

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Andrew Bunter (Applicant)
AND The University of Auckland (Respondent)
REPRESENTATIVES Brian Spong, Advocate for Applicant
Shan Wilson, Counsel for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 27 July 2001
**CLOSING SUBMISSIONS
RECEIVED** 16 August, 20 August, 23 August 2001
DATE OF DETERMINATION 14 September 2001

DETERMINATION OF THE AUTHORITY

Mr Bunter lodged this matter with the Authority on May 15. He described his employment problem as:

- A personal grievance for unjustified dismissal
- A breach of section 66 of the Employment Relations Act 2000.
- A breach of section 4 of the Employment Relations Act 2000.

The background to the employment problem.

The respondent (the University) employed the applicant in January 2000, as Front Office Manager in its Accommodation and Conference Centre. At the time it had sought someone to fill this position temporarily while the incumbent, Mr Wilde, was on a secondment related to a restructuring project. Mr Wilde was temporarily filling the position of 'Acting General Manager' while the person who held the General Manager's job (Mr Stewart McElwain) was himself 'acting up' into the role of Acting Group Manager.

The University had approached an agency to assist with recruitment (in preference to advertising the position) because time was tight. Three or four candidates (including Mr Bunter) were sent by the agency and interviewed by Mr Wilde and Mr McElwain. Mr Bunter was selected and placed on an employment contract for a fixed term of six months, from 17 January to 16 July 2000. He reported to Mr Wilde.

Both parties were clear when the first contract was entered into that it was for a fixed term and to cover a secondment. However, soon after Mr Bunter started Mr Wilde said something to him to the effect that if he was made permanent in the position of General Manager, Mr Bunter would be *'in line'* (Mr Bunter's words) for the permanent position of front office manager when that had to be filled. Mr Bunter took this to mean that if he did the job and performed reasonably well that he would get permanently appointed. This impression was reinforced for him when, also early in the employment (possibly at interview) Mr Wilde told him that there was a process of permanent appointment, and that all three jobs would be advertised. Mr Bunter told me that Mr Wilde said:

"He was going through it and so was Stewart. He told me that Stewart's level had more to be concerned about because of the keener interest in that level of job from within the University.

He also told me that I should be the last to worry when it came to my job. By this I took it to mean that as far as my job went, appointment to the permanent position would be more or less a formality and I need not worry about not succeeding."

Mr Wilde strongly disputes that he said anything to give Mr Bunter the impression that the job would be his, although he agrees that he did talk to him about it as a potential opportunity for him. Because of the differences between them, I questioned both witnesses closely on this exchange. Mr Bunter always knew the job would be advertised, and accepts that he was never promised the job. He accepts that if Mr McElwain or Mr Wilde were unsuccessful in their own applications, the Front Office manager's position would not have been advertised at all. Yet from the two conversations he had with Mr Wilde he inferred that he would eventually get the permanent position. Although I accept that this expectation was genuine, I do not accept that Mr Wilde said anything specific to give rise to it. The discussions with Mr Wilde were in the context of the applicant having to apply for the permanent position in a competitive process. Mr Wilde indicated only that if and when the Front Office Manager's job came up, the competition for it might not be great and so Mr Bunter should have a good chance of getting it. I believe Mr Bunter read more into Mr Wilde's comments than was justified.

In about May, Mr Bunter went through a standard performance appraisal process. Arising out of it, areas of weakness were identified and professional development courses suggested to help improve these areas. Mr Bunter told me he was not totally happy with his ratings (which were not particularly good) and felt that they were not objective. He accepts that there were areas for improvement in his work but considers this was because he was new to his job. This was the only performance review Mr Bunter underwent during his time with the University.

At the end of the six months the restructuring was not complete. Permanent appointments to both the Group Manager and the General Manager positions were still pending and the secondments continued. Mr Wilde and Mr Bunter agreed that his employment would therefore be extended. A letter was sent to Mr Bunter confirming that the new contract would run from 8 August 2000 to 16 October 2000.. In that letter it stated (as had the first):

"Nothing contained or implied in this contract creates a commitment by either party to an on-going employment relationship beyond the end of the term of this contract."

Mr Spong has attempted to make something of the fact that the new written contract was not provided immediately upon the expiry of the old, and that there is therefore a gap between the two. However, since the written contract simply confirmed the results of an earlier face to face talk I do not consider this to be of any significance in itself.

Nothing had changed by 16 October, so the contract was renewed again (16 October 2000-15 January 2001.) As with the previous renewal, Mr Wilde met with Mr Bunter and explained the reason for it (continued uncertainty as to when the positions of Group and General manager would be filled.) Again, a new contract was subsequently provided to him. It stated that the fixed term was offered “*after taking into account academic, operational and financial requirements of the University.*”

By the end of December, however, the situation was finally becoming clearer. Mr Wilde and Mr McElwain had both been confirmed as the permanent appointees to the roles in which they had been acting, and so Mr Wilde would not be returning as Front Office manager. The University does not advertise vacancies until late January and in addition the holiday period is the busiest time for the Accommodation and Conference Centre as student accommodation is being organised for the year. For these reasons it decided that a further fixed term contract would be necessary in order to provide temporary cover whilst the process of appointing a permanent replacement was underway. A further contract, 5 January 2001-9 March 2001 was entered into on this basis. Mr Wilde told me he remembered discussing with Mr Bunter:

“the need for this fourth term, in the context of how this would allow the position to be advertised and the permanent appointment process worked through.”

Mr Bunter’s service was continuous throughout this time. (Mr Bunter’s employment was further extended by casual contracts from 16 March-10 April and 10 April until 8 May 2001 but these were on different terms to the previous contracts, involving specific project work, and did not represent a continuation of those contracts.)

The job of front office manager was advertised in early 2001, both in the University’s own newsletter, *Next Week*, and in the *Herald*. The position description of the advertised job was unchanged. In order to ensure that there was no presupposition by Mr Bunter that Mr Wilde would automatically forward his CV for him, Mr Wilde made a point of telling him to be sure to get his application in. (Mr Bunter had been aware that it was to be advertised, but not of the exact date.) Shortly before applications closed Mr Bunter was also reminded by Graeme Eddy, Senior Human Resources Advisor, to put in an application and did so. Mr Wilde told me that the General and Group Manager’s positions were:

“only advertised internally because the University was confident that it would find an applicant within the University environment to fill the two positions. This was because the two roles were administration oriented and so it was considered that current university administration experience was important. In contrast, the Front Office manager’s position could suit a candidate with hotel or office administration experience and so it was appropriate that we open the positions to a wider application process...”

In December 2000 Andrew and I had a conversation at the Railway Centre, discussing his role. He asked if we were still going to advertise the position, to which I answered that we would be. He asked why that was and I said that it was so we could source the widest possible pool of applicants. He asked if that would mean that he would not get the position. I replied that it didn’t necessarily mean he wouldn’t get the position but he would have to apply for it.

In January 2001 Andrew and I had a similar conversation.”

Mr Bunter originally told me that Mr Wilde did not speak to him until after he had put his application in, but on reflection he agreed that it was earlier. He told me that Mr Wilde strongly hinted that he should consider other avenues of employment, and explained that he should not

automatically expect selection, and should keep his options open. He came away feeling that he was unlikely to get the job.

Mr Bunter was interviewed on 8 March 2001. On the morning of his interview, he visited the Human Resources Manager, Susan Cathersides, at her office. He had questions regarding the right and ability of the University to advertise the position under the Employment Relations Act. She told him that the University was obliged by the State Sector Act to notify the position and to appoint the best suited applicant and that its own policy also was that vacant positions were to be advertised.

At the investigation meeting Ms Cathersides also told me the same thing: that where a fixed term appointment is made and this position becomes permanent for any reason, the University considers itself obliged to advertise the role and appoint the most suited applicant. She said that in some circumstances a commitment as to the on-going nature of the role may be made to an incumbent at the commencement of the role, or at some stage during the term of appointment. However, this would normally apply only in situations where the initial appointment process had been competitive and based on merit.

Mr Wilde told me that after the interview process, Mr Bunter was second choice for the position, out of a total of four candidates. One week after his interview, Mr Bunter was told that he was unsuccessful. Mr Wilde told him then, and continues to assert, that the successful candidate was offered the job because she clearly stood out from the others. Mr Bunter attempted to obtain the notes his interviewers had made, but they were destroyed soon after the interview in line with a policy of not retaining any materials relating to unsuccessful applications.

The argument

Mr Bunter told me:

“I believe that the University misled me from the outset about my prospects for this job. I accepted what the University had told me about my prospects and applied myself in the expectation that I would be rewarded with permanent appointment to the job I was engaged to do.”

His arguments are:

- The implied promise of permanent employment and the repeated renewal of the contracts raised a reasonable expectation of employment hence the fixed term did not reflect the parties’ true intentions;
- At the time of the making of the October 2000 agreement and subsequently, the respondent failed to carry out its statutory obligations under s 66 of the Employment Relations Act 2000. It did not have genuine and reasonable grounds for specifying that the employment should end on a specified date and did not advise the employee of the reasons for his employment ending. The back dating of written contracts was also a breach of s.66.
- Alternatively, when the respondent turned its mind to advertising the applicant’s job, it no longer had genuine reasons for ending the applicant’s employment;
- The respondent has treated the employment of the applicant in effect as being to establish his suitability for continued employment and thereby did not act out of genuine reasons or in good faith for the purposes of s66;
- The breach of section 66 has led to unfairness in the selection procedure for the permanent position and ultimately to the unjustifiable dismissal;
- The parties to the employment contract had to act in good faith to each other. Impliedly, in the fixed term context, information regarding the respondent’s intentions ought to have been communicated to and consulted about with the applicant as and when the changes were decided.

- The respondent should have consulted with the applicant as to his employability for the job and allowed him any reasonable opportunity to correct perceived shortcomings. The follow-up and training after the first performance review was inadequate;
- The fact that the position was to be advertised as permanent employment should have been advised to the applicant so as to allow reasonable time for him to apply and prepare for an interview on an equal footing with the other applicants;
- Alternatively if s.66 had been properly applied, there would have been no need for the job to be advertised in the first instance, notwithstanding the application of the State Sector Act;
- Once the employment need became permanent the respondent ought to have considered direct appointment of the applicant on the basis of the expectation it had given him. It could have done so because Mr Bunter's original appointment was made by a competitive process, on merit;
- Section 77H does not oblige the respondent to advertise in a particular way or for a particular length of time. The respondent had a choice about where to advertise and in this case it was open to it to advertise in-house only;
- The destruction of Mr Bunter's interview notes soon after the interview was in itself a breach of good faith.

The University takes a very different view. It maintains that its need for temporary cover, at the time Mr Bunter was first employed, was a justifiable and genuine reason for placing Mr Bunter on a fixed term contract. A temporary employee was needed for a genuine operational reason; as cover during the secondment of the incumbent permanent employee. This need continued, and justified subsequent fixed term contracts. Then, a further fixed term contract was appropriate during the time required to complete the process of making a permanent appointment.

The University also maintains that it was necessary to advertise the permanent position when it became available. The process of Mr Bunter's original appointment was not truly competitive, since the position was not notified and only candidates from the agency's books were considered. The University was obliged, in terms of both its own policies and the relevant provisions of the State Sector Act, to advertise the vacancy.

Section 77G of the State Sector Act provides:

“An employer in making an appointment under this Act shall give preference to the person who is best suited to the position.”

Section 77H of the State Sector Act provides:

“Where an employer intends to fill a position that is vacant or is to become vacant in the institution (other than with an acting or temporary or casual or relieving employee) the employer shall, wherever [[practicable]], notify the vacancy or prospective vacancy in a manner sufficient to enable suitably qualified persons to apply for the position.”

The respondent submits that even if an on-going permanent employment relationship had been established, the Employment Relations Act does not override the provisions of the State Sector Act as to the obligation to have an open recruitment process for permanent State Sector appointments (rather than automatic appointment of a temporary employee.) If Parliament had intended this, then it should have expressly stated so. Instead, the State Sector Act was amended as follows:

“Except as otherwise provided in this Act, the Employment Relations Act 2000 applies in relation to the Education Service.” (Schedule 5, Employment Relations Act.)

On this basis, the respondent advances the proposition that the law as expressed in *Principal of Auckland College of Education v Hagg [1997] ERNZ 116 (CA)* remains correct, and the public interest provisions of the State Sector Act override the provisions of Part 6 of the Employment Relations Act.

The University further argues:

- it informed Mr Bunter from the outset of the reason for the fixed term nature of his employment, and it was not to assess his suitability for permanent employment.
- Mr Bunter's position was always described to him as temporary; indeed he was told at interview that the position was temporary and fixed term;
- Each extension was explained to, and agreed with, Mr Bunter;
- The content of each discussion was confirmed by written contract;
- Mr Bunter's employment was terminated in accordance with the reason for his fixed term employment (that is, the reason for the fixed term was consistent with the actual ending of his employment.)
- The University has not, therefore, breached s.66;
- the applicant was given the opportunity to apply for the permanent position.
- The University does not accept the applicant's assertion that he should have been directly appointed;
- it acted towards Mr Bunter at all times in good faith.

Conclusions

I have taken the trouble to summarise the key points made in submissions by Ms Wilson and Mr Spong since I anticipate that at this point, any determination relating to the provisions of Parts 5 and 6 of the Employment Relations Act is likely to be of some general interest.

I have come to the conclusion that the evidence does not support the applicant's case. I have already explained that I do not accept that Mr Wilde gave Mr Bunter any sort of undertaking, or even any clear indication, that he would be appointed to the position of front office manager if and when it was advertised. This critical finding of fact is largely determinative of the outcome of the case, and leads me to accept the respondent's submissions almost in their entirety. I am satisfied that:

- The respondent broke no express or implied promise of renewal of the contract, because, on the evidence I have, there was no such promise.
- The applicant's employment was not terminated in the face of a legitimate expectation of renewal of the applicant's employment.
- I accept that the applicant was genuine in his belief that he would somehow get the job, but I do not accept that there was a reasonable or substantial basis for this belief. The evidence does not establish a legitimate expectation of an on-going and permanent relationship.
- The respondent had genuine and justifiable operational reasons for placing the applicant on each successive fixed term contract. These were advised to the applicant in direct discussion.
- The temporary position was not put in place in order to establish Mr Bunter's suitability for permanent employment. Particular reasons existed for the first, second and third contracts. At the time these were entered into it was not even known whether a permanent appointment would be advertised. At the time of the fourth contract, this was known, however, it was many months after Mr Bunter's original employment, and the employer had already had plenty of opportunity to observe his suitability for permanent employment, had it wished to do so.

- It was open to the respondent to conclude that the process of Mr Bunter's original appointment was not sufficiently competitive to satisfy the requirements of s 77H, and therefore, for it to opt to advertise the permanent position when it became available.
- The employer kept the applicant abreast of developments as it became aware of them. It may have been open to criticism for not advising beforehand the date the job was to be advertised, but Mr Eddy's call went some way to rectifying this.
- The applicant was entitled, indeed obliged, to advertise the position in the new year of 2001. It did so, quite properly, in order to meet its obligations under s 77H of the State Sector Act and in order to comply with its own policies. The public interest considerations that underlie the State Sector Act preclude the University from merely converting a temporary appointment to a permanent one. Appointments must be open and on merit.
- I accept that s77H does not specify the manner in which a position is to be "notified" and hence the employer had a discretion as to where and when it would advertise. However in exercising that discretion it had to be satisfied that it had done so in a manner "*sufficient to enable suitably qualified persons to apply for the position.*" I am not prepared to substitute my judgement for that of the employer in deeming it necessary (in order to meet its obligations under s 77H of the State Sector Act) to advertise the Front Office manager's position in both the *Herald* and in *Next Week*.
- The matter of the destruction of the interview notes is unfortunate; however, it is reasonable for an employer to destroy the records of unsuccessful applications. I do not consider this a breach of good faith.
- The employment ended because the end of the fixed term had been reached. There was no unjustified dismissal.

For all these reasons, I am satisfied that the University's actions have at all times been justified and that it has not breached either the provisions of Part 6 of the Act or its obligations of good faith towards him. I can do nothing more to resolve his employment problem.

Costs

The parties are encouraged to attempt agreement on this issue. If this is not possible, then they have a period of fourteen days in which to approach the Authority with a request for a determination.

Y S Oldfield
Member of Employment Relations Authority