

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Carolyn Mary Bowater (Applicant)
AND	Ministry of Education (Respondent)
REPRESENTATIVES	Grant Bowater, for the Applicant Aaron Martin, for the Respondent
MEMBER OF AUTHORITY	Marija Urlich
INVESTIGATION MEETING	12 November 2003
SUBMISSIONS RECEIVED	18, 19 and 26 November 2003
DATE OF DETERMINATION	5 February 2004

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Carolyn Bowater says she was unjustifiably dismissed from her position as Administration Co-ordinator on 28 February 2003. She also says she was unjustifiably disadvantaged in her employment as a result of an unfair selection and appointment process. Mrs Bowater seeks reinstatement to the position she held at date of dismissal, wages lost as a consequence of her dismissal, a review of recruitment processes for the Administration Officer position and compensation pursuant to section 123 (c) (i) of the Act.

The Ministry of Education (“the Ministry”) says Mrs Bowater’s employment ended lawfully through the expiry of her fixed term employment contract. The Ministry also says Mrs Bowater was not unjustifiably disadvantaged in her employment.

Background

Mrs Bowater was first employed by the Ministry on a fixed term agreement, the term of which was 11 September 2001 – 21 December 2001. She was employed as an Administration Co-ordinator in the Whakatane office of the Special Education Service (“SES”). The employment agreement was for a fixed term because the SES was in the process of transitioning into the Ministry. This process involved a review of all positions including the position of Administration Co-ordinator.

On expiry of this first fixed term agreement Mrs Bowater was offered and accepted a further fixed term agreement, the term of which was 21 December 2001 to 28 June 2002. During the period of her employment with the Ministry Mrs Bowater was engaged in five fixed term agreements. These agreements were successive and covered the period 11 September 2001 to 28 February 2003. The term of the last fixed term agreement was 31 January 2003 to 28 February 2003.

Mrs Bowater's position was covered by the SES Administrative Staff collective employment agreement ("the CEA"). During the period of her employment the cea expired and was renegotiated.

By 31 January 2003 Mrs Bowater had applied for, been interviewed and advised she was not successful for the position of Administration Officer. The position of Administration Officer was created as a result of the transitional restructuring and replaced the Administration Co-ordinator position, disestablished as a result of a review of the administration function carried out during September and October 2002. Mrs Bowater participated in the review by completing a questionnaire detailing her duties. The outcome of the review was published in a document entitled "Administration Effectiveness and Efficiency Review Outcomes" dated 25 November 2002, a copy of which was available to Mrs Bowater.

The Administration Officer position was concurrently advertised externally and internally. Mrs Bowater told me she was surprised when she learnt the Administration Officer position was advertised externally. She said she had understood the position would be treated like other positions effected by the restructuring and advertised internally first. She relied on a telephone conference call she attended in late November 2002 and notes she took during that call. The notes do not expressly record any representation that all advertised positions would first be internally advertised. The witnesses for the Ministry, Soraya Reid, Team Leader Administration – BOPE, and Diana Shepherd, District Manager, said that it was never intended that the Administration Officer role would only be internally advertised. This is because the restructuring guideline document, which governed the impact of the restructuring on staff, did not require internal advertising of positions held by fixed term employees, as was case for those positions held by permanent employees.

Mrs Bowater completed an application for the Administration Officer position on 9 January 2003. She attended an interview on 30 January. The interview was structured and the six candidates were all asked the same questions. Mrs Bowater was ranked fifth out of the six candidates.

On Friday 31 January Ms Shepherd telephoned Mrs Bowater to advise she had not been successful in her application for the position. Ms Shepherd told Mrs Bowater that a further fixed term contract could be entered for another month but that it was entirely Mrs Bowater's decision if she wished to accept the offer. Mrs Bowater said she would consider the offer.

On Saturday 1 February, Grant Bowater, Mrs Bowater's husband, telephoned Ms Shepherd to advise of Mrs Bowater's intention to seek a review of the appointment process for the Administration Officer position. Mr Bowater also advised that Mrs Bowater would accept the offer of a further fixed term agreement.

On Monday 3 February Ms Shepherd drove to Whakatane from Tauranga to discuss the further fixed term agreement with Mrs Bowater. The following letter was presented to Mrs Bowater during this discussion:

"Dear Carolyn,

I am pleased to formally offer an extension of our employment relationship. Your current Fixed Term Employment Agreement expires on 31/01/2003 and we would like to extend this to 28/02/2003.

The extension of your agreement is because of the need to cover the period of the organisational restructuring and appointment process.

All other details of your agreement remain the same, including that there should not be any expectation of ongoing employment at the new expiry date.

Please confirm that you accept this extension by signing below and returning this letter to me. If you have any queries do not hesitate to contact me.

Yours sincerely

Diana Shepherd
District Manager (BOPE)

Accepted: _____

 Date ”

Mrs Bowater indicated her acceptance by signing and dating the agreement then and there.

Ms Shepherd told me a further fixed term agreement was necessary because the organisational restructuring was not complete. The two services had merged but the new positions had not yet all been filled. Ms Shepherd also told me she and Mrs Bowater agreed on the end date of 28 February because she (Ms Shepherd) envisaged the successful applicant starting in a month's time and that a month was a reasonable period for Mrs Bowater to find another position. Mrs Bowater said she could not recall a lot about the discussion with Ms Shepherd on 3 February but did recall that she was prepared to work until the successful applicant had started in the position.

On 11 February Mrs Bowater wrote to Ross Macklow, Regional Human Resources Advisor, lodging a document entitled "Review of Provisional Appointment for the Administration Officer, Whakatane Office". This document set out two broad reasons for seeking a review of the selection and appointment process. The first was that Mrs Bowater did not believe it was appropriate to advertise the position externally because she felt she had the skills to perform the job and to advertise externally when a suitable internal applicant existed breached the Ministry's review protocol and recruitment and selection policy. The second was that Mrs Bowater did not believe the appointment process was fair and equitable because she had successfully performed the role of Administration Co-ordinator for 17 months, the selection was based solely on the performance at the interview, only one selection tool was used to assess her application and she had not understood she had been offered whanau support at the interview or in the confirmation of interview letter as required by Ministry policy.

The first preferred candidate declined the position. The second preferred candidate withdrew her application on 20 February. On 21 February a telephone conference was convened with the interview panel (Nicola Hampshire – Team Leader Whakatane, Philip Sherrell – Psychologist Field Staff, Ms Reid and Ms Shepherd), Ross Macklow, the Regional Human Resource Advisor and Kath Fox, Regional Manager – Central North, to discuss the situation. The decision was made not to offer the position to the third ranked candidate, to end the Administration Coordinator position on Friday, 28 February and to commence the new position on 3 March.

By letter dated 22 February Mr Bowater wrote to Kath Fox following a telephone conversation he had with her on Thursday, 20 February. Among other matters the letter requests that Mrs Bowater remain in the role of Administration Co-ordinator until a permanent appointment is made to the Administration Officer position.

On 24 February Mr and Mrs Bowater and their union representative, Margaret Takoko, meet with Ms Reid and Ms Hampshire to discuss Mrs Bowater's fixed term employment agreement ending and the inability of the Ministry to make a permanent appointment to the Administration Officer position. Ms Reid advised that Mrs Bowater's fixed term agreement would expire on 28 February

and would not be renewed. She also advised of the proposal to fill the new position internally with administration staff seconded from the Tauranga office and to re-advertise later.

On 27 February Mr Bowater wrote, by email, to Kath Fox and Sharon Searle asking the Ministry:

“...to suspend the decision to terminate Carolyn’s fixed term contract this Friday, and to offer an extension of it until the permanent administration position has been filled.”

The letter also referred to Mrs Bowater’s request for a review of the appointment process.

By letter dated 28 February Ms Fox replied to Mr Bowater’s email of 27 February, including:

“I wish to emphasize this is a new role and not the current role your wife undertakes and I urgently wish to see the new role implemented as this is the last point now in terms of implementing our regional administration review. Had we been continuing the current (as at 28 February 2003) role then we would have considered extending Carolyn’s contract. I have no reason to believe that Carolyn was anything less than adequate in her fixed term role to date and that she has generated a good deal of friendship and support, but it is time to move forward.”

By memo dated 28 February Ms Reid recommended to Ms Fox that the Tauranga administration staff be seconded to fill the Whakatane Administration Officer position until it was permanently filled. Ms Reid’s recommendation was accepted.

Mrs Bowater’s last day of employment with the Ministry was Friday, 28 February. On Monday 3 March the Tauranga administration staff rolled out the Administration Officer role in Whakatane.

In a letter dated 3 March Sharon Searle, HR Operations Manager replied to Mrs Bowater’s request for a review as follows:

“RE: REQUEST FOR REVIEW

Further to my letter of 12 February 2003 and your request for a review of appointment, I now understand that an appointment to the position of Administration Officer in the Whakatane office will not be made at this time.

Section 65 of the State Sector Act 1988 requires all government departments to set up a process of appointment review but only in the case where an appointment is made. The Ministry of Education’s appointment review process is in compliance with this.

This letter will advise you that we will not be pursuing a review on your behalf at this time.”

By letter dated 22 May Mrs Bowater lodged personal grievances with the Ministry, one for unjustified action causing disadvantage in relation to the recruitment process for the Administration Officer position and the other for unjustified dismissal upon expiry of the fixed term agreement. Ms Fox replied by letter dated 30 May, denying any breach of duty on the part of the Ministry.

To date the position of Administration Officer, Whakatane has not been permanently filled.

I am satisfied the parties have attempted to mediate a resolution of this employment relationship problem.

Determination

(i) Unjustified action causing disadvantage

Mrs Bowater says the Ministry's actions in advertising, interviewing and selecting candidates for the position of Administration Officer were unjustified and caused her disadvantage in her employment. Mrs Bowater does not say she expected to be appointed to the position, rather she says the process denied her a fair chance of winning the position.

If the position of Administration Officer was different to the position of Administration Co-ordinator then Mrs Bowater's claim cannot succeed. It is well established that an employee cannot bring a successful claim for disadvantage in relation to future employment (*Victoria University of Wellington v Haddon* (1996) 1 ERNZ 139). Mrs Bowater's ability to be trained to perform the role of Administration Officer is not at issue here, nor is her performance in the role of Administration Co-ordinator, which was universally recognised.

The position of Administration Co-ordinator and Administration Officer are not the same. It is clear from reading the job descriptions and salary rates that the roles are distinct and require different skills in more than minor ways. There is no need to list these differences, they are known to the parties. Mrs Bowater acknowledged these differences in the roles at the investigation meeting. For these reasons the claim for unjustified action causing disadvantage in relation to the interview and selection process can be taken no further because it does not relate to Mrs Bowater's fixed term position.

The advertising of the Administration Officer position externally did not breach any obligation owed to Mrs Bowater by the Ministry. There was no evidence that any such promise was made to Mrs Bowater or obligation owed to her to first advertise the position internally before the position was advertised externally.

By letter dated 11 February Mrs Bowater sought a review of the interview and selection process. The Ministry declined to initiate the review citing section 65 of the State Sector Act, which provides:

"The chief executive of each Department shall put into place for the Department a procedure for reviewing those appointments made within the Department that are the subject of any complaint by an employee of that Department."

At 11 February no appointment had been made to the position of Administration Officer. I agree with Mr Martin's submission that Mrs Bowater's request for a review concerned her non-appointment to the position of Administration Officer. I also agree with his submission that such a request falls outside the ambit of section 65. The Ministry did not breach its obligations to Mrs Bowater in declining her request for a review.

(ii) Unjustified dismissal

Mrs Bowater says the expiry of her fixed term agreement on 28 February 2003 amounts to an unjustified dismissal.

Section 66 of the Employment Relations Act 2000 governs fixed term agreements and provides:

- (1) An employee and an 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 or her 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 subsection (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."

In *Edward Clarke v Norske Skog Tasman Limited*, 26 June 2003, AC 42/03 at p 12 Judge Colgan discussed the meaning of s66(2)(b) in the following terms:

"The legislation places a positive obligation on employers to advise before a fixed term agreement can lawfully be agreed to. The statute is clear that the test is what the employer tells or advises the employee, not what the employee may or may not know independently of such advice as is, or is not, given."

The Ministry gave Mrs Bowater written and oral advice of the reasons when and why her position would end. The written advice is set out in the fixed term agreement dated 3 February. In relation to the oral advice, at the investigation meeting Ms Shepherd told me "Carolyn and I agreed on an end date because I envisaged a month for the new person to start and also felt a month was reasonable for Carolyn to find another position." Mrs Bowater said she was happy to remain in her position until the appointee to the new position started.

On the final day of Mrs Bowater's employment with the Ministry there was no permanent appointee to the Administration Officer position, a decision had been made to abandon the appointment process and alternative arrangements had been made to "roll out" the position on 3 March. Mrs Bowater says the failure to appoint anyone permanently to the Administration Officer position and the decision to second administration staff to fill the position on a temporary basis does not comply with the advice to her that her fixed term agreement would be extended "...to cover the period of the organisational restructuring and appointment process." Mrs Bowater says "appointment process" means a permanent appointment to the Administration Officer position. This was the section 66(2)(b) advice given to Mrs Bowater on 3 February by Ms Shepherd who, at that stage believed the new appointee would start the new role in one month.

This is a situation where a genuine reason for entering a fixed term agreement altered during the term of the fixed term agreement. Section 66 does not require an employer to establish the genuine reasons for offering the fixed term agreement existed at its end. To establish compliance with section 66 an employer must show the reasons for entering the fixed term agreement were genuine at offer and that the employee was advised of those reasons. The Ministry is able to demonstrate it has complied with all the requirements of section 66, the reasons for offering a fixed term agreement were genuine and Mrs Bowater was advised when and the reasons why her employment would end. For these reasons Mrs Bowater's application is declined.

The Employment Relations Act requires parties to employment relationships to deal with each other in good faith. It seems to me that a change in the reasons for offering a fixed term agreement, as occurred in Mrs Bowater's situation, would require the employer to discuss those changes with the effected employee in good faith. Such a discussion did occur with Mrs Bowater on 24 February and subsequently in correspondence between Mr Bowater and Ms Fox. Mrs Bowater was advised of the difficulties the Ministry was facing in making a permanent appointment and of the temporary solution that had been proposed and made representations regarding this proposal which were considered by the Ministry.

Costs

I invite Mr Martin and Mr Bowater to attempt to resolve the question of costs between them. If they are unable to do so Mr Martin should file a memorandum of costs within 28 days of the date of this determination. Mr Bowater has a further 14 days from date of receiving Mr Martin's memorandum in which to file a memorandum in response. Mr Martin should file anything in reply within 7 days of receipt.

Marija Urlich
Member of Employment Relations Authority