

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 344/09
5152620

BETWEEN ALEC DRAPER
 Applicant

AND MODERN TRANSPORT
 ENGINEERS (2002) LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Scott for Applicant
 Mark Flyger for Respondent

Investigation Meeting: 22 July 2009

Submissions Received: 1 September 2009 for Applicant
 4 September 2009 for Respondent

Determination: 24 September 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Alec Draper was employed by Modern Transport Engineers (2002) Limited (“Modern Transport”) from 16 September until his dismissal on 19 December 2008. Mr Draper says his dismissal was unjustified and seeks remedies. Modern Transport denies the claims. Modern Transport says Mr Draper was employed pursuant to a fixed term employment agreement which expired on 16 December 2008.

[2] There is no dispute Mr Draper was dismissed. Mr Draper seeks an order that the dismissal was unjustified. The test of justification is prescribed at section 103A of the Employment Relations Act 2000 (“the Act”). The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

Fixed term employment

[3] Section 66 of the Act allows parties to enter into fixed term agreements but requires the employer to have genuine reasons based on reasonable grounds for specifying that employment of an employee must end in the manner specified. These reasons are required to be included in the written employment agreement pursuant to subsection (4). These provisions are intended to avoid disputes such as the present case. As stated in *Borckett v Transpacific Technical Services (NZ) Ltd*¹:

Compliance with the writing obligation is a responsibility of the employer as s 66(6) makes clear, and failure to comply allows employees to elect to treat a term to end their employment at an agreed time or point as ineffective.

[4] The Authority has been provided with three signed employment agreements purporting to relate to Mr Draper's employment. They are dated, 28 August 2008, 8 September 2008 and 16 September 2008.

[5] The first agreement signed on 28 August was used for Mr Draper's application for a work permit with Immigration New Zealand. There is no dispute that the contract was a permanent contract. The agreement at clause 3.0 reads (verbatim):

This agreement shall come into force on or after the _____ and shall continue in force until the _____.

[6] The second agreement signed on 3 September, was also used for immigration purposes. The original agreement did not meet the requirements of the Holidays Act 2003 and Mr Draper was asked to have the document changed to reflect that Act. The agreement was updated and sent to Immigration New Zealand on 8 September. Clause 3.0 of this agreement states:

This agreement shall come into force on or after the 1st day of February 2005 and shall continue in force until the 1st day of February 2010. [my emphasis]

[7] Clearly this agreement was not the same agreement Mr Draper had originally signed on 28 August and the fixed term dates could not possibly have been intended to apply to him as the first date is 18 months prior to Mr Draper making any approaches to Modern Transport. I have concluded therefore that Modern Transport did not intend this second document to be of a fixed term nature, but rather was only intended to reflect the requirements of Immigration New Zealand. Mr Draper's work

¹ Unreported, [4 December 2007] Employment Relations Authority, Auckland, AA 382/07.

permit allowing him to work for Modern Transport was granted on 10 September 2007.

[8] The third agreement, which is the document Modern Transport relies on with regard to the fixed term nature of the employment, was signed on 16 September. This is the date Mr Draper commenced his employment with Modern Transport. Mr Draper also completed and signed a Tax Code Declaration and a Previous Medical History document.

[9] Mr Len Smith, a senior manager with Modern Transport says he got a standard employment agreement off the shelf when Mr Draper came into the office and took him through the document and asked him to sign it. Mr Smith says he was not aware Mr Draper had previously signed an employment agreement. Mr Smith also says he made alterations to the dates on the agreement at the same time, meaning that Mr Draper would only be working for Modern Transport for a fixed term period of three months.

[10] That agreement has had the words "...1st day of February 2005..." crossed out and the words "16th/09/08" have been handwritten above. Also the words "...1st day of February 2010..." have been crossed out and the words "16th/12/08" have been handwritten above. There is no written explanation in this clause, or elsewhere in the agreement, as to the reasons for the employment being fixed term.

[11] When he signed the third agreement Mr Draper never mentioned to Mr Smith that he had signed two other copies, however, Modern Transport must have been aware of the two previous documents as it had provided both documents to Mr Draper and had altered the clauses referring to the Holidays Act in the second contract as requested by Immigration New Zealand.

[12] It was this third document which Modern Transport says was a fixed term agreement and on which it relies to substantiate Mr Draper's dismissal. However, I am not satisfied this agreement is a genuine fixed term agreement. I have carefully examined the agreement and the only differentiation between this purported fixed term agreement and the permanent agreements previously signed by Mr Draper are the handwritten changes set out in paragraph [10] above.

[13] Reading the agreement as a whole, there are clauses in the agreement which tend to indicate that the employment was intended to be ongoing. For example, the agreement provides for annual holidays based on the requirements of the Holidays Act 2003 which anticipates the employee working for longer than 12 months, the sick leave provisions anticipate that the employee party to the agreement will be working for Modern Transport for at least 6 months, and the agreement provides for wage reviews to be undertaken annually.

[14] I find the position Mr Draper was offered and for which he signed his first employment agreement was a permanent position. He accepted that position on 28 August 2009. It was not until after he commenced his employment on 16 September that Modern Transport, through the actions of Mr Smith, has altered the term of his employment. However, I find the agreement does not meet the requirements s 66(4) of the Act in that the agreement does not specify the reasons for the agreement ending pursuant to a fixed term.

[15] In its submissions Modern Transport relies on a decision of the Court of Appeal² published on 2 May 2004, to support its contention that it provided Mr Draper with the required specificity through Mr Smith when Mr Smith says he discussed the reasons for the fixed term with Mr Draper on 16 September. Mr Draper denies Mr Smith mentioned anything about a fixed term and says the handwriting on the agreement produced to the Authority did not exist when he signed the agreement on 16 September.

[16] In any event, the decision of the Court of Appeal was effectively overruled by Parliament on 1 December 2004 when the Act was amended to specifically include subsections (4) and (6) and the requirement that reasons for the fixed term be in writing.

[17] It follows that Mr Draper was entitled, pursuant to s 66(6) to treat any provisions in his employment agreement purporting to end his employment on a specified day as being invalid. Any dismissal in reliance on the fixed term is therefore unjustified.

² *Norske Skog Tasman Limited v Clarke* [2004] NZCA 74.

[18] For all the forgoing reasons I find Modern Transport's actions and how it acted towards Mr Draper on 15 December were unjustified and consequently the dismissal of Mr Draper was unjustified in all the circumstances at the time.

Remedies

[19] Mr Draper seeks lost income from the date of his dismissal until the Authority's investigation meeting. I am satisfied Mr Draper took steps, as required of him, to mitigate his loss. He was successful in obtaining new employment on 8 April 2009. I find Modern Transport cannot be held liable for any lost wages resulting from the ending of that employment as it did not end as a result of any action by Modern Transport, but was a mutual agreement by Mr Draper and that company.

[20] Mr Draper is entitled to be reimbursed for wages lost as a result of the unjustified dismissal from 19 December 2008 to 7 April 2009 inclusive pursuant to s 123(1)(b) of the Act.

[21] I accept Mr Draper found his dismissal distressing. He had a new baby, and had just recently immigrated to a new country. He is entitled to an award to compensate him for hurt feelings consequent to his dismissal. I set that award at \$5,000 pursuant to section 123(1)(c)(i) of the Act.

[22] Section 124 of the Act requires me to consider whether Mr Draper has contributed to the circumstances which gave rise to his grievance. Mr Smith and Mr Ratcliffe for Modern Transport were clear in their evidence that Mr Draper was not meeting their standards for work. However, those matters were issues of performance. Mr Draper was not dismissed as a result of any performance issues, he was dismissed in reliance on a fixed term agreement, which I have found did not meet the requirements of the Act. Mr Draper did not contribute to that situation. I find there should be no reduction to the awards made to Mr Draper.

[23] Mr Draper also seeks the payment of interest on his lost wages. I have exercised my discretion pursuant to clause 11(1) of the Second Schedule of the Employment Relations Act 2000 and order Modern Transport to calculate and pay

interest, on the lost wages sum from 19 December 2008 until the date of payment at the rate of 5%.

Summary of orders

Modern Transport (2002) Limited is ordered to pay to Mr Draper within 28 days of the date of this determination:

- **a sum equal to Mr Draper's lost wages for the period 19 December to 7 April inclusive pursuant to s 123(1)(b) of the Employment Relations Act 2000 plus interest at the rate of 5%; and**
- **\$5,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.**

Costs

[24] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr Draper may file and serve a memorandum as to costs within 28 days of the date of this determination, with any submissions in reply to be lodged 14 days later. I will not consider any applications outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority