IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 113
5323605

	BETWEEN	BRETT FAHY Applicant
	A N D	NICHOLS GARDEN GROUP LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Maxine Knowler, Counsel for Applicant Allan Dippie, Advocate for Respondent
Investigation Meeting	18 July 2011 at Cromwell
Date of Determination:	29 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Fahy) alleges that he was unjustifiably dismissed from his employment by the respondent (Nichols). Nichols resists that claim and argues that Mr Fahy's employment agreement had come to an end by the effluxion of time.

[2] Mr Fahy was employed by Nichols working in its landscape gardening area in the Central Otago region. He was employed pursuant to an explicit fixed term agreement for the period from 23 November 2009 down to 23 February 2010. It is common ground that that agreement (which I will refer to throughout this determination as "*the first agreement*") complied with s.66 of the Employment Relations Act 2000 (the Act).

[3] It is what happened after the end of that first employment agreement that is in issue between the parties. Mr Fahy says that he had always understood it was Nichols' intention to eventually offer him full time employment, but he accepted without reservation that the initial engagement was on a fixed term basis and for

legally proper purposes. However, after 23 February 2010, Mr Fahy continued to work for Nichols. Nichols says that Mr Fahy and its agent, Steve O'Kane, entered into a subsequent fixed term agreement to run from the expiry of the first agreement down to 23 May 2010. Mr Fahy says there was no such agreement and in consequence, when he was told by Nichols in the third week of May 2010 that there was "*no more work for me*", he was unjustifiably dismissed.

[4] The parties attended mediation but were unable to resolve matters by agreement and the employment relationship problem proceeded to the Authority in the usual course.

Issues

[5] It will be convenient if the Authority examines first the nature of the second agreement and then considers what remedies, if any, flow from that conclusion.

What was the second agreement?

[6] I am satisfied on the evidence heard by the Authority that the second agreement was not a second fixed term employment agreement. The evidence on that point is as clear as can be. First, there is no agreement between the parties in terms of s.66 of the Act. That section requires that the parties enter into an agreement which identifies the terms of the engagement, its beginning and end, a genuine reason for the fixed term engagement, when and how the employment comes to an end and why.

[7] Nichols relies on a meeting which it says took place on 22 January 2010 at which it claims there was a comprehensive discussion between its Mr O'Kane and Mr Fahy covering broadly the requirements of s.66 and at the conclusion of that meeting or at some time during the meeting, Mr O'Kane is said to have annotated the first agreement schedule with the following words:

> *Fixed term contract extend for three months period to complete Coral Thompson Te Anau landscape project. Contract likely to terminate on 23 5 2010.*

[8] I was told by Mr Dippie and I accept that the writing of that annotation was Mr O'Kane's. However, Mr O'Kane was not available to the Authority to confirm his recollection of that supposed meeting; all Mr Dippie had to assist the Authority were notes that he told me (and I accept) were prepared for him by Mr O'Kane about what Mr O'Kane said happened, together with Mr Dippie's own notes about some

questions that he asked Mr O'Kane and which he says he faithfully recorded Mr O'Kane's response to. Again, I have no wish to impute any impropriety to Mr Dippie who did his best to assist the Authority and I accept what he told me.

[9] The difficulty for Nichols (and for the Authority) was that Mr O'Kane was not physically available himself to give that evidence. Mr O'Kane had been made redundant by Nichols and Mr Dippie told me that he did not think that he could get Mr O'Kane to give evidence. Certainly, Nichols knew the fixture was coming up and attended the investigation meeting without Mr O'Kane to give evidence. However, even if Mr O'Kane had given evidence which satisfied the Authority that his recollection of the events in question were clear and transparent, there was another huge problem.

[10] That was, that Mr Fahy, who according to Nichols was the only other person present at the 22 January 2010 meeting, had no recollection of the meeting and quite properly said to me in his evidence on oath that he thought he would have remembered a meeting discussing his employment future. I agree with that suggestion and while I must say that I thought Mr Fahy was a young man who saw things in reasonably black and white terms, I have no reason to think that he told me anything other than the unvarnished truth.

[11] Quite clearly, in the absence of any recollection by Mr Fahy of attendance or involvement in the 22 January 2010 meeting, the meeting at which, according to Mr Dippie for Nichols, the annotation to the first employment agreement was made, Nichols' argument immediately starts to fall away. The argument, such as it is, is further weakened by Mr Fahy giving clear and unequivocal evidence that he never agreed to a second fixed term engagement to expire on 23 May 2010 and that while he understood that the employment was continuing, he was completely unaware of any agreement for it to conclude at any particular time. As I endeavoured to make clear to Mr Dippie during the course of the investigation meeting, Nichols' failure was not just a failure to get signatures on a paper as Mr Dippie wanted me to accept; rather, the point about the legislative provision was to ensure that there was in truth a meeting of the minds on a contractual arrangement which was different from the norm and which, as a consequence, the Parliament had enunciated clear rules around documentation to avoid the possibility of abuse.

[12] Mr Dippie stoutly denied any wrongdoing on the part of Nichols and I certainly accept that there was no bad faith on the part of the employer. The statute provides rules to be followed by parties to ensure, in this case anyway, that there is no abuse of power by one party over another. Quite clearly, Nichols has not complied with the law and it follows from that conclusion that Mr Fahy's second employment agreement was not a fixed term agreement at all but was open ended.

Are there remedies due?

[13] Given my conclusion that Mr Fahy's second employment agreement was an open ended one, the manner of his dismissal was not, as Nichols maintains, simply the end of a fixed term engagement but rather was a peremptory sending away with effectively no notice at all. It follows that I am satisfied Mr Fahy has proved his personal grievance and is entitled to the usual remedies provided by the law.

Determination

[14] The claim for Mr Fahy is for loss of wages as a consequence of the dismissal together with compensation for humiliation and legal costs. In the particular circumstances of this case, I am prepared to deal with all of those matters, including the fixing of costs. In doing so, I observe that the legal costs sought on Mr Fahy's behalf seem higher than I would consider reasonable for a matter as straightforward as this, and accordingly I fix costs at a much lower figure than the $5,000 which is sought, particularly when there is no supporting information to justify that figure.

[15] However, before dealing with the fixing of remedies in total, I must first consider whether Mr Fahy contributed in any way to the circumstances giving rise to his grievance. I hold that he did not. He did receive two warnings during the employment; I am satisfied neither has a bearing on the dismissal, at least to the extent of being in any way a contributory cause of the precipitate end of the employment.

[16] To remedy Mr Fahy's personal grievance, I direct that Nichols is to pay him the following sums:

(a) Lost wages quantified at $2,100 net;

(b) Compensation under s.123(1)(c)(i) in the sum of $2,500;

(c) Legal costs of $1,500 recognising the very brief investigation meeting required and the Authority's usual practice of not requiring contribution to the costs incurred by a successful party in attending mediation. In the particular circumstances of this case as well, by the Authority's direction, no briefs of evidence were prepared so the amount of costs fixed by the Authority is ample.

James Crichton
Member of the Employment Relations Authority