr Timmis' evidence was that he loved his job, was the happiest he had been in years, and really enjoyed his colleagues and the work that he did. Mrs Timmis said that she had never seen her husband happier in a job. Mr Timmis described how he enjoyed the camaraderie and the routine of going into work each day and losing this as well as his job was a significant blow. His confidence also took a serious knock.

[73] I consider that Mr Timmis gave his evidence in a moderate and understated manner. It was clearly difficult for him to talk about the impact his dismissal had on him and I note that he broke down when giving his evidence. Mrs Timmis also became tearful when giving her evidence. She described her husband as being a different person after his dismissal. Her evidence was that he told her that she and the kids would be better off without him, because he was unable to provide for their family.

[74] I am satisfied that Mr Timmis suffered significant hurt, humiliation, and distress, as a result of his unjustified dismissal. Bearing in mind his length of employment, and levels of awards in other cases of a similar nature (in particular *Shortland v Alexander Construction Company Limited* [2010] NZEMPC 41 in which Judge Couch described an award of \$8,000 as moderate), I award \$10,000.

[75] I order that, within one month of the date of this determination, BDL is to pay Mr Timmis \$10,000 pursuant to s123(1)(c)(i) of the Act.

### **Costs**

[76] Mr Timmis has been successful, so is entitled to a contribution towards his actual legal costs.

[77] The parties are encouraged to agree costs themselves. If that is not possible, then Mr Timmis has 14 days within which to file a costs memorandum, which records his actual legal costs. BDL then has 7 seven days within which to file its costs

submissions. **I will not entertain any costs applications or submissions which are outside of these timeframes, without prior leave having been granted.**

[78] To assist the parties to resolve costs themselves, I can indicate that (subject to any submissions) costs are likely to be awarded on the usual daily tariff basis, with the starting point being around \$3,000 per day. That would then be adjusted in light of the particular circumstances of this case.

**Rachel Larmer**  
**Employment Relations Authority**