

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Rosslyne Burnside (Applicant)
AND Ministry of Social Development (Respondent)
REPRESENTATIVES Jeff Goldstein, Counsel for Applicant
Keith Binnie, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 17 January 2005
27 and 28 January 2005
DATE OF DETERMINATION 5 April 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Burnside, alleges that she has been unjustifiably dismissed and has suffered a disadvantage by the respondent's unjustifiable action.

[2] Ms Burnside further contends that the respondent has breached express and implied terms and conditions of her employment agreement and that the respondent has breached sections 4 and 66 of the Employment Relations Act 2000. Section 4, of course, is the overarching principle requiring good faith between parties to an employment relationship and section 66 is the provision of the statute relating to fixed term employment, dealing particularly with the conclusion of an employment relationship governed by a fixed term agreement.

[3] The Ministry of Social Development as respondent (the Ministry) denies each and every one of the applicant's claims and indeed contends that at all times it treated the applicant in a fair and reasonable manner.

The facts

A. Introduction

[4] Ms Burnside was employed by the Ministry as a solicitor/prosecutor – benefit control, at the Ministry's Christchurch office for a total period commencing on 2 September 2002 and concluding on 29 October 2004.

[5] However, the nub of the dispute between the parties revolves around the nature of the employment agreement between the parties, for Ms Burnside was employed on a succession of fixed term agreements (seven in fact).

[6] Ms Burnside contends in essence that the way in which the Ministry managed the various extensions of the employment agreement creates the basis for her various claims.

[7] In order to assess the claims that Ms Burnside makes and evaluate them in the context of the relevant law, it is necessary to consider the history of the employment relationship in its totality but particularly in respect to the various renewals of the employment agreement.

[8] Although the basic factual issues between the parties are not in dispute, the factual matrix is complicated by very distinct differences and in those circumstances anyway, I have had to make judgements based on my assessment of the credibility of the witnesses who were interviewed in the investigation meeting. In making my findings, I indicate wherever appropriate whose evidence I prefer.

[9] In my analysis of the factual matrix, I deal first of all with the timeline for the various renewals (about which there is no contention) then I give a brief explanation of the organisational structure of the workplace as it relates to the dispute between the parties (about which there is limited disagreement) and then I identify the other factual elements about which there is more significant discord.

B. The Timeline Generally

[10] Turning then to the first of those three issues that I have identified, I set out below in a graphic form the details of the various extensions to the employment agreement:

TABLE ONE

Number of fixed term agreement	From	To
First	2 September 2002	30 June 2003
Second	30 June 2003	31 December 2003
Third	31 December 2003	30 April 2004
Fourth	30 April 2004	30 June 2004
Fifth	30 June 2004	31 August 2004
Sixth	31 August 2004	17 September 2004
Seventh	17 September 2004	29 October 2004

[11] Each of the extensions or renewals of the employment agreement between the parties was reduced to writing in the sense that on each occasion that a renewal or extension was proposed by the Ministry, it reduced its offer to writing and conveyed that offer to Ms Burnside by way of a letter setting out the proposed terms of the extension or renewal.

C. First Employment Agreement

[12] We need to go through the agreements one by one and identify the salient issues. As a matter of general principle, there was a decreasing measure of agreement between the parties as the employment relationship wore on. It follows that the first employment agreement commencing on 2 September 2002 is not the subject of any real disagreement between the parties.

[13] The letter of offer is dated 13 September 2002 and quite explicitly sets out the reason for the fixed term being offered to Ms Burnside. It says that the fixed term is because Ms Burnside is

filling in for another solicitor, Ms Michelle Munn, who had accepted a secondment to a project team in the North Island.

[14] For her part, Ms Burnside accepts that she was told in writing why she was offered a fixed term employment agreement but she makes the rather different contention that she was not told on this occasion or indeed on any other occasion apart from the final occasion (that is the seventh employment agreement concluding on 29 October 2004) why the fixed term was to end.

[15] I will need to decide whether the distinction that Ms Burnside draws is one supported by the law and in particular by the clear words of section 66 of the Employment Relations Act 2000. I note for the sake of completeness at this point that the provisions of that section as they impact on this particular matter must be considered prior to the new words inserted into that section by the passing into law of the Employment Relations Amendment Act (No 2) 2004.

[16] Whatever the position in relation to the particular distinction that Ms Burnside draws is, for all other purposes, it seems that this particular duration of the employment agreement was reasonably uncontroversial as between the parties.

[17] There was a variation to it during its term, a variation it seems originated by Ms Burnside rather than by the employer. This variation resulted in Ms Burnside going from what was a half time position at 20 hours per week to 30 hours a week on and from 24 October 2002. There was a further variation (again it seems initiated by Ms Burnside) which resulted in her hours going from 30 hours per week to 40 hours per week (a full time span of hours) on and from 14 April 2003.

[18] In her evidence, Ms Burnside sought to make something of the fact that no-one could tell her why the Ministry had initially decided that her position was half time. I do not take any particular point from this. The employer is entitled to structure its business in any way that it sees fit consistent with the prevailing law and the fact that no-one seems to have been able to explain to Ms Burnside why the position was initially half time is in my view neither here nor there.

[19] Equally, Ms Burnside sought to interest me in the significance of a discussion between Ms Michelle Munn (the permanent solicitor who Ms Burnside was filling in for) and Ms Joan McQuay, a senior manager with the Ministry, about approval for an additional .5 solicitor position in Christchurch. Ms Burnside's evidence was to the effect that this purported approval of an additional half time resource meant that even if Ms Munn returned from her secondment, there would still be a half time vacancy which Ms Burnside could either aspire to or indeed be appointed to as of right.

[20] There is no doubt that the conversation between Ms Munn and Ms McQuay took place. Ms Munn gave evidence of the conversation and I accept that evidence without reservation. However, the evidence that Ms Munn gave was only that she had had a conversation with Ms McQuay about needing an additional resource and it seems as though Ms McQuay acquiesced to that proposal although as Ms McQuay did not give evidence before me, I cannot be sure that she did acquiesce. Another senior manager, Ms Michelle Mitchell, who did give evidence before me was surprised by the suggestion there was approval to engage an extra half time resource within the benefit control solicitor area and she gave evidence to that effect. She was able to satisfy me that whatever Ms McQuay may have said, there was never approval in a fiscal sense for the existence of a .5 position additional to the substantive position which Ms Munn had occupied prior to her secondment.

[21] Even if there had been financial provision for a .5 additional resource, I am not sure that that takes Ms Burnside's argument anywhere because the existence of an increase in the complement

does not of itself add anything to her argument that she is entitled to be treated in a more favourable way than in fact she was.

D. Second Employment Agreement

[22] By letter dated 14 April 2003, Ms Burnside received two changes to her employment situation. The first was, as I have already noted, that her hours of work were increased to full time and the second was that her temporary employment agreement was extended to 31 December 2003. Again, as I noted in the tabular form above, this second fixed term agreement was expressed to be for the reason that it was *to fill the solicitor position left vacant while Michelle Munn is seconded to project work*. To continue the theme that Ms Burnside advanced in relation to the first fixed term agreement, there was no specific reference in the letter of 14 April 2003 indicating why the extension or renewal finished on a particular date.

E. Third Employment Agreement

[23] When the third fixed term agreement was contemplated, Ms Burnside received a letter dated 5 December 2003 offering an extension. This letter does not set out the reason for the extension – there is for instance no reference to Ms Munn and her circumstances in this letter although the Ministry’s evidence before me was that Ms Jacqui Kime who was at that time Ms Burnside’s manager had a discussion with Ms Burnside in which she said that Michelle Munn’s secondment was continuing and therefore the Ministry wished to extend her employment for a further fixed period but this intelligence is not included in the letter of offer dated 5 December 2003 nor again is there any indication of why the extension or renewal should conclude on the particular date that it does.

[24] The letter does, however, contain the telling sentence: *You will remain on your existing terms and conditions*. That sentence must be given its ordinary and reasonable meaning and must be allowed to speak for itself. It cannot mean anything other than that the offeror (the Ministry) is intending that the offeree (Ms Burnside) accepts the proposal on the same basis as previous proposals were offered. Given that Ms Burnside is herself a solicitor, it does not seem to me unreasonable for the Ministry to think that it had done enough in respect to communicating the basis on which its fresh offer (in this case the third offer) is to be considered.

[25] There is a clear conflict in the evidence as to what happened when this extension offer was presented by the Ministry to Ms Burnside. In this particular regard, I prefer Ms Kime’s evidence to Ms Burnside. In giving her evidence at my investigation meeting, Ms Kime was quite unequivocal that she would never simply hand staff bits of paper but would sit down with them and go through it. That is what her evidence said that she did in respect to the renewal or extension of the third fixed term agreement and I prefer her evidence to that of Ms Burnside who acknowledges that there was a discussion with Ms Kime but denies that it was a discussion of any substance. The effect of this finding of fact is that I accept that the Ministry did explain the reason for the further extension was because Ms Munn was continuing with her secondment although I acknowledge this was not included in the written documentation except to the extent mentioned above.

F. Fourth Employment Agreement

[26] The same factual position broadly speaking seems to have applied in respect to the fourth fixed term agreement which was the subject of an offer made by the Ministry on 7 April 2004. Again, Ms Burnside’s evidence is that she simply received the letter dated 7 April 2004 offering her a further extension to 30 June 2004. That evidence is in direct conflict with the evidence of Ms Kime who says that she discussed matters with Ms Burnside in early April and that in particular

she conveyed the intelligence that it was expected that Ms Munn would conclude her secondment at 30 June 2004 and accordingly this latest extension was offered to expire on the same date.

[27] Again, I indicate that I prefer Ms Kime's recollection of these events to Ms Burnside's. Accordingly I find as a fact that Ms Burnside was told why this extension (the fourth) was timed to expire on 30 June 2004. Again, for the sake of completeness I note that the letter of offer dated 7 April 2004 did not contain any reason for the extension except to the extent that it too contained the sentence found in the third offer dated 5 December 2003: *You will remain on your existing terms and conditions.*

G. Fifth Employment Agreement

[28] On 2 June Ms Burnside was forwarded a letter offering her her fifth extension of her employment agreement for the period from 30 June until 31 August 2004. Again, there is a conflict in the evidence which I need to resolve. The Ministry says that Ms Kime discussed the issue with Ms Burnside in early June as it was not clear at that stage whether Ms Munn's secondment now to an Auckland role would continue beyond 30 June or not.

[29] For her part, Ms Burnside gave evidence that there was no reason given orally for this latest extension and it is common ground that the written offer from the Ministry did not contain any particulars as to the reason except to the extent that it too contained the sentence found in the third offer dated 5 December 2003: *You will remain on your existing terms and conditions.* Again I am forced to make a decision as to which evidence I prefer and having heard Ms Kime and Ms Burnside on the matter, I prefer the evidence of Ms Kime for the Ministry.

H. Sixth Employment Agreement

[30] The sixth fixed term agreement from 31 August until 17 September 2004 was offered by the Ministry on 27 July. This particular extension was sought by the Ministry to allow it to complete the recruitment process for the substantive position which Ms Burnside applied for. The template used for this particular extension was slightly different from the earlier ones. There is still the ever-present sentence, viz: *You will remain on your existing terms and conditions.* But in addition, there is, under the section Employee Acknowledgment and Acceptance, a reference that the offer is on the same terms and conditions as set out in the letter of **2 June 2004** (emphasis mine). That is a reference back to the letter conveying the offer of a fifth employment agreement which is in similar terms to the earlier offers of employment.

[31] Ms Diane Evans of the Ministry gave evidence that she had explained to Ms Burnside the reason for the extension, being the Ministry's desire to complete the recruitment process and their estimate that the matter could be concluded by 17 September 2004. Ms Evans gave me clear evidence on the point and I prefer her evidence to Ms Burnside's evidence on the same matter.

I. Seventh Employment Agreement

[32] On 6 September 2004 the seventh and final extension of the agreement was proffered by the Ministry for the period from 17 September to 29 October 2004. This letter of 6 September 2004 is in exactly the same terms as the letter of 27 July offering a fixed term agreement even down to the reference back to the earlier letter of 2 June 2004, namely the fifth extension letter. Again, it seems that Ms Burnside has no recollection of being spoken to by a representative of the Ministry as to the reason for this final extension.

[33] Ms Evans gave me very clear evidence on the matter. She said that she telephoned Ms Burnside on 6 September to tell her that the Ministry were unable to complete the recruitment

by 17 September as previously hoped and accordingly that they intended to offer a further extension to 29 October to enable that matter to be completed. I accept that evidence as truthful.

J. Summary of Issues Concerning the Agreements

[34] By way of summary then, I have found that I prefer the evidence of the Ministry in that I think their recollection of significant events is less attenuated by stress than Ms Burnside's and accordingly is more likely to be able to be relied upon. Further, the Ministry are able to advance two witnesses, Ms Kime and Ms Evans, each of whom gave similar evidence in respect to different extensions of the employment agreement. It seems unlikely that both Ms Evans' and Ms Kime's evidence about different events at different times when the other was not involved, is altogether mistaken.

[35] In my considered view then, Ms Burnside was told on each and every occasion either by letter or verbally the reason for the fixed term nature of the agreement. Further, I find that the persisting reference in the letters of offer to the offeree being on *your existing terms and conditions* ought to have put Ms Burnside (who is after all a lawyer), on notice that the original terms and conditions for the short term arrangement continued.

[36] In tabular form, the basis for the offers made by the Ministry to Ms Burnside on each of the extensions/renewals is as follows:

TABLE TWO

No of Agreement	Date of offer	Reason given for extension
First	13 September 2002	To fill in for Michelle Munn who is on secondment
Second	14 April 2003	To fill the solicitors position left vacant while Michelle Munn is seconded on project work
Third	5 December 2003	None in writing but verbal advice from Ministry in similar terms to above
Fourth	7 April 2004	None in writing but verbal advice from Ministry in similar terms to above
Fifth	2 June 2004	None in writing but verbal advice from Ministry in similar terms to above
Sixth	27 July 2004	None in writing but verbal advice from Ministry that extension offered to enable recruitment for the permanent position to be completed
Seventh	6 September 2004	None in writing but verbal advice from Ministry that extension offered to enable recruitment for the permanent position to be completed

K. Organisational Structure

[37] Now I need to deal with the structural issues of the employer as they relate to the employment relationship problem. Ms Burnside was employed by the Ministry as a solicitor and until 1 July 2004, Ms Burnside's role reported to Ms Kime who was the Area Manager for the northern South Island of the Benefit Control Unit based in Christchurch. On and from 1 July 2004 Ms Burnside's position began reporting to the Chief Legal Advisor of the Ministry.

[38] This change in structure seems to have also created disputation between the parties.

[39] John Bassett gave evidence at my investigation meeting on behalf of the Ministry. Mr Bassett is the deputy chief legal advisor (operations) and for reasons that need not trouble us, he is effectively the occupant of the role that Ms Burnside's position reports to on and from 1 July 2004. He describes in his evidence the situation before 1 July 2004 in the following terms:

The organisation structure for benefit control solicitors at the time of Rosslyne's (Ms Burnside's) employment was that they had a dotted line relationship to the chief legal advisor for professional purposes but on a day to day basis they reported to the local benefit control manager.

[40] Ms Burnside's evidence was that she did not become aware of the change in structure until late June 2004. Again I have to resolve inconsistencies in the evidence. The Ministry's evidence was that Ms Burnside was as involved in the proposal to restructure the solicitors working for the benefit control unit as any other solicitors working in the unit and that she had attended a meeting on 6 May 2004 at which the issue was canvassed and that she had received consultation papers in March 2004 and a final structure and report dated 22 April 2004. Clearly Ms Burnside has limited recollection of the thrust of the 6 May meeting or of receiving the documentation just referred to but it seems to me that the Ministry fulfilled its obligations in respect to consultation and it cannot be expected to have done more.

[41] Much was made in Ms Burnside's evidence of the fact that when she reported to Ms Kime the latter would need to obtain further information from legal services before responding to Ms Burnside. Ms Burnside seemed to draw the conclusion from this factual situation that Ms Kime was not in fact her manager at all but merely a cipher for some hidden functionary in legal services. But until 1 July 2004 that very clearly was not the position. Ms Kime's evidence, which I accept, was that the reason that she would refer matters to legal services was not because she needed to obtain their blessing for any step that she wished to take but rather to establish from legal services what, if anything, they could advise in respect to the plans of Ms Munn whose secondment had created the position that Ms Burnside was filling on a temporary basis.

L. Other Factual Issues

[42] Ms Burnside's evidence is redolent with her increasing anxiety over the period of her employment. She says that she conveyed this to Ms Kime at least until Ms Kime ceased to be her manager and was always reassured by Ms Kime that all would be well. Ms Burnside seemed to have the view that she was being ignored by legal services. She was very clear in her evidence that she had asked Ms Kime to organise a meeting between her and legal services. Ms Kime was equally clear that no such request was ever made. Further, Mr Bassett who would have received such a request from Ms Kime had it been made, was equally clear that no such request had ever been received by him. Indeed he made it abundantly clear that had such a request been made by Ms Kime on Ms Burnside's behalf he would have made himself available immediately for such a meeting.

[43] It is difficult for me to conclude anything other than again Ms Burnside has the wrong end of the stick and the request for a meeting with legal services which she clearly thought she had made had not been clearly articulated to the employer.

[44] Perhaps the most significant issue of all in terms of this continuing conflict of evidence is the question whether there were promises made by Ministry officials which were designed to encourage Ms Burnside to believe that she had continuity of employment and/or security of tenure. I have carefully reviewed and reflected upon the evidence that I have heard. I accept without reservation that Ms Burnside was given every encouragement by Ms Kime in particular and also Ms Hamilton. However, I do not accept that the evidence discloses that that encouragement went so far as to either: (a) give Ms Burnside any encouragement in the belief that she was guaranteed appointment, or (b) create in Ms Burnside's mind any form of legitimate expectation of continued employment beyond the end of her various short term employment agreements.

[45] In the result, the Ministry quite properly advertised the permanent position in accordance with its obligations under the State Sector Act and while Ms Burnside applied and presumably advanced her two years of experience in the temporary *fill in* role she was unsuccessful. In any event, Ms Burnside's claim is not about the propriety of the final appointment process except to the extent that she complains about a comment made by John Bassett, who was the chairman of the interview panel for the employer, immediately prior to the interview.

[46] It appears to be common ground that Mr Bassett approached Ms Burnside immediately prior to the interview and reinforced to her that just because she was the *incumbent* albeit on a temporary fill in basis, it did not mean that she could automatically assume that the job was hers. These observations apparently were made immediately prior to the interview and arguably would have influenced Ms Burnside's stress and anxiety levels negatively for the purposes of the interview. I make findings about this issue in the following section.

The Law

[47] The essence of the applicant's claim in respect to her allegation of unjustified dismissal revolves around two heads, the first of which is an allegation that the respondent has breached s.66 of the Act and the second of which concerns the allegation of legitimate expectation of continued employment.

A. Legitimate expectation

[48] I have already found as a fact that there is no evidence of a legitimate expectation of continuing employment and so I need to say very little more about that aspect. Mr Goldstein for the applicant advances a number of propositions in his closing submissions about why I should accept that the applicant had a legitimate expectation. I have reflected on these submissions but I am not persuaded that the factual matrix supports any of his contentions.

[49] In my opinion, the facts disclose that Ms Burnside was retained by the Ministry to fill a role vacated by a permanent employee who was seconded elsewhere and that while Ms Burnside was praised for her good work during her employment, there is no evidence whatever that anybody for the Ministry created any reasonable and legitimate expectation that she would have continuity of employment beyond the end of her several fixed term employment agreements.

[50] I do not think that it is necessary for the job that Ms Burnside was performing to be exactly the same as the job that Ms Munn had previously performed before her secondment. Plainly they were different jobs, at least to some extent. But that does not in my view strengthen the applicant's claim or indeed weaken the respondent's defence. In my view the law requires the applicant to

prove, on the balance of probabilities, that she had a reasonable and legitimate expectation of ongoing employment and she simply has not done that. Whether she is doing precisely the same job as the permanent employee of the respondent who she replaced is neither here nor there.

[51] In a practical commonsense way, Ms Burnside replaced Ms Munn in the Benefit Control Unit at Christchurch as the prosecution solicitor and to say otherwise seems to me to simply fly in the face of the facts.

B. Section 66 Employment Relations Act 2000

[52] I turn now to the effect of s.66 of the Employment Relations Act. I need to consider a number of the elements to s.66 and I start with the question, whether the respondent had a genuine reason based on reasonable grounds for each and every one of the temporary employment agreements. I note in passing that the Act sets out some examples of reasons which are “non-genuine” but of course that is not an exhaustive list although it may well be illustrative of the kinds of things that will not be genuine.

[53] It is clear that the use of the word “reasonable” in the phrase in question allows the Authority to substitute its own objective assessment for the Ministry’s.

[54] In *Canterbury Westland Free Kindergarten Association v. New Zealand Educational Institute* CC14/04, the Chief Judge defined “genuine” as “sincerely held” and went on to indicate that s.66 situations should be confined to discrete projects of limited duration which could, as it were, be boxed off from the usual situation of ongoing employment.

[55] In my opinion, the present case is a situation where in principle anyway there is a genuine reason for the fixed term and of necessity, each and every one of the fixed terms offered by the Ministry to Ms Burnside was in principle anyway not a situation of continuing employment but a succession of special discrete pieces of work.

[56] Where there are a succession of fixed term employment agreements, it is possible that the reason for the fixed term (however genuine) recedes over time. Even if that is not the position, a continued rolling over of an employment agreement may of its own motion create a strong likelihood of continued employment. The uncertainty that as it were forces the employer to contemplate a further fixed term employment agreement with the employee must be a higher level of uncertainty than is present in every job.

[57] The leading case in this area of the law and one which on its facts is very much in point is the decision in *Norske Skog Tasman Ltd v. Clarke*. Mr Clarke was employed by Norske Skog for a total of 11 fixed term employment agreements totalling around two years. Mr Clarke was found to have been unjustifiably dismissed and was reinstated to his position because although the Court of Appeal had found that the employer had complied with s.66(2)(a) – the ‘genuineness’ test – it considered that the employer had not complied with s.66(2)(b) – the ‘when, how and why the relationship is to end’ test. The Court of Appeal also thought that the employee’s knowledge from sources other than the employer was highly relevant in evaluating the **quality** of the advice given by the employer to the employee.

[58] It seems to be settled law from this decision that the employer’s advice need not be given in written form.

C. Section 66 applied

[59] The first and second fixed term employment agreements are to all intents and purposes the same in a factual sense. Each is activated by a written offer from the employer to the employee and

the offer in each case is in similar terms and explains that the reason for the fixed nature of the employment is to fill in for Ms Michelle Munn and that it would come to an end on a certain date which is specified. The plain implication from the words used is that the employer expected on each occasion that Ms Munn's secondment would have come to an end at the date identified, thus bringing the need for the temporary position to an end. I am persuaded that in relation to these first two employment agreements, the Ministry has complied with the requirements of s.66(2)(a) as to genuineness and it is plain on the face of the offer from the Ministry to Ms Burnside on each occasion that the Ministry tells Ms Burnside when her engagement will come to an end.

[60] The only question is whether the employer has told the employee why the employment agreement is to come to an end on that stipulated date. I have given earnest consideration to Ms Burnside's submission that the Ministry has failed to indicate to her why the agreement should terminate on that date. I find that in each of these two cases (which as I say are similar), the implication from the clear words in the respective offers satisfactorily convey the reasons for her employment ending.

[61] It is clear from Ms Burnside's evidence that she had her own sources of information. She speaks regularly of finding out information about Ms Munn from sources other than the official channel through her manager. In those circumstances I find it inconceivable that she could reasonably claim that, although she had been told when her employment agreement would end, she did not also understand that the reason it should come to an end at that time was because the incumbent would return to her substantive position.

[62] In relation to the third employment agreement, the situation is different. The third employment agreement involved a letter which is much less detailed than the letters pertaining to the first and second employment agreements, but this letter does contain the sentence: "You will remain on your existing terms and conditions". Those words need to be given their plain meaning. Clearly the Ministry intended that they be read to mean that the original references in the two earlier documents to Ms Munn's secondment continue to apply in this case and the letter is clear as to the date that the new employment agreement is to expire on. As with the first and second employment agreements, we are left to consider the question whether the employer has adequately conveyed the reasons for the employment ending then. I have already made clear that I accept the employer's evidence that Ms Kime of the Ministry discussed the matter with Ms Burnside and told her that the extension was being offered because Ms Munn's secondment was continuing. Having accepted that that exchange of information was imparted, and noting that Judge Colgan in the *Norske Skog* case held that the employer does not need to provide the advice required in writing, that seems to me to conclude issues in relation to the third employment agreement.

[63] The position is similar in respect to the fourth employment agreement where again I have accepted as truthful the Ministry's evidence that Ms Kime spoke to Ms Burnside in early April and that in particular she conveyed the intelligence that it was expected that Ms Munn would conclude her secondment at the end of June so this latest extension was set to expire on 30 June 2004. Again there is reference to those words: *You will remain on your existing terms and conditions*.

[64] The fifth employment agreement again included the sentence about existing terms and conditions and an end date but no other detail. Again I have accepted the Ministry's evidence that Ms Kime spoke to Ms Burnside in early June because it was not clear to the Ministry at that point whether Ms Munn's secondment, which was now to a different role in Auckland, would continue beyond 30 June or not.

[65] The sixth employment agreement and the seventh employment agreement are in slightly different terms from the earlier agreements and emanate from a different part of the Ministry. Each of them has a clear reference to the end date, each of them has the sentence referring to existing

terms and conditions of employment and each of them refers back to the letter of 2 June which is the letter which offered the fifth employment agreement. The letter of 2 June, as I have already noted, is somewhat minimalist in its approach and the fifth employment agreement is only perfected by the verbal imparting of information which I have found as a fact happened between Ministry officers and Ms Burnside.

[66] That does not perfect the sixth and seventh agreements and it is necessary to consider the particular circumstances of those agreements at the time that they were offered to Ms Burnside. Again, a different officer of the Ministry, Ms Diane Evans gave me evidence at my investigation meeting on both these matters and she was quite explicit that she had spoken to Ms Burnside before each of these proffered extensions and explained the rationale for them. The rationale for the sixth employment agreement was the Ministry's need to get the recruitment process for the substantive position completed and the belief was that 17 September 2004 (the date on which the sixth employment agreement concluded) would be the appropriate date for that to happen. In relation to the seventh agreement, this was a short extension designed to enable the Ministry to complete the recruitment process when it found that the earlier date of 17 September 2004 was not achievable.

[67] I am satisfied, on the evidence I heard, that on each renewal the Ministry complied with the *genuineness test* required by s.66 (2)(a) and that the Ministry told Ms Burnside when her agreement would cease albeit that on some occasions the advice was informal. In each of the first five employment agreements, the question which remains is whether Ms Burnside was told why the particular agreement was to come to an end. There is no doubt that the law requires that.

[68] I have reached the conclusion that, even in the absence of explicit words to enunciate why the agreement is to end when it does, the only possible implication that can be drawn from the facts is that the agreement is to come to an end because the occupier of the substantive position is returning to fill that position. Given the context of the employment environment and the history of the relationship between the parties, there can be no other credible explanation, in my view.

[69] As to the sixth and seventh agreements, I found as a fact that Ms Evans, for the Ministry, told Ms Burnside why these agreements would end and why. In her evidence Ms Burnside accepts there is no *why* issue in relation to the seventh agreement.

[70] Accordingly, having analysed the matter in this way, I have reached the conclusion that the Ministry has satisfied the requirements of s.66 of the Act and accordingly I have been unable to accept Ms Burnside's claim that she has been unjustifiably dismissed as a consequence of a breach by the Ministry under s.66 of the Act. I reiterate the point that I have already made earlier in this determination to the effect that I need only consider the part of s.66 that was enacted before the 2004 amendment.

D. Breach of section 4, Employment Relations Act

[71] Section 4 as it applies to this particular employment relationship problem is the original unamended text of the section.

[72] The section enunciates the overarching principle of good faith in the relationship that the parties have to one another. Parties have a mandatory obligation to deal with each other in good faith and a like obligation not to mislead or deceive each other or even engage in conduct that is likely to mislead or deceive the other.

[73] I heard no evidence which would enable me to reach the conclusion that there had been a breach of section 4 by either party. I am not persuaded by any of the arguments advanced by the applicant that the conduct of the respondent constituted a breach of section 4.

E. Pre-interview comments

[74] John Bassett, the deputy chief legal advisor (operations) of the Ministry who gave evidence at my investigation meeting presided over the interview panel which selected the permanent replacement for Ms Munn. Ms Burnside applied for the role. Immediately prior to the interview, Mr Bassett told Ms Burnside that because she was filling the role on a temporary basis did not carry with it the implication that she could assume the job was hers.

[75] Ms Burnside said in her evidence that these observations of Mr Bassett *threw her*. However, her written contemporaneous note of her interview experience seems to be at variance from her oral testimony. Further, Ms Burnside said that Mr Bassett said something else as well, namely that he himself had been in a similar position to her and had not been appointed, but Mr Bassett, while admitting making the statement that she was not to bank on being appointed just because she was the incumbent denied the other remark.

[76] Mr Bassett also told me at the investigation meeting that he had made precisely the same statement at the meeting that he had with Ms Burnside on 5 August so he was really just repeating something that he had already said.

[77] Ms Burnside invites me to find that this action of Mr Bassett was an unjustified action which caused her disadvantage. I agree that the comment was ill-advised. Mr Bassett confirmed to me in giving his evidence that he might not do the same thing in future although there was other evidence before me that Ministry managers in a similar position to Mr Bassett would habitually administer that caution immediately prior to an interviewee's interview.

[78] I do think that process to be ill-advised and I would commend to the Ministry the notion that they refrain from issuing those kinds of warnings immediately prior to an interview process. There has to be a risk that a candidate will be affected adversely by such a warning and in consequence perform less well at interview than they might otherwise.

[79] In this particular case though I am not persuaded that Mr Bassett's action went so far as to created a disadvantage to Ms Burnside in the legal sense.

F. The multiplicity of extensions

[80] Is it reasonable for an employee to be engaged on the footing that there are six extensions of an original fixed term employment agreement over a two year period. Can this multiplicity of extensions of itself ground a cause of action? Is this a situation where the continued roll-over of a succession of employment agreements of its own motion creates an implication of continued employment?

[81] I accept that there can be circumstances where the sheer number of renewals or extension of an existing employment arrangement becomes such an abuse of the legal purpose for which the fixed term agreement was entered into in the first place that it would be unjust not to regard the employment as continuous.

[82] However, I do not think that this is such a case. Here, I am satisfied that the temporary nature of the employment agreement is for a genuine reason and I am satisfied that the employer has properly advised the employee of the reasons for such arrangements coming to an end when they do.

[83] In my opinion, Ms Burnside entered into the initial employment arrangement and the subsequent employment arrangements with her eyes open and with the benefit of her professional training I do not believe she can be heard to say that she did not understand the nature of the

bargains that she was entering into. On each occasion that there was a renewal, she had the option of declining to accept the proffered extension but she chose to accept it. I do not believe that the evidence I have heard justifies the claim that, on these facts, just because an employer seeks to extend an employment agreement on a multiplicity of occasions, it must follow that such a situation must be interpreted as one of continuing employment.

G The effect of the State Sector Act

[84] Mr Binnie, for the respondent Ministry, invites me to reach particular conclusions in relation to the effect of the State Sector Act on the employment relationship between the parties.

[85] The Ministry is of course bound by the State Sector Act, sections 60 and 61 of which require that appointments in the public service must be made to the individual best suited to the vacant position and that a form of notification of any vacancy must be adopted so as to attract applications from suitably qualified persons.

[86] Because the Employment Relations Act 2000 is subject to the State Sector Act the Ministry invite me to reach a conclusion that, even if there had been a breach of the second leg of the section 66 test, (what I refer to earlier as the *when, how and why the relationship is to end test*) the State Sector Act would apply to require that the vacant position be advertised thus allegedly excluding the possibility that the temporary incumbent could simply continue in office.

[87] Given my findings of fact in the matter of the second leg of the section 66 (2) test, it is not necessary for me to address this issue but I do mention in passing that I do not accept the logic of the argument.

[88] It seems to me perfectly possible for the Ministry to be required to continue employing a person in Ms Burnside's position even although there is an obligation to advertise the position to which she happened to apply. In this particular case though, I have reached the conclusion that the Ministry has fulfilled its obligations under section 66 and so the question does not arise.

Determination

[89] Ms Burnside has not been able to persuade me that she has either a personal grievance by reason of an unjustified dismissal or a personal grievance by reason of suffering an unjustified action to her disadvantage or a breach of any express or implied term of her employment agreement and accordingly her claim fails in its entirety.

[90] Costs are reserved.

James Crichton
Member of Employment Relations Authority