

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 362
5086506

BETWEEN

IAN McAULEY
Applicant

AND

CARTER HOLT HARVEY
LIMITED
Respondent

Member of Authority: Dzintra King

Representatives: Anne-Marie McNally, Counsel for Applicant
Elizabeth Coats, Counsel for Respondent

Investigation Meeting: 31 May 2011 at Rotorua

Submissions received: 8 and 22 June 2011 from Applicant
14 June 2011 from Respondent

Determination: 17 August 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Ian McAuley, says that he was a permanent employee and that two of the four fixed term employment agreements he entered into were invalid.

[2] The applicant says he has been denied benefits he would have received had he been a permanent employee and that he is entitled to be compensated for a number of benefits available to permanent employees:

- Redundancy compensation;
- Payment of the employer contribution to superannuation;
- Interest related to superannuation;

- Medical insurance for the applicant and his wife;
- Life insurance for the applicant and his wife;
- Earnings protection insurance;
- Interest on the above;
- Compensation of \$4,000

[3] The respondent, Carter Holt Harvey Limited (“CHH” or “the Company”) says the applicant was employed on valid fixed term contracts and that his employment was terminated in accordance with the terms of the last fixed term contract.

[4] The respondent says the applicant’s employment was terminated in accordance with a genuine fixed term agreement and that he has no entitlement to any remedies.

Background

[5] The applicant is a professional fire fighter.

[6] The respondent operates a pulp and paper mill in Tokoroa. The respondent employed a crew of professional fire fighters who were based at a fire station at the entrance to the Kinleith estate.

[7] For some time CHH had been considering restructuring and in March 2002 proposed a site wide restructuring proposal – Project Green.

[8] Amongst the proposed changes was a plan to have production employees act as fire fighters, with a reduction in the number of full time fire fighters. Fire fighters were part of emergency services. Consultation on this proposal continued until December 2002.

[9] Mr McAuley was offered and accepted a fixed term agreement on 29 November 2002.

[10] The first stage of the restructure, the outsourcing of Maintenance to ABB Limited, took place in January 2003.

[11] On 24 February 2003 Mr Jim Newfield, the National Environment Manager, wrote to Mr Mike Sweeney, the Northern Regional Secretary of the Engineering Printing and Manufacturing Union (“the EPMU” or “the Union”) advising that the Company was investigating contracting out the emergency services. The Union accepted this as part of the company’s continuing attempts to restructure emergency services and the applicant accepts that the second fixed term agreement offered to and accepted by him on 7 March 2003 was a genuine fixed term agreement. This agreement expired on 31 May 2003.

[12] On 7 March a 90 day strike by production employees started. The Company’s proposal to use production workers in fire fighting roles was an issue in the collective bargaining then taking place.

[13] In May 2003 a new collective was settled. An important aspect of the settlement was that the Company withdrew its proposal for production workers to carry out fire fighting duties. Consequently, there were no proposed redundancies of fire fighters flowing from the redeployment of production staff.

[14] Under the heading “**Consultation**”, the terms of settlement referred to immediate challenges faced by the Company and provided that “*The review of the Fire Service would fit into this category of challenges.*”

[15] The restructure of Operations was complete on 7 June 2003.

[16] On 18 June 2003 Mr McAuley was offered a third fixed term agreement. This provides:

This agreement and the work performed under it will cease on completion of the Kinleith Restructure. It is expected that implementation of the proposed changes will occur following 31 August 2003. The temporary role undertaken under the terms of this agreement will cease on the implementation of the new structure.

[17] This is the critical point. The applicant says that at this point the restructuring of the fire service lapsed. The respondent says the restructuring of emergency services was an outstanding matter and consultation regarding that continued.

[18] The third fixed term agreement expired on 31 August 2003.

[19] A new fixed term agreement, dated 29 August 2003, was offered to and accepted by Mr McAuley. This differed from the previous agreements in that there was no reference to a date, only to an event. The agreement provides:

Accordingly, we would like to offer you a fixed term Agreement commencing on 5 September 2003 and terminating on the event of the completion of the restructure.

[20] On 20 August 2003 Mr Newfield wrote to Mr Sweeney:

Kinleith Emergency Services

I refer to our meeting yesterday. It was a pity we did not get a chance to properly discuss the issues confronting the company in relation to emergency services at the mill. I look forward to setting some further dates and discussing the issues.

Despite past conversations on this issue, I think it is fair to say we are “back at the drawing board” in respect of emergency services at Kinleith. Until we have jointly discussed our respective perceptions of the current state of affairs, it is premature for anyone to draw conclusions as to the eventual outcome.

The discussion should encompass all emergency services functions at Kinleith, i.e, those associated with the occupational health centre, the fire brigade, and the appropriate parts of the security function. The objective is to design and implement an integrated, modern, effective, and cost efficient emergency service. Removal of unnecessary cost is a desired outcome....

*From the company’s perspective, the important first step is to get the right people around a table to define the problems that need to be addressed. ...
Please could you advise me of dates that would be suitable to your team for a first meeting on this topic.*

[21] The respondent says that not too much should be read into this letter. However, it is clearly a reflection of how the company saw matters regarding the emergency services at that stage.

[22] By 18 June, when Mr McAuley was offered the third agreement, there were no longer any particularised proposed changes. Nothing in the oral or documentary evidence provides a proposal or a plan.

[23] It is clear that the Company wished to continue to review emergency services but that is not the same thing as having a specific plan or proposal. The proposal regarding the use of production workers had been withdrawn and the letter clearly shows that any past proposal had lapsed. It is difficult to interpret the words “*back at the drawing board*” and the reference to a first meeting in any manner other than one

consistent with a recognition that a new set of proposals needed to be arrived at after discussion by the parties.

[24] It was not until 6 April 2004 that Mr Paul Weaver sent Mr Sweeney the “*principles*” for a new integrated service model; and it was only on 11 January 2005 that Mr Newfield advised Mr Sweeney that there was a proposal for restructuring that could be put to the employees.

[25] Subsequently attempts were made to negotiate changes but these were unsuccessful.

[26] In 2006 the Company met with the Union and advised that it was considering outsourcing and that negotiations would cease, to be followed by consultation on the outsourcing proposal.

[27] In February 2007 a letter was sent to staff regarding the commencement of consultation and the new restructuring proposal remained active until its implementation.

[28] On 4 April 2007 the Union notified CHH of a personal grievance by Mr McAuley on the grounds of disadvantage.

[29] The proposal that was started in February 2007 came to fruition on 14 December 2007 when notice of termination was given to affected staff.

[30] Section 66 Employment Relations Act 2000 provides:

- (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.

[31] Subsection (2) provides that an employer must have genuine reasons based on reasonable grounds for specifying that the employment is to end in a particular manner.

[32] At the time that the third agreement was entered into, the Company did not have a sufficiently specific proposed event upon which to base a fixed term agreement. There was no particularised proposal in place at that time.

[33] The Company continued to wish to review and implement changes to its emergency services. However, a genuine but general desire to effect change is not sufficient to bring the provisions of s66 into effect. That is why there are references to specificity in s66 (1).

[34] I find that the third and fourth fixed term agreements were not valid and that Mr McAuley was a permanent employee.

[35] That leaves the issue of when that took place. I do not have a specific date as to when the Company withdrew its claim regarding the production workers. I conclude that upon settlement of the CEC in May 2003 Mr McAuley was a permanent employee.

[36] At the hearing the parties indicated that they would be willing to attempt to resolve the issue of remedies. If they are unable to do so leave is reserved to return to the Authority on that matter.

Costs

[37] The parties should attempt to also resolve the issue of costs. If they are able to resolve the matter of remedies but wish the Authority to determine costs, the applicant should file a memorandum 28 days after the parties have reached agreement on remedies. The respondent should file a memorandum in reply 14 days after receipt of the applicant's memorandum.

[38] If the parties are unable to resolve the matter of remedies, I will set a timetable to deal with the issue of costs in my determination regarding remedies.

Dzintra King

Member of the Employment Relations Authority