

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Gail Irwin (Applicant)

AND Massey University of Wellington Campus (Respondent)

REPRESENTATIVES John Langford for the applicant
Peter Chemis for the respondent

INVESTIGATION MEETING 23 April 2001

DATE OF DETERMINATION 24 April 2001

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

1. In her original application filed with the Authority on 31 January 2001 Dr Irwin disputes the Massey University's move to make her position redundant. She says she is employed under a fixed term employment agreement the terms and conditions of which do not permit the respondent to effect an early termination of her employment. Dr Irwin originally asked for an order reinstating her to her employment. However, she subsequently accepted the termination of her employment on the basis that she would be able to challenge her dismissal for the reason set out above, i.e. it was in breach of her fixed term agreement.

2. Dr Irwin has filed an Amended Statement of Problem. It makes allegations of procedural unfairness in respect of the termination of her employment. Dr Irwin also reserves her position on whether her position was genuinely redundant. By agreement those matters will not be addressed in this determination but will be dealt with later, in light of this decision.

Investigation

3. The parties have already attempted mediation but without success. The gap between the parties' positions relate to their differing interpretation of Dr Irwin's employment agreement. There is no value in directing the parties back to further mediation.
4. By agreement an investigatory meeting was convened at 10.00 am, on Monday 23 April 2001. Dr Irwin was present as was her counsel and representatives of the respondent.
5. The parties reiterated their invitation that the Authority address only one issue, i.e. whether clause 12 of Dr Irwin's employment agreement was a redundancy or a compensation clause. Or, put another way, did the employment agreement provide for its termination before the expiry of its fixed term by the application of clause 12?
6. While raising an issue of relevance the respondent accepted the documents already before the Authority and in the "Applicant's Bundle of Documents". Neither party uplifted the Authority's invitation to present additional evidence through witnesses but instead spoke to their clients' respective positions and points of view.

Findings of Law

7. Like the parties, I agree that the answer to the employment relationship problem brought by Dr Irwin lies in her employment agreement. The original agreement is dated 18 December 1991. It is common ground that its correct date is in fact 18 December 1992. Nothing turns on this proofing error. The agreement was for a fixed term of five years, commencing on 11 January 1993 and expiring on 10 January 1998 (clause 2).

8. By letter of 28 September, 1998 and countersigned by the applicant on 30 September, 1998, Dr Irwin agreed to, what was then, the Wellington Polytechnic's offer to extend her employment agreement by another five years, from that day. Dr Irwin's agreement was now set to run until 6 October 2002. During that period Wellington Polytechnic merged with the respondent, Massey University of Wellington Campus ("the University").
9. In a memo dated 26 May 2000 Dr Irwin was reminded of earlier advice that her position would become surplus to requirement that year. A copy of a proposed new organisational chart was put to her along with an opportunity to comment. Confirmation of the disestablishment of Dr Irwin's position was communicated to her in a letter dated 20 September. It was proposed that she go on to a redeployment list for three months until 31 December 2000. In a letter dated 4 October Dr Irwin was formally advised her position would cease on 2 February 2001. In a letter dated 25 January 2001 Dr Irwin's counsel advised the University of his client's concerns about the proposal to terminate her employment agreement.
10. Unable to reach agreement themselves, the parties now ask the Authority for a determination as to the meaning of clause 12 of Dr Irwin's employment agreement, "Compensation for Termination of Contract". It, and a number of surrounding provisions, are as follows (verbatim):

"Termination of Contract"

- 9.1 *If at any time during the term of this Contract the employee shall be found guilty of any serious misconduct, or of any serious, material breach, or continued non-observance or non-compliance of the terms of this Contract, the employer shall be entitled, after considering the employee's explanation of the matter of complaint, to terminate this Contract by giving such written notice to the employee as the employer deems appropriate in the circumstances of the case fully outlining reasons for the termination.*
- 9.2 *Without limiting the generality or interpretation of sub-clause 9.1, the employer may, after considering the employee's explanation of the matter of complaint, terminate this Contract by giving such written notice to the*

employee as the employer deems appropriate in the circumstances of the case if the employee:

- (a) commits any act of bankruptcy or becomes insolvent*
- (b) behaves in such a manner which brings the employee, the Chief Executive, the Council or the Polytechnic into disrepute.*

9.3 Without limiting the generality or interpretation of sub-clause 9.1, the employer may terminate this Contract by giving such written notice to the employee as the employer deems appropriate if as a result of mental or physical illness the employee is rendered incapable of properly performing the duties of the employee under this Contract. Before taking any action under this sub-clause the employer shall require the employee to undergo a medical examination by a registered medical practitioner nominated by the employer, or if the employee wishes, two medical practitioners, one nominated by the employer and the other by the employee, and shall take into account any report or recommendations made available to it as a result of that examination and any other relevant medical reports or recommendations which the employer might receive or which may be tendered to the employer by or on behalf of the employee.

9.4 The employer will fix the date of termination under clause 9.3 to enable the employee to use all available sick leave.

10 Suspension

10.1 Where the employer forms the opinion that one or more of the grounds that would entitle the employer to exercise the powers of termination under sub-clause 9.3 may exist, the employer, by written notice to the employee, may suspend the employee from the performance of the duties under this Contract upon full remuneration but otherwise for such period and upon such conditions as the employer thinks fit, for the purpose of determining whether the employer should exercise the powers under sub-clause 9.3.

10.2 Notwithstanding the provisions of sub-clause 10.1, if the employer suspends the employee in accordance with that sub-clause, the provisions

of this Contract shall, subject to any necessary modification, continue to apply and bind the employee as if the employee had not been suspended.

10.3 *This Contract shall not be deemed to have expired by virtue only of the employer suspending the employee pursuant to sub-clause 10.1.*

11 **Non-Renewal of Contract**

11.1 *Where the employer decides not to renew the Contract at the expiry of the term of this Contract, the employer shall advise the employee, giving reasons in writing, of this decision not less than six months before the expiry date of the Contract.*

11.2 *If the employer fails to provide written notice to the employee in compliance with 11.1 above, the employer shall either:*

(a) *With the agreement of the employee extend the terms of this Contract by the difference between the period of written notice given prior to the expiry date, and six months; or*

(b) *On the expiry date of this Contract pay to the employee a sum equivalent to the difference between the base salary received by the employee since written notice of non reappointment was given to the employee, and the salary that the employee would have received had the employee continued to have been employed under this Contract for six (6) months from the date that written notice was given to the employee, at the base salary applying at the expiry date of the Contract. The payment of this sum of money is not an extension of the employee's Contract of employment.*

11.3 *If the employer decides not to renew the employee's contract of employment for reasons other than those specified in Clause 9, then the employee shall be compensated in accordance with sub-clause 12.2.*

12 **Compensation for Termination of Contract**

12.1 *If the employer terminates or purports to terminate the employee's Contract of employment for reasons other than those specified in Clause*

9, then the employee shall be paid compensation in accordance with sub-clause 12.2.

12.2 Subject to sub-clause 12.3 the employee shall elect to receive compensation calculated in accordance with either paragraph (a) or paragraph (b) below.

(a) The employer shall within thirty days from the date of termination of this Contract, pay to the employee a lump sum payment equivalent to the employee's salary or a lump sum payment equivalent to the employee's salary for the time the Contract has left to run, which ever is the lesser.

(b) The employer shall apply to the employee at the date of termination of this Contract the provisions of any deployment or redundancy agreement that applies to full-time employees under the Collective Contract Document 2137 "NZ Polytechnic Tutors Award".

12.3 The employee shall not be entitled to receive any sum payable under clauses 11 or 12 of this Contract, and the employer shall not give the employee any such sum if prior to the date of termination, the employee receives any reasonable offer of employment from the employer, or elsewhere in the Education Service (as defined in the State Sector Act 1988).

12.4 The employee shall not be entitled to receive payments or benefits under both Clause 11 and clause 12 of this Contract.

12.5 The employee acknowledges that the acceptance of the payment by the employer of the sum-payable to the employee under this Contract in the event of early termination of this Contract shall constitute full settlement of any claim the employee has or may have against the employer or against any agent of the employer for salary, compensation, special or general damages, interest or legal costs or disbursements or otherwise whether under any statute, at common law, in equity or otherwise and arising out of or in connection with the termination of the employment of the employee under this Contract."

11. At issue is clause 12 and sub-clause 12.1 in particular.
12. Mr Langford sets out the gist of Dr Irwin's position in his letter of 25 January 2001 to the University. At its core is the claim that a fixed term employment agreement cannot be terminated before its expiry date unless it expressly provides a means to do so or if Dr Irwin agrees: *Williams v Attorney General* [1999] 2 ERNZ 457. He argues that Dr Irwin's agreement provides no such provision. She has not agreed to an early termination. Counsel for the applicant reiterated his view that,

"Clause 12 seems to be an attempt to cap compensation, in the event of an early termination"

(letter of 25 January, above).

13. In arriving at this view, Mr Langford relied on the dicta of Goddard CJ (*Williams*, above, p470), that,

*"It seems not unreasonable to suggest that parties – notably, employers – have a choice between **stipulating** on the one hand for contracts of indefinite duration with provision for termination by notice which can be given in the event of redundancy, and on the other hand for fixed-term contracts which should then be expected to run their term in accordance with the contract."*

(emphasis added)

14. Mr Langford says that clause 12 does not stipulate that his client's employment agreement can be terminated within its fixed-term period because of redundancy. It is instead a compensation provision.
15. The respondent also relies on *Williams* (above). Predictably, Mr Chemis adopted a different view. In particular he drew attention to the comments of Goddard CJ, at p 470 also, that

"However, it was not suggested ... that it is not open to parties to enter into a hybrid contract which is for a fixed term duration but which can be terminated"

before the expiry of its terms upon the happening of events defined in the contract. One of these may be redundancy, as defined in the contract.”

16. Mr Chemis says the parties entered into just such an agreement. He readily conceded that Dr Irwin's employment agreement was inelegantly and imprecisely drafted. But, nonetheless, read in context and by implication, clause 12 could only be read as a redundancy provision. It existed for no other reason. It is not coincidental that clause 12.2(b) refers to redundancy and clearly provides for redundancy compensation. Clause 12.3 makes it clear that redundancy compensation is not payable in the event the employee receives a reasonable redeployment offer. In other words, clause 12.3 is a standard technical redundancy provision.
17. Properly, the respondent is not arguing that clause 12.5 can be used by the University to prevent Dr Irwin from attempting to recover any other losses.

Conclusion

18. I find in favour of the respondent for the reasons it has set out. In particular I accept Mr Chemis' contention that it is necessary to read the employment agreement as a whole (*Lowe Walker Paeroa v Bennett* [1998] 2ERNZ 558). By reading the entire employment agreement it can be seen the parties clearly envisaged that their relationship could be brought to an end within the contracted five-year fixed-term, for at least two undisputed reasons. They are:

First, the five-year fixed term period was expressly stated as being subject to clause 9, Termination of Contract. Clause 9 permits termination for cause with or without notice, for serious misconduct/breach of contract, bankruptcy/disrepute and ill health.

Second, Dr Irwin was free to terminate the agreement by giving three months notice of termination (clause 2.4).

19. It was in the parties' contemplation to terminate the employment agreement within its fixed term under certain circumstances. I am satisfied agreement was also reached on a third ground, that clause 12 also – but less clearly – provides for termination by

reason of redundancy. I reach this view after looking at the entire clause 'in the round' and because I cannot imagine what other lawful function it might serve. It cannot be there to sanction an action for no reason, as that would be repugnant to the nature of the contract (*Williams*, p470, above). I am satisfied therefore it, "... *specif(ies) as part of a bargain or agreement*" (definition of stipulate, Concise Oxford Dictionary, 1999) that Dr Irwin's employment agreement could be terminated before its term for redundancy.

20. I do not accept that clause 12.1 should be 'read down' in the manner proposed by Mr Langford. The interpretation he contends for goes against not only the contextual meaning of clause 12 when read in its entirety, but also against proper consideration of the complete employment agreement.
21. Counsel for the applicant contended that it was never his client's intention to enter into a redundancy arrangement. That may be so. Dr Irwin did not elect to give evidence on this matter. The University also offered no evidence as to its intention. Consistent with the parties clear wishes I was anyway satisfied that a proper interpretation of the disputed clause could be arrived at on its plain meaning and without resort to extrinsic evidence.

Determination

22. Dr Irwin's position was made redundant. I have not been asked to determine whether that redundancy was or was not lawful. Instead, the question put to the Authority by the parties is whether clause 12 of the employment agreement between Dr Irwin and the University is a redundancy provision that could be applied to terminate her contract before the expiry of its fixed-term. For the reasons set out above I am satisfied it is. Dr Irwin's application, as amended, is therefore declined and I find instead for the respondent.
23. By agreement costs were reserved. I urge the parties to settle this matter in the usual way, failing which the matter can be referred to the Authority.

Denis Asher
Member of Employment Relations Authority