

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 165/09  
5150520

BETWEEN                      WHIU CARROLL  
   Applicant  
  
AND                                TE TAIWHENUA O TE  
   WHANGANUI A OROTU  
   Respondent

Member of Authority:        G J Wood  
  
Representatives:              David McLeod for the Applicant  
   Stuart Webster for the Respondent  
  
Investigation Meeting:        17 September 2009 at Napier  
  
Submissions Received:        17 September 2009  
  
Determination:                27 October 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Mr Whiu Carroll, claims that he was unjustifiably dismissed by the respondent (Te Taiwhenua/the Trust) when it attempted to require him to work under a new employment agreement with different hours and less pay. When he tried to continue on in his employment he was told his services were no longer required.

[2]     Te Taiwhenua claims that Mr Carroll had been employed as a casual employee until such time as it restructured its whole organisation. He was then offered a permanent position, albeit at a lesser rate of pay, which he declined to accept. Therefore it denies Mr Carroll's claims that it dismissed him or that his dismissal was unjustifiable.

- [3] The issues for determination are:
- (a) What was the nature of Mr Carroll's employment in fact and in law;
  - (b) Was his employment terminated unjustifiably;
  - (c) If so, what remedies is Mr Carroll entitled to?

### **The Facts**

[4] The Trust provides mentoring services, together with mental health and addiction services, for people in the Hawke's Bay, primarily through the operation of contracts with the Hawke's Bay District Health Board (the DHB). Its parent body is Ngati Kahungunu Iwi Inc.

[5] Te Taiwhenua's current chief executive officer, Mr Barry Wilson, was appointed in 2007 when it was facing a serious financial position, as well as other governance issues. From his appointment at that time, Mr Wilson was required to look closely at how the Trust functioned, structured and provided its services.

[6] One of the Trust's functions is the provision of support services for people who require support in a private house, through residential support workers. During the course of 2008, the Trust was providing services to the DHB on basically a month-by-month basis because neither party was prepared to enter into a new contract, the duration of which was normally two years. The contract did, however, require full time staff with some tenure of employment being appointed to the residential home support staff.

[7] In May 2008, Mr Wilson obtained Board approval for a new structure, including the appointment of two residential support workers in the Trust's *Kaupapa Maori Mental Health Services*. A public advertisement for staff stated: *These positions are both 24/7. The minimum qualification for this position is that of a National Certificate in Level 4 Maori Mental Health.* Applicants were directed to Mr Wilson for a position description.

[8] Mr Carroll became aware of these advertisements through his sister, who was a contractor to the Trust until May 2008. Because of the wide range of work required, Mr Carroll's sister helped out with staffing issues, although the Trust had employed an employment relations consultant in relation to the restructuring which took place

between December 2007 and April 2008. On his sister's recommendation he had previously filled in at the home for three days when in Hawke's Bay on personal business. Mr Carroll and his wife at that time lived in Christchurch.

[9] While Mr Wilson considered that staff would only be employed on a temporary basis, the advertisement does not say that. There is nothing in what was said to be a draft standard agreement, which did not cover important matters like pay rates, sent to Mr Carroll, that gave him any reason to believe his employment was anything other than ongoing. Mr Carroll also had no reason to believe the position was temporary because he was never told that by Mr Wilson. In fact Mr Wilson told Mr Carroll's sister, but not Mr Carroll, that he would continue to be paid at the same rate of pay as earlier in the year, namely \$20 per hour, until he was in a position to formalise an ongoing salary with him. Unfortunately, Mr Wilson was and is a very busy man and he never got around to doing so until some months later.

[10] In the meantime, Mr Carroll had in good faith left Christchurch. He rented out the family property and moving to rented accommodation in Napier, where his wife joined him some time later. I accept that had Mr Carroll been told that this was only a temporary job neither he nor his wife would have agreed to move to Napier, even though Mr Carroll did want to be closer to his family.

[11] Mr Carroll was expected to and did work for the Trust in effectively a 24/7 capacity, on a one week on/one week off basis. He started working on 13 June and continued working on that basis until his employment ended.

[12] By September, Mr Carroll had not had any contact with Mr Wilson about any written contract, but Mr Wilson had told him that the shift arrangements were being reviewed. Mr Carroll was, however, being given pay slips which showed that holiday pay was being included in his pay, in that he was paid ordinary hours and *casual holiday pay*. This was the same as the other residential support staff member. However, Mr Carroll was also paid fortnightly by automatic payment, which was how the Trust stated *full time permanent staff that are appointed* would be paid, whereas the *temp staff would be paid weekly*.

[13] Mr Carroll was specifically told that he was casual when he queried not being paid on a public holiday. Mr Carroll responded that he had been waiting to sign a

contract for the last three weeks and asked if there was any way he could recoup his lieu day. The Trust subsequently chose to pay Mr Carroll for that day.

[14] On 21 November, after consultation with the DBH in particular about pay rates, Mr Wilson spoke to Mr Carroll about the new positions he was now offering in the house, which paid substantially less (\$15 per hour) and had changed working hours from week on/week off to a 12 hour roster system. Mr Carroll was provided, in writing for the first time, a proposed employment agreement. The positions were to commence on 2 December.

[15] When questioned later by his supervisor, Mr Carroll said that he was going to take the position but he was not prepared to sign the employment agreement. Mr Carroll was later told that the Trust was working to a very tight timeframe and he had to advise if he was going to accept the new contract well before 2 December, because if he did not accept the position, the Trust would only have three days to find a replacement.

[16] Mr Carroll was prepared to negotiate over the hours of work, but would not accept the \$5 per hour pay reduction offered. Mr Carroll sought advice and a grievance was raised on his behalf on 28 November for unjustified disadvantage. He indicated that he would be prepared to work the new hours, but wanted to be paid for 48 hours per week and retain his current pay rate of \$20 per hour.

[17] In its response, through its employment advocate (not its present representative), the Trust stated that Mr Carroll had only ever been employed as a casual reliever and that that position would no longer be available after 1 December. Despite that, Mr Carroll attended work on 2 December. Mr Wilson was advised by the employment advocate to tell Mr Carroll that he no longer had a job with the Trust as his casual employment had ended, which he did.

[18] Mr Carroll and the Trust attended mediation, but it was unsuccessful. Despite discussions between the parties during the course of the investigation, they have still been unable to resolve their employment relationship problem and therefore the matter falls to the Authority for its determination.

## The Law

[19] In *Lee v. Minor Child Developments Ltd* (unreported, Shaw J, AC52/08, 23 December 2008), the concept of casual employment is discussed in paras.[43] to [45]:

[43] *In the absence of any definition of casual employment in the Employment Relations Act 2000 the Courts have assessed whether employment is casual against the following characteristics:*

- *Engagement for short periods of time for specific purposes;*
- *a lack of regular work pattern or expectation of ongoing employment;*
- *employment is dependant on the availability of work demands;*
- *no guarantee of work from one week to the next;*
- *employment as and when needed;*
- *the lack of an obligation on the employer to offer employment or on the employee to accept any other engagement; and*
- *employees are only engaged for the specific term of each period of employment.*

[44] *The concept of casual employees being employed for a specific task and on an as required basis is akin to periods of fixed term employment. Such employment is provided for in s66 of the Employment Relations Act 2000. A genuine fixed term employment arrangement requires there to be an agreement on when the employment will end and this must be linked to specified dates or the conclusion of specific events or projects.*

[45] *The question of whether or not a person has been employed as a casual employee depends on the mutuality of the intention at the outset of the employment and the nature of the work including its regularity, its hours and the obligations imposed on the employee.*

[20] Clause 66 of the Act provides for fixed term employment and states:

- (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;*
  - (c) *to exclude or limit the rights of an employee under the Holidays Act 2003.*
- (4) *If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing –*
- (a) *the way in which the employment will end; and*
  - (b) *the reasons for ending the employment in that way.*
- (5) *Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.*
- (6) *However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1) –*
- (a) *to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or*
  - (b) *as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.*

## **Determination**

[21] As was clear from Mr and Mrs Carroll's evidence, there was no mutuality of intention at the outset about whether or not this was a casual job. There was a regular pattern of work over an extended period of time and as the contract with the DHB required staff other than casual, it is clear that this was not casual employment.

[22] Similarly, it is not a fixed term employment under s.66 of the Act in the sense that there was no agreement that the employment would end on the occurrence of any specified event such as the signing of a contract with the DHB. Certainly any such condition was not put in writing as required under s.66(4), and therefore even if there had been such an arrangement, the Trust could not rely on it to end Mr Carroll's employment, but that is exactly what it did.

[23] It therefore follows that Mr Carroll's employment must have been of indefinite duration and that the key terms were that he be paid \$20 per hour and work the shift arrangements as previously agreed.

[24] When the Trust naively considered that it could simply impose new terms of employment on Mr Carroll, a redundancy situation did not occur, but rather what followed was an attempt to unilaterally vary Mr Carroll's terms and conditions of employment. When he resisted that, he was dismissed and it follows that that dismissal was unjustifiable, because an employment agreement can not be unilaterally varied by one party.

[25] That is not to say that the Trust could not have decided to consult with Mr Carroll and reach an agreement on new terms and conditions or, in the absence of that, that his position may have been made redundant because of the new shift structure. Had the Trust gone down that track, Mr Carroll's employment may have ended around six to eight weeks later, although it is equally possible his employment may have continued under freshly negotiated conditions.

[26] I conclude that Mr Carroll has failed to fully mitigate his loss. He first limited his search for alternative employment to roles of exactly the same nature, which were necessarily very limited in the Hawke's Bay region. He did not until much later look for other work, the sort of which he has subsequently obtained, although his written evidence did not refer to it. As I am not satisfied that Mr Carroll has fully mitigated his loss some of the remuneration lost by him is not necessarily as a result of his personal grievance for unjustified dismissal. I therefore limit his lost remuneration to eight weeks, being \$10,368 gross.

[27] Mr Carroll suffered greatly as a result of the loss of his job. Because of an attempt to unilaterally vary his employment agreement he was shut out of his job, which led to great financial loss for his family, his wife and he having just moved to the Hawke's Bay. He is struggling to come to terms with what has happened to him after coming back to work with his Iwi and it is a fair conclusion that his dismissal led to him subsequently becoming clinically depressed. I therefore assess compensation in the sum of \$8,000.

[28] There can be no contributory conduct by Mr Carroll in this case. There is no blameworthy behaviour on his part in trying to retain his job under the same terms and

conditions he had been employed under for several months. There is also no issue of him failing to be responsible and communicative with the Trust.

[29] I therefore order the respondent, Te Taiwhenua o Te Whanganui a Orotu, to pay to the applicant, Mr Whiu Carroll, \$8,000 compensation under s.123(1)(c)(i) and \$10,386 gross in lost remuneration.

**Costs**

[30] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**