

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Maureen McCarthy (Applicant)
AND Television New Zealand Limited (Respondent)
REPRESENTATIVES Andrea Halloran, Counsel for Applicant
Christopher Eggleston, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 23 May 2002
DATE OF DETERMINATION 5 June 2002

DETERMINATION OF THE AUTHORITY

The applicant, Ms Maureen McCarthy, claims that she has been unjustifiably dismissed by the respondent, Television New Zealand Limited. The respondent asserts that there has been no dismissal as the applicant was employed on a genuine fixed term contract and further that she indicated on a number of occasions that she was not interested in renewing the contract. The applicant claims that the respondent was under an obligation to consult with her prior to employing her ex-husband in a position in which she had to report to him and he would be able to have an adverse impact on her employment. The respondent says there was no reporting relationship. The applicant also claims that the respondent had an obligation to consult with her about the continuation of the position and that the respondent did not consider properly reasonable alternative placements once she raised with the respondent that she was unhappy about the appointment of her ex husband.

Ms McCarthy initially worked for the respondent in a freelance capacity. She approached TVNZ wanting more secure employment with hours that would enable her to care for her son. Mr Hedges, the Head of Operations, offered her a six month contract for thirty hours per week and indicated that if the position were to become permanent it would need to be contestable at that point. He said the reason for the fixed term nature of the contract was the uncertainty over the continued in house provision of editing services. Ms McCarthy accepted the contract on that basis.

Ms McCarthy had previously applied for the position of Team Leader Editing. She had not been successful in her application. During the term of her six month contract Mr Adam Bains, Ms McCarthy's ex-husband, was appointed to that position. Ms McCarthy was extremely distressed about this as she was concerned that the appointment would result in increased contact between them (Mr Bains had already also been working at TVNZ) and that his appointment would affect her detrimentally.

Mr Mark Cathie is the Edit Manager for TVNZ and Ms McCarthy reported directly to him. I am satisfied that this direct report did not change with the appointment of Mr Bains. Mr Cathie said that Ms McCarthy spoke to him on a number of occasions about her dissatisfaction with her role and that the remuneration was 'crap'. He said she also told him on a number of occasions that she did not know whether she wanted to continue with it past the expiry date of the contract. This was both before and after the appointment of Mr Bains.

After Mr Bains was appointed Mr Cathie and Ms McCarthy had a number of meetings. On 29 June she asked Mr Cathie whether Mr Bains could influence or change any of the things she might want to initiate. Mr Cathie told her he would have input and he hoped they could work together. She was also concerned that Mr Bains might influence her remuneration level or have knowledge of it. Mr Cathie assured her that he would have no impact on her conditions of employment.

On 9 July Ms McCarthy met with Mr Cathie and told him she did not want to be in the same room as her ex-husband and she did not want to seek an extension of her contract. On 12 July Ms McCarthy again stated to Mr Cathie that she would not be renewing her contract. He asked her if she wanted to freelance in an editing capacity and she said she did not and he was not to bother to contact her about it. She also asked what would be her responsibilities and those of Mr Bains and Mr Cathie reiterated that Mr Bains would have no influence over her remuneration.

Mr Cathie and Ms McCarthy said that when Mr Bains started there were some problems which, in Mr Cathie's view, had to do with unfamiliarity in Mr Bains' part. He spoke to Mr Bains about the problems that Ms McCarthy had raised with him and he agreed to alter his behaviour. Mr Cathie said he believed problems arose from Ms McCarthy's refusal to communicate with Mr Bains and that matters reached the point where he either had to act as go-between or confront Ms McCarthy. As her contract had a short period to run he chose the former.

Obligation to consult prior to appointment of Mr Bains

The applicant originally contended that the respondent had an obligation to consult with her prior to appointing her ex-husband. Section 22 (1) (a) Human Rights Act prohibits an employer from refusing to employ a person on any of the prohibited grounds which include a party to a marriage now dissolved (s.21 (1) (b) (iv)).

As I understood the applicants position she later accepted that the Privacy Act and The Human Rights Act prevented this but she contended that there was an obligation to consult once the appointment had been made in order to determine how the relationship would work. The applicant also posited the proposition that the respondent should have asked Mr Bains to waive his privacy rights so the matter could have been discussed with Ms McCarthy prior to his appointment. Ms Halloran said this was particularly so given that Mr Bains had expressed concerns about his appointment would impact on his relationship with his ex-wife. While I accept that Mr Bains did express such concerns I find that these were expressed after he had accepted the appointment not prior to that.

If there is a possibility of violence or there is a non molestation in force then clearly the mutual obligations of trust and confidence in the employment relationship (leaving aside the legalities of the non molestation order scenario) could require an employer not to employ a particular person. That would be a health and safety issue. Mere bitterness or anxiety occurring as a result of the dissolution of a marriage or relationship I do not think is sufficient.

To deny someone employment on one of the prohibited grounds is a very serious matter. It could not be solely on that ground. There would have to be some additional factors and I am not

convinced that such factors exist in this case. In the absence of such factors I do not see on what legal basis the applicant can contend that there was an obligation to consult with her about her ex husband's employment.

In the course of employment people sometimes have to come into contact with people they do not like and do not get on with. This is unfortunate but is a reality. Unless one person behaves towards another in a manner that disadvantages that person the fact is that people have to learn to live with such situations. If the conflict is at a stage where there are performance issues or health and safety issues then the employer must investigate the matter and ultimately make a decision as to who is to stay and who is to go. However, in a situation where there is a mere anticipation that detriment may arise that cannot be sufficient to justify a refusal to employ a person.

The right to be employed and not to be discriminated against is a fundamental right. The fact that the human Rights Act contains an express prohibition on discriminating in employment against ex-spouses must, I think, place a prohibition in circumstances such as the ones in the instant case, on the employer doing anything that might tend to indicate an intention to discriminate. Why would an employer consult with an ex-spouse prior to appointment if not with the possible intention of discriminating against the applicant?

TVNZ did know that Ms McCarthy and Mr Bains had been married. It would be a rare relationship that comes to an end without some degree of acrimony, bitterness, anger and upset ensuing from the dissolution. Unfortunately, there is nothing unusual in this. Mr Cathie said Ms McCarthy had discussed certain details of her relationship with him but that he had respected her confidence and not conveyed this information elsewhere. That was entirely proper. Mr Hedges was not privy to any detail and Mr Cathie was not in a position to provide it to him. The only person who could have done so was Ms McCarthy. In the absence of Mr Hedges having any information that there was anything particularly unusual in the circumstances of Ms McCarthy's relationship with her ex-husband Mr Hedges had no obligation to consult with her.

Failure to deal with the situation fairly

Ms McCarthy told Mr Cathie that she had concerns about the appointment. She suggested two ways whereby she felt she could be protected from any adverse influence being exercised by Mr Bains. One was a transfer to the IT Team and the other a transfer to the Tech Services Team. Mr Cathie took her concerns and proposals to Mr Hedges and they were considered. Mr Hedges reached the conclusion that any transfer would not result in Ms McCarthy having a lesser degree of contact with Mr Bains (Ms McCarthy accepted that that was so) and would create some difficulties. He also felt that in terms of a buffer one already existed because Ms McCarthy reported to Mr Cathie not to Mr Bains. There was evidence that since Ms McCarthy's departure some of her job functions had been taken over by the Team Leader and others by staff within Tech Services. I accept Mr Hedges' evidence that the difference was that all the Tech Services staff were carrying out some of the functions rather than, as with Ms McCarthy's proposal, one person doing all of the duties.

I think it was unfortunate that Mr Hedges did not personally report his decision back to Ms McCarthy rather than leaving it to Mr Cathie to convey the outcome. While I understand that Mr Cathie was Ms McCarthy's direct report it would have been considerate of Mr Hedges to have gone to Ms McCarthy himself. However, I cannot find anything unreasonable in Mr Hedges' decision not to move Ms McCarthy to another team. It was apparent to me during the meeting that Mr Cathie and Ms McCarthy had had a good relationship and that Mr Cathie had a genuine concern for Ms McCarthy's wellbeing and would have done what was necessary to protect her should any such eventuality have arisen.

This is attested to by the fact that when Mr Bains initially took up his appointment he intruded into areas that had been Ms McCarthy's. When she raised this with Mr Cathie he spoke to Mr Bains and Ms McCarthy herself accepted that matters improved.

Was there a genuine fixed term contract?

Ms McCarthy contended that TVNZ did not have genuine reasons based on reasonable grounds to put a fixed term employment contract in place. It was also submitted that the reasons for her employment ending had to be in writing.

I will deal first with the genuine reasons issue. In New Zealand Merchant Service Guild Inc & Ors v Pacifica Shipping (1985) Ltd, unrep, GJ Wood, 24 August 2001, WA 26A/01 a number of employees had been employed on fixed term contracts for continuing periods of up to two years. The claimed rationale for the fixed term contracts was that the company was uncertain as to whether it would be able to continue operating four ships and therefore did not want to employ staff on permanent contracts. In that case there was a collective employment contract that had set out the criteria for employing staff as relieving or temporary officers and the criteria specified by the company were clearly outside the contractual criteria. The Authority held that the threatened redundancy situation had been in place for three or four years and as there was no sign of it changing Pacifica did not have genuine reasons for employing staff on fixed term contracts. Ms Halloran argued that the situation was the same as the one in the instant case.

Ms McCarthy had been contracted to TVNZ as a consultant dealing with AVID for two and a half years. The number of hours for which she was contracted had increased from an initial ten to twenty. She approached Mr Hedges and told him she needed at least thirty. He was reluctant to offer that number of hours to a consultant but indicated he decided he would establish a tentative position for Ms McCarthy as an employee on a thirty hour per week basis. He told her that he could not establish it as a permanent position at that stage because the future of editing at TVNZ was uncertain. It had not been decided whether TVNZ would continue to provide AVID services in-house, whether it would contract them out or whether it would engage in some form of joint venture. Mr Hedges said it was expected that a decision would be made in the near future.

Mr Hedges told Ms McCarthy that he could offer a position for six months during which time a decision on the future of editing should be available. If at the end of that time no decision were available or the editing department was definitely to remain in some form a business plan would be prepared before the end of the fixed term to assess whether the position could be justified on a permanent basis. I do not think this situation is analogous with the Pacifica one. I accept that the editing area had been "under a cloud" for some time. However, TVNZ had not employed staff on fixed term contracts and kept rolling these over. This was the first time a position for an employee had been offered and it was intended that a decision be made on the future during the duration of the contract. No decision was made and Ms McCarthy was not consulted about the future as she said it had been agreed she would be. I will deal with this later. At this stage, suffice it to say that this came about because of Ms McCarthy's reaction to the appointment of Mr Bains. TVNZ had genuine reasons based on reasonable grounds for specifying a fixed term contract.

Is there a requirement for the rationale to be in writing?

The next issue is whether the rationale for a fixed term must be provided in writing. I am aware that the Authority found this to be the case in Pacifica Fishing (supra). Section 65 Employment Relations Act 2001 states that an individual employment contract must be in writing and may contain such terms and conditions as the employer and employee think fit. Section 65 specifies

certain elements that must mandatorily be included in an individual contract. Section 66 dealing with fixed term employment contracts does not state expressly that the specified date period or the specified event or project must be in writing. Neither does it expressly state that the rationale for the fixed term must be put in writing. Section 67, however, which deals with probationary arrangements does state expressly that the fact of a trial or probationary period must be in writing. It would be a very unwise employer who would not put the date or event or project into the contract in writing. It may be that the failure to state that the end date and the rationale must be in writing is a legislative oversight. The only requirement is that the employer advise the employee of when or how the employment will end and the reasons for that. A person can be advised verbally. Ms McCarthy was advised of the reasons.

Was there a dismissal?

Ms McCarthy accepted that the contract was for six months and that if it were to be made permanent she would have to apply. Given that I have found that there was a genuine fixed term contract it is evident that the employment came to an end because of the expiry of the contract term. Ms McCarthy worked till the end of the term and so there cannot have been a dismissal.

If I had found that the contract was not a genuine fixed term contract I would not have been able to find that Ms McCarthy had been constructively dismissed. I could not have found that the employer breached her contract in any way. As I have already indicated the employer had no obligation to consult with Ms McCarthy about the appointment of her ex-husband and no obligation to consult with her after his appointment. The employer reasonably considered her proposals for transfer and rejected them. It was entitled to do this. When Ms McCarthy raised concerns about Mr Bains' intrusion into her work the matter was dealt with.

Ms McCarthy also said she should have been consulted about the continuation of the position. Ms McCarthy made it abundantly clear that she not interested in continuing in the position. Mr Hedges said nothing further happened because Ms McCarthy had indicated that she did not want to continue and also that she did not want further consulting work as long as Mr Bains continued to be employed. It was perfectly reasonable for Mr Hedges to conclude that consultation in such circumstances would have been a pointless exercise.

Ms McCarthy does not have a personal grievance.

Costs were reserved. I suggest that in the first instance the parties try to resolve this themselves. If they are unable to do so leave is reserved for the respondent to file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of Employment Relations Authority