

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 320/08
5095421

BETWEEN JOHN WALTER YEATES
 Applicant

AND JETSTICK LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
 Don Atkinson, advocate for Respondent

Investigation Meeting: 27 August 2008

Determination: 10 September 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr John Yeates was employed by Jetstick Limited between February and June 2007. The employment relationship problem he has referred to the Authority for investigation and determination is a claim that the employment was ended by the action of Jetstick dismissing him.

[2] Mr Yeates claims that he was a permanent employee of Jetstick and was dismissed without reason or cause, although later on he did hear a suggestion that his position was redundant.

[3] He seeks orders from the Authority requiring Jetstick to reimburse him for lost wages and compensate him for hurt feelings, humiliation and distress caused by the contended unjustified dismissal.

[4] Jetstick in response to the claim has denied dismissing Mr Yeates. Jetstick contends that the employment ended by operation of a fixed term of engagement in the contract that related to the time needed to complete assembly work on Jetstick's label applicator equipment.

[5] Jetstick claims that Mr Yeates became a party to and was bound by an individual employment agreement containing the fixed term.

[6] That agreement as produced to the Authority is dated 27 February 2007. It has on it the name and signature of Mr Don Atkinson as agent of Jetstick, but it has not been signed by Mr Yeates. He says it was his deliberate decision not to execute the contract after it was given to him by Mr Atkinson, because he was not agreeable to the expressed fixed term nature of it and was dissatisfied with the lack of detail about his duties and position.

[7] In respect of the remuneration provisions and all other terms and conditions expressed in the written agreement, Mr Yeates took no issue and he performed his employment for about four months in the way prescribed in the contract document. On about 2 May however he was advised that his employment was due to finish at the end of that month. Mr Yeates worked beyond the end of May for about 3 more weeks, when a short extension of his employment was offered by Jetstick.

[8] Mr Yeates contends that as he did not sign the agreement or at least consent to the fixed term of it as expressed, he was not bound by that arrangement and Jetstick is not therefore able to rely on it as justification for his contended dismissal.

[9] It is a clear and uncontested fact that Mr Yeates did not sign the written employment agreement given to him by Mr Atkinson, but did that make the fixed term of it ineffective?

[10] Under s 65 of the Act, an individual employment agreement must be in writing. That provision was complied with by Jetstick which had a written agreement drafted that contained terms and conditions of employment. The document was presented by Mr Atkinson to Mr Yeates for him to consider and execute.

[11] At s 66(1) of the Act it is provided that an employee and employer may agree that the employment will end at the close of a specified date or on the occurrence of a specified event or at the conclusion of a specified project. There is no requirement, I find, that the matters required under s 66(4) to be stated in writing must also be signed by the parties before the employment agreement becomes binding.

[12] I do not consider that an agreement in writing, as there is required to be for every employment relationship under the Employment Relations Act 2000, must also

be signed by the parties to it before it becomes binding on them. An employee who deliberately evades signing the agreement or who, for whatever reason, omits to do so, cannot later take advantage of his or her failure to execute the document if, as a matter of evidence, the parties had intended to be bound by its terms including a fixed term.

[13] I do not suggest that Mr Yeates tried to avoid becoming bound by the fixed term in the draft agreement he was given, simply by not signing the contract. I accept that one reason he had for not signing it was the lack of detail about his duties and responsibilities, which was a matter of genuine concern to him and one that Mr Atkinson acknowledged had been made known to him.

[14] Although there was no signature by Mr Yeates put on the written employment agreement to evidence his consent to its terms, the question is whether he and Jetstick nevertheless agreed that the employment would end at the conclusion of the work specified in Schedule 1 of that agreement?

[15] There is no dispute that it was at some time after Mr Yeates had commenced working that Mr Atkinson presented him with the written agreement for his consideration and signature.

[16] I accept that it was probably on or about 27 February 2007 when Mr Atkinson gave Mr Yeates a copy of the written agreement signed and dated 27 February by Mr Atkinson. I also accept that by then Mr Yeates had been working for Jetstick since at least Friday 16 February, some 11 days before he was presented with the draft agreement.

[17] There was some disagreement by Mr Yeates in his evidence about when he commenced. Wage and time records kept by Jetstick give his start date as 16 February 2007 but he claims this was on or about 2 February, a date he could remember because it was his birthday. When shown the wage records entry of 16 February, he recalled working for Jetstick for two weeks before that date, but without pay.

[18] Mr Atkinson refuted this suggestion and the Authority considers that Mr Yeates must be mistaken that he worked for nothing for a week or so. I do not consider it likely from what I have seen of Mr Atkinson and Jetstick that Mr Yeates was encouraged or permitted to start work under some arrangement that had him

doing the kind of technical job he did for 40 or more hours on five or more days a week, for two weeks providing “*free labour*” as Mr Atkinson sceptically described it.

[19] Although not a great deal turns on fixing the exact commencement date of Mr Yeates, the issue does highlight his uncertainty about other more important events during the employment.

[20] What is a relevant consideration is the extent to which Mr Yeates had been offered the employment from the commencement of it on a fixed term basis. In this regard Mr Yeates said he had started the job after being interviewed by Mr Rick Hannay the marketing manager, and by another man named Howard.

[21] Mr Atkinson’s evidence was that those two men had not been authorised to make decisions about the terms and conditions of new employment and he had formally interviewed Mr Yeates for that purpose, near the beginning of the employment. Mr Atkinson said that at the interview he had agreed to pay \$19.50 per hour and 30c per hour tool money, which Mr Yeates had requested for doing the job. Mr Yeates agreed that he had been interviewed by Mr Atkinson after his first interview with Mr Hannay and Howard.

[22] Mr Atkinson’s evidence was also that at this formal interview he had advised Mr Yeates that the contract would be for about three months because the purpose of it was to build and assemble the labelling machines his company makes and sells. Mr Atkinson said he had explained that problems with the machine and with the labels it affixes to fruit and other produce, had led to the need for some additional assistance by an employee over this period of time until assembly of the machines could be completed.

[23] After this formal interview, Mr Atkinson said he had asked an HR advisor to draw up the written employment agreement and when this had been done he gave the signed copy of it to Mr Yeates.

[24] At the top of the first page of that agreement are the words ***2007 Fixed Term Individual Employment Agreement***. In this regard clause 1.3 provides:

The parties agree that employment is on a fixed term basis for work during 2007. The details of each period of employment during 2007 will be provided on Schedule 1. The employer has genuine reasons based on reasonable grounds for specifying the employment ends after a fixed period and will detail them in Schedule 1. The parties

also confirm that the employee has been advised by the employer when discussing employment, the terms for the employment ending in this way.

[25] Clause 1.4 continues;

Nothing in this agreement shall prevent the parties from entering into a subsequent agreement of employment by mutual agreement; but nothing in this clause shall be interpreted or understood to give the employee any expectation that this agreement will be renewed, or that any subsequent agreement will be entered into, and no assurance or arrangement for any renewal or subsequent agreement shall bind either party unless such assurance or arrangement is in writing signed by both parties.

[26] At Schedule 1 of the agreement, the following reason for its fixed term is provided;

The reason for the fixed term nature of this employment is that the engagement is to complete manufacturing of Mark 5 in-line labellers and JIA projects only.

[27] Still further detail found in the contract is that the employment was expected to start on 19 February 2007 and the work was expected to be completed by 18 May 2007.

[28] Mr Yeates has not disputed that he received a copy of the agreement from Mr Atkinson a week or so after he had commenced working for Jetstick. But again there was some uncertainty in his evidence about when he discovered that the contents of the agreement included a fixed term provision. Mr Yeates' evidence to the Authority was that he had taken home the agreement given to him by Mr Atkinson and shown it to his mother, who had pointed out to him the "temporary" nature of the employment. Mrs Brown who is Mr Yeates' mother, confirmed that evidence.

[29] The uncertainty arises because of a letter written to Mr Atkinson by the solicitor Mr Yeates had originally instructed about his grievance claim. In her letter of 17 July 2007 she gave the following account:

John did receive a draft employment agreement during his employment. This refers to the employment being for a fixed term. This agreement was never signed by John and it was not until after he was told that his employment was being terminated, that he even realised that the agreement made reference to a fixed term. When John received the agreement, his sole focus was on sorting out his duties and responsibilities. As noted above, when he tried to do so, he was assured this would be sorted at the end of the trial period.

(My underlining)

[30] According to this advice, Mr Yeates had not known there was a fixed term expressed in the draft agreement until early May 2007, when told that his employment was due to finish later that month.

[31] I accept the evidence of Mrs Brown that near the start of her son's employment after he had brought home the document given to him by Mr Atkinson and shown it to her, she did say to Mr Yeates that the draft agreement contained a fixed term provision. I do not know why his lawyer seemingly was instructed by Mr Yeates that he had not realised there was a fixed term in it until some two months later, unless Mr Yeates later on had difficulty recalling the advice he had received from Mr Atkinson in this regard.

[32] While still on the contents of the solicitor's letter of 17 July 2007 to Mr Atkinson, I note that it also contains the following advice:

Our client has struggled to find work and has only recently gained employment at a much lower salary.

[33] This suggests that by 17 July 2007 at least, Mr Yeates had become re-employed after finishing with Jetstick. His evidence to the Authority, however, was that it was not for some four months, until just before Christmas 2007, that he had obtained new employment. I note this further uncertainty surrounding an important aspect of Mr Yeates' evidence. It was obvious during the investigation meeting that he needed help from his mother in answering my questions about basic factual matters to do with the employment.

[34] Over the months of March and April, the employment agreement was left unsigned by Mr Yeates. Mr Atkinson's evidence, which I accept, was that he did not become immediately aware of that situation. He was busy on business matters and had naturally left the documentation of the employment to the administration person in the office. Obviously there was no system in place in this relatively small business by which a check could have been made as to whether the agreement had eventually been returned signed by an employee.

[35] On the one hand, Jetstick as an employer might be criticised for not following up the agreement and finding out from Mr Yeates whether he had signed it and returned a copy to the office. That might have brought to a head a discussion about

any problems the employee had with the contract including the expressed fixed term nature of the arrangement.

[36] On the other hand, Mr Yeates as an employee might be criticised for not making it clear to Mr Atkinson reasonably soon after receiving and reading the contract that he had not accepted the fixed term nature of the employment. Instead he continued working for several months under the remaining terms and conditions of the agreement, as if he was satisfied with them. I accept Mr Atkinson's evidence that the only matters Mr Yeates had wished to raise were in relation to his duties and responsibilities and that there had been some discussion around those issues.

[37] An employee does have some responsibility not to lead the employer into thinking that the terms and conditions offered in writing had been accepted, if that is not the case. The duty of good faith requires parties to an employment relationship to be active, responsive and communicative, and unreasonable delay in raising any disagreement over the proposed terms of employment may in some circumstances be taken as affirmation of those terms.

[38] I am satisfied that when entering into the employment at the very beginning, following discussion with Mr Atkinson and following agreement being reached at the proposal of Mr Atkinson about the remuneration, there was also agreement that the employment would be for a fixed term. I do not consider that Mr Yeates necessarily had much option if he wanted work, and for that reason at least tacitly he then accepted the fixed term nature of his employment.

[39] I find that Mr Atkinson confirmed the offer of employment earlier made to him on that basis when he had the fixed term provision drafted into the written contract and gave a copy of it to Mr Yeates for his consideration and execution by his signature.

[40] For those reasons, I do not consider this to be a case where the employer failed to put in writing the way in which the employment was going to end and the reasons for it ending in that way. That was done in confirmation of an agreement that had been reached at the beginning of the employment and it was not later rejected by Mr Yeates during his employment.

[41] Furthermore, I am satisfied that the reasons themselves were genuine reasons based on reasonable grounds. It is clear and is accepted by the Authority that the

company was under considerable pressure because of assembly problems with its labelling equipment and also because the labels themselves had been found to be defective in their design. For this reason the company needed someone to help out, but only for a finite term. There was also the seasonal nature of the apple and kiwifruit growing industry that had an influence on the period for which Mr Yeates was required.

[42] It is not in dispute that Mr Yeates was advised on about 2 May that his employment would be ending, as stated in the employment agreement, near the end of May. I find that the company offered to extend the employment of Mr Yeates for a further three weeks, which he worked. No issue arises out of that extension.

[43] I find from the evidence that Mr Yeates was not dismissed from his employment but that it came to an end by operation of a valid fixed term provision in a written agreement that, even although not executed by both parties, reflected their intentions as had been formed at the commencement of the employment and affirmed by performance.

Determination

[44] As Mr Yeates was not dismissed, he does not have any claim that can succeed for unjustified dismissal.

[45] No orders are therefore required to be made against Jetstick.