

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 164
5504673

BETWEEN DUNCAN MACNAB
 Applicant

A N D MOUNT CAMPBELL
 COMMUNICATIONS
 LIMITED
 First Respondent

 LLOYD WENSLEY
 Second Respondent

Member of Authority: M B Loftus

Representatives: Paul McBride, Counsel for the Applicant
 Graham Downing, Counsel for the Respondents

Investigation Meeting: 28 April 2015 at Nelson

Submissions Received: At the investigation meeting

Date of Determination: 2 November 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Duncan MacNab, claims he was unjustifiably dismissed by the first respondent, Mount Campbell Communications Limited (Mount Campbell), on or about 10 August 2014.

[2] Mr MacNab also claims to have been unjustifiably disadvantaged in that Mount Campbell breached the employment agreement by not providing support or training and failed to review his performance in the course of his employment.

[3] Mr MacNab seeks penalties against both Mount Campbell and the second respondent, Lloyd Wensley (a director and majority shareholder in Mount Campbell), for these breaches.

[4] Mount Campbell's response is it acted in accordance with a fixed term arrangement the parties agreed when entering into the employment agreement. It adds that arrangement is not accurately reflected in the written agreement and seeks an order rectifying the agreement so it matches the intent of the parties. Mount Campbell contends this rectification will address the problems raised by Mr MacNab and render his claims nugatory.

Background

[5] Mount Campbell is in the business of providing radio communication products and services to clients in the Nelson, Marlborough and West Coast regions. In late 2013 Mount Campbell advertised for an account manager based in Nelson. Mr MacNab applied.

[6] At the time Mr MacNab resided in Queenstown but sought a return to his home town, Nelson. He accepts he did not possess all of the skills sought by Mount Campbell but felt he had sufficient experience to adapt into the role and perform adequately. Mr Wensley had doubts but decided to interview Mr MacNab as he was to be in Queenstown for other reasons. After the interview Mr Wensley concluded Mr MacNab was not suitable and did not offer the position.

[7] Mr MacNab, however, continued to pursue the possibility and telephoned Mr Wensley a couple of times. Those approaches led to a second interview when Mr Wensley next visited Queenstown.

[8] Mr Wensley says he decided to make a fixed term offer during the second interview despite concluding Mr MacNab lacked sufficient technical experience. He says he did so given he considered Mr MacNab had some skills which might benefit Mount Campbell and an understanding he was returning to Nelson in any event. He says *this would be beneficial to both of us as it provided my business with some cover and also provided Duncan with some employment on his return to Nelson.*

[9] Mr MacNab has a different view. He does not believe a job offer was made at the second interview. He says that during the interview he and Mr Wensley discussed

permanent employment but he was required to undergo a psychometric test before an offer might be made. He understood the test results erased some of Mr Wensley's doubts and led to a later telephone discussion about a fixed term arrangement.

[10] Irrespective of when it occurred, and given Mr MacNab's concession in this regard, there is no doubt an offer was made and a fixed term arrangement was discussed. What is not agreed is the outcome.

[11] Mr Wensley says *Duncan and I agreed that we would employ him for a six month fixed term. He verbally agreed to that. On 17 December 2013 I wrote to Duncan confirming that, and enclosing an employment agreement.*

[12] Mr MacNab says they discussed an initial fixed term of six months which would be used to ascertain his suitability for ongoing employment. If acceptable there would be a second six month fixed term arrangement to confirm his suitability and that would be followed by permanent employment. He says the expectation was, barring failure which was not envisaged, he would be employed permanently.

[13] The individual employment agreement records the employment was:

Fixed contract six months with extension of six months subject to review by both parties and thereafter subject to review a permanent position.

[14] The covering letter notes:

As agreed upon with you we are offering you a fixed six month employment contract. We would appreciate if you would review, and if you agree, sign it before commencement.

[15] Mr MacNab signed the employment agreement and commenced on 11 February 2014. The letter of offer also noted *we generally carry out annual reviews but in the first year we will review after three and six months.*

[16] In early May 2014 Mr MacNab approached Simone Nolte, Mr Wensley's personal assistant. He says he asked for a three month review and advised he wanted feedback on his progress and to raise concerns about the lack of a sales target along with other issues including a lack of information which would assist his performance. He says he told Ms Nolte that while not urgent the meeting had to occur.

[17] Shortly thereafter Mr MacNab had a couple of days sick leave for which he was paid at the time.

[18] On 6 June Mr MacNab was called to a meeting with Mr Wensley. He says he had no idea what the meeting was about and was left feeling terrible and confused when *Lloyd told me my contract was not going to be renewed and that I was to finish immediately at the end of the day. No reason was given.*

[19] Mr Wensley essentially agrees he did little more than tell Mr MacNab the employment was coming to an end. He says he had concluded the arrangement was not working and as he was willing to pay to the end of the six month fixed term he was simply ending the arrangement in accordance with the employment agreement. Mr MacNab was allowed to use a company car to which he had access for a few more weeks. He adds he thought the meeting cordial and that Mr MacNab seemed happy with the outcome.

[20] Shortly thereafter Mount Campbell advertised for what Mr MacNab considers was his replacement. Mount Campbell says the jobs were dissimilar.

[21] On 18 July 2014 Mr MacNab received an email from Mount Campbell. It reads:

As you know we agreed to employ you for a 6 months period and also paid \$700 towards your relocation costs. We are sorry the arrangement didn't work out and we have advised that we would not continue with the contract after 6 months and that we did not require you to work out the contracted period.

Whilst we of course will honour our legal commitments we would appreciate it if you could give some consideration to discharging us from our obligation and agree that no further payments are required.

We trust that you are having a good break and further employment is forthcoming.

[22] Mr MacNab said *no*.

[23] On 24 July Mr MacNab received a payslip with advice the payment for sick leave he had previously received had been reversed as he was not entitled to paid sick leave in the first six months. Mr MacNab replied that he was uncomfortable with the reversal. The following day Mount Campbell confirmed its view it could reverse the

payment. It finished the message by advising *It is unfortunate that your employment did not work out with us.*

[24] On 31 July Mr MacNab wrote to Mount Campbell. The letter is a detailed one of some three pages and raises various personal grievances including one of unjustified dismissal. It also enunciates, for the first time, a view the fixed term provision upon which Mount Campbell relies is invalid.

[25] Mr Wensley responded the following day. He says:

...
It seems that we are both under a misunderstanding.

To clarify the position:

You have not been dismissed.

I advised you that our intention at that time was not to renew your Employment Agreement after the end of the 6 month term that you agreed to.

You continue to be paid.

You continue to be employed.

While I thought I was being fair to you to give you time out of the office to look for possible work in the future, you have misinterpreted that and you are now trying to use that against me.

In such circumstances, I require you to return to the office.

As a first step to resolve this misunderstanding and what now appears to have become a dispute, could we please meet at 11am on Monday 4th August at my office...

[26] Mr MacNab replied that he was happy to return and could be there at 8am. He went on to say he would not be able to attend a meeting at 11am as he had to arrange a time suitable for his support person who would be in attendance. He says he would confirm availability which would most likely be on Tuesday. He then asks what time he should come on Monday before reiterating his view *The requirements for a valid fixed term did not and do not exist.*

[27] Mr Wensley's response was to advise that as Mr MacNab had raised a dispute he considered it appropriate it be settled as a first step. He said he could meet Monday afternoon or Tuesday at 11.00am.

[28] As a result Mr MacNab did not return but the parties met in what was essentially a without prejudice discussion on 6 August. The following day, 7 August, Mount Campbell's solicitors wrote to Mr MacNab. Advised therein is a view that:

The basic problem here is that both parties entered into the written Employment Agreement under a common mistake. Both parties agreed to the employment being for a six month term, with an option for an extension if both parties agreed...

However, towards the end of the six month period you have discovered that a mistake was made in the formal written agreement that you both signed, and that the formal written Agreement does not accord with the intention of the parties, and has created a permanent Agreement. You have attempted to take advantage of that mistake by now lodging a grievance.

What you may not be aware of is that sections 162 and 164 Employment Relations Act enable the Employment Relations Authority to make an order under the Contractual Mistakes Act 1977 and/or under the law of rectification where the written Agreement does not accord with the common intent of the parties at the time it was agreed. In other words, the normal principles of contract law apply to an employment agreement, and you cannot take advantage of a mistake in the wording of a written agreement.

[29] The letter goes on to advise Mount Campbell would proceed on the basis the fixed term was valid and Mr MacNab's pay would cease on 10 August 2014.

[30] The parties also agreed to attend mediation in September but their differences remained unresolved hence the present investigation.

Determination

[31] As already said Mr MacNab claims he was unjustifiably dismissed. Mount Campbell's response, as summarised in the letter quoted in [28] above, is it acted in accordance with the parties agreement and rectification can address any deficiencies in the relevant documentation.

[32] There can be little doubt the parties entered into a fixed term arrangement. Mr MacNab conceded as much in his written brief (refer [12] above) and when answering questions during the investigation. Further confirmation is contained in the letter through which he raised his grievance where he refers to the offer of a fixed term agreement. He says he had some concerns about what he describes as an unorthodox arrangement before conceding he decided he *would back himself and make it work*.

[33] However Mr MacNab's concessions and the way they are framed raise a supplementary question - what was the purpose behind the fixed term arrangement? It is clear from Mr MacNab's evidence he considered the fixed term arrangement was to ascertain his suitability for ongoing employment.

[34] Mr Wensley was questioned about this. His initial answers suggested the decision was driven by a view the salary Mr MacNab sought could not be justified by his skills and Mount Campbell needed to ascertain whether there was sufficient business to warrant an ongoing relationship. The answers were, however, offered with a degree of reticence and I must say they created a level of uncertainty regarding the exact reason for the fixed term agreement(s).

[35] Further probing elicited a clear concession from Mr Wensley that one factor, indeed a significant factor, influencing the decision to offer a fixed term agreement was that it allowed an opportunity to ascertain whether or not Mr MacNab was suitable for the job.

[36] Therein lies a significant problem for Mount Campbell. Section 66(2)(a) of the Employment Relations Act 2000 (the Act) states the parties must have genuine reason for agreeing a fixed term arrangement. Section 66(3)(b) states that establishing the suitability of an employee for permanent employment is not a genuine reason.

[37] Mr Wensley's concession in this regard renders invalid the clause upon which Mount Campbell relies as justifying the decision to dismiss. Reliance on the clause is the sole explanation Mount Campbell tendered in support of its decision to dismiss. In the absence of any other justification the dismissal must be found to be unjustified.

[38] Section 66(3)(b) of the Act also precludes a positive response to Mount Campbell's claim for rectification. There is absolutely no justification for ordering the inclusion of a clause that is unlawful. It could not, in the circumstances, be enforceable and could not be used to justify what Mr Wensley's concessions have confirmed to be unjustifiable.

[39] Turning to the claim Mr MacNab was disadvantaged by Mount Campbell's failure to provide support or training and that it did not review his performance as promised during the course of his employment.

[40] Mount Campbell offered little evidence in response to these claims save to say, via Ms Nolte, that Mr MacNab advised her at the time he was not worried whether or not the meeting occurred.

[41] When questioned Ms Nolte resiled from the evidence above and conceded Mr MacNab had said the meeting must occur. It didn't and given the inclusion of a provision expressly stating there would be a three month review I conclude there was a breach.

[42] That said I find it difficult to take the matter further. Mr MacNab offered little evidence about how the breach affected his employment to his disadvantage. There is also no evidence he pursued the lack of a review or otherwise attempted to raise his other concerns with Mount Campbell. Nor is there any evidence about hurt that emanated from these issues as opposed to the dismissal.

[43] In the circumstances no remedies would be likely to accrue and there is no possibility I would be inclined to consider a penalty. A penalty is generally imposed where there is reckless or deliberate disregard of ones' obligations. Mr MacNab's failure to pursue the failures means I accept Mount Campbell's evidence it was not aware of the problem(s). This means their failure to address them is far from reckless or deliberate.

[44] The evidence is it was the dismissal that gave rise to the hurt Mr MacNab suffered. In that respect Mr MacNab seeks twelve months lost wages and a total of \$35,000 under section 123(1)(c)(i) of the Act. The claim under section 123 is divided into two parts - \$15,000 for hurt emanating from Mr MacNab's unlawful and unjustified exclusion from the workplace and \$20,000 for the dismissal.

[45] I shall not distinguish the compensatory claim as Mr MacNab has. The exclusion claim has its roots in an assertion the fixed term was invalid and therefore its use constituted an unlawful exclusion from the workplace when Mount Campbell tried to rely on it. That, to me, is something that has exactly the same effect as the dismissal, especially as the latters justification was the existence of a valid fixed term agreement.

[46] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time

remuneration. Additional amounts may be awarded on a discretionary basis and Mr MacNab asks that I exercise this discretion and award a year's salary.

[47] Mr MacNab bases this claim on the fact he had extreme difficulty in obtaining alternate employment and felt compelled to shift towns. That said the claim for twelve months wages faces some severe impediments. The key point is Mr MacNab chose to establish his own business which has been providing an acceptable and liveable return since February 2015. This would preclude any claim beyond that point in time.

[48] To that I add the fact Mr MacNab decided to establish his new business in early November 2014 (approximately three months after the dismissal) and stopped applying for jobs at that time. There is then Mr MacNab's own concession some of his difficulties were attributable to his age. Age discrimination on the part of others cannot be visited upon Mount Campbell.

[49] Having considered the evidence I conclude there is no justification in adding to the three months prescribed in the Act and will order reimbursement accordingly. Three months salary is, according to the employment agreement, \$16,750.

[50] Turning to the compensation claim. Mr MacNab offered evidence about the effect his dismissal had on him. While it was not as strong as I might have expected it was supported by others who knew him and it was from this direction the stronger evidence emanated – especially that of a friend with psychiatric nursing experience who evidenced a significant level of hurt suffered by Mr MacNab.

[51] Having considered the evidence I conclude an award of \$10,000 to be appropriate.

[52] Finally there are claims for penalties for breaching section 66 against both Mount Campbell and, on the basis he aided and abetted the breach, Mr Wensley. This is not a claim that will succeed. While it is clear a breach occurred it is once again difficult to consider it a reckless or deliberate attempt to undermine Mr MacNab's rights. Mount Campbell had a problem – it did not consider Mr MacNab suitable but was persuaded to give him a try. It then sought to protect its position and did so by using the fixed term. Furthermore that was an approach Mr MacNab accepted.

[53] It is evident that had Mr MacNab not agreed to the fixed term there would have been no employment. While wrong it was Mount Campbell's way of protecting itself while possibly assisting Mr MacNab and not an act of malicious wrongdoing. It is enough that this has led to Mr MacNab's success with his personal grievance and I am not inclined to add the further imposition of a penalty in the circumstances.

Conclusion and orders

[54] For the above reasons I conclude Mr MacNab has a personal grievance as he was unjustifiably dismissed.

[55] As a result the respondent, Mount Campbell Communications Limited, is to pay the applicant, Duncan MacNab, the following:

- i. \$16,750.00 (sixteen thousand, seven hundred and fifty dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[56] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority