

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 54
5333439

BETWEEN PAULA MARIE McGREGOR
Applicant

A N D WAIMAKARIRI DISTRICT
COUNCIL
Respondent

Member of Authority: M B Loftus

Representatives: Robert Thompson, Advocate for Applicant
Michael Prisk, Advocate for Respondent

Investigation meeting: 4 October 2011 at Christchurch

Submissions Received: At the investigation meeting

Date of Determination: 30 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Paula McGregor, claims she was unjustifiably dismissed from her employment with the respondent, Waimakariri District Council (the Council), on 24 December 2010.

[2] Ms McGregor also claims that she was unjustifiably disadvantaged in her employment in that she was not permitted to participate in promised training activities. It should be noted that this claim differs from that originally pleaded and results from clarifications sought during the investigation meeting.

[3] The Council's position is that Ms McGregor could not have been dismissed given her status as a casual employee. As such, she was engaged on an as-and-when required basis and her cessation on 24 December was the natural conclusion of one such engagement.

[4] The Council rejects any suggestion that it entered into an agreement to provide training to Ms McGregor.

Background

[5] Ms McGregor commenced with the Council on 8 June 2010. She was engaged as an assistant animal control officer, though the parties agree that the arrangement was, at that time, intended to be temporary with Ms McGregor replacing an employee who was on leave for a period of five to six weeks. The arrangement, as originally entered into, was that Ms McGregor would work approximately two hours each morning on five or six days of the week and it is accepted there would be some flexibility as a result of fluctuations in the number of animals at the pound.

[6] The individual employment agreement between the parties identifies the position as casual and provides that:

- a. *Because of the nature of the work provided, the Employee may be offered work on an "as and when required basis" and can have no expectation of ongoing or regular employment. The Employee has the right to accept or refuse an offer of work.*
- b. *Each period of work is separate and there is no continuity of employment from one term to the next.*

[7] As events transpired, the employee whose absence Ms McGregor was covering returned but Ms McGregor simply continued to attend at the workplace as before. This situation continued for approximately two weeks, at which point Ms McGregor was called to a meeting with Mr Chris Goldsmith, the Council's senior animal control officer, and Mr Les Pester, the Council's environmental services manager.

[8] Ms McGregor says:

I was informed by Les that I had done a good job and I had performed my duties to a high standard. I was then advised that I would be kept on and I would retain the same hours I had while [S] was taking annual leave. I was advised that the Respondent would assist me in gaining the qualifications I would require for a full time job as an Animal Control Officer, namely gaining Level 2 National Certificate in Animal Control. I was advised that it was anticipated there would be a vacancy in June/July 2011. It was explained to me that the respondent would fund any associated courses and assist me to achieve the appropriate qualifications for the full time position. I was very excited by this opportunity.

The training consisted of me completing practical hours carried out under supervision. Les Pester stated that he would like to be able to offer me more hours, but at present my hours and days would remain the same at around 11 hours per week. However, he did add that there would be a further review around Christmas to see if my hours could be increased ... I had no doubt in my mind, that when I left this meeting that I was to be employed on a permanent basis and that I would continue to do my 11 hours per week.

[9] The Council, however, has a very different view about what occurred at that meeting which the parties agree occurred on a date neither can specify but was in late September.

[10] Mr Pester stated in oral evidence that the meeting was about *where to from here*. He agrees that he thanked Ms McGregor for her efforts and that he recognised that she had worked hard for the team. He advises, by way of background, that he was of the view that the then present staffing of two animal control officers should be increased to three but states that he was facing resistance as that would require an increase in fees. That said, he felt he was *getting there* and there were indications that his proposal for a staff increase would be accepted with effect the commencement of the 2011/12 budget year in June 2011 and, as events transpired, that is what eventuated.

[11] In the interim, he saw an opportunity to allow the two permanent animal control officers to perform more work in the community by retaining Ms McGregor and he therefore asked whether she would be willing to stay on until Christmas. He adds that he does not remember any mention of training other than an agreement that he would source course documents for Ms McGregor to peruse, but he does accept that he was encouraging Ms McGregor to apply for the new animal control officer position when it eventually came up.

[12] Mr Goldsmith, again in oral evidence, advises that he was about to commence a period of leave and that he understood that Ms McGregor's arrangement would be extended to cover his absence, though he accepts that that rationale was not mentioned. He says that Mr Pester did most of the talking and informed Ms McGregor that her arrangement could continue till around Christmas but that there was no discussion about what would happen then. He adds that he tried to advise Ms McGregor about the best way to gain her animal control qualifications, but was of the view that Christchurch City Council offered a better avenue for success as a result of its size.

[13] The meeting was followed by a letter from Mr Pester to Ms McGregor dated 1 October 2010. It reads:

I would like to take this opportunity to thank you for your input into the animal control operations; I know that Chris speaks highly of your commitment, and attention to detail.

It is intended at this stage that we continue your employment of approximately 11 hours per week working at the pound on an unchanged casual basis until around Christmas only, whereupon a review will be carried out into our resource requirements for the upcoming 2011 to 2012 financial year.

It is envisaged within this budget process an allocation will be confirmed to employ a qualified animal control officer commencing soon after July 2011 on a full time basis. This position will be advertised and applications invited at the time.

If it remains your intention at this later date to seek this type of employment, I would be pleased and encourage you to make yourself available for this process.

Once again thank you for your valuable contribution.

[14] Ms McGregor accepts that she received the letter but claims that she understood the review referred to a reconsideration of the hours she would work and not whether or not the arrangement would continue.

[15] The arrangement then continued, though it appears there were a couple of issues over which some tension may have arisen. The first involves a disagreement over the level of exercise that the dogs should have been allowed and there was another about the recording of payments made by members of the public to release their dog from the pound. Here it should be noted that I am not suggesting there are any allegations of wrongdoing on Ms McGregor's part. Indeed, and with respect to the recording of payments, it was she who was seeking a more rigid process than that then applied by the Council.

[16] There was also some interaction over the *training* that Ms McGregor believes she was entitled to. It would appear from the evidence that she made various requests in this respect but the responses were, at least from her perspective, confusing and incomplete. It was her view that nothing was received whilst the Council is of the position that nothing was owing, as nothing was promised. That said, the Council was of the view Ms McGregor should take steps to improve her chances of attaining a full time animal control position and claims it was encouraging her to do so.

[17] As indicated earlier, it was Ms McGregor's belief that the Christmas *review* would simply address the number of hours she worked and she had no suspicion that it could lead to the cessation of her employment. She also adds that the letter of 1 October created an expectation that she would be consulted and have an opportunity to discuss any proposed changes. The events of 24 December therefore came as a shock. She says:

On the morning of 24 December 2010, I was almost finished at the kennels when Chris arrived and asked if I could call in to see Les Pester before I left work. On arrival at the office I waited for around 10 minutes until both Chris Goldsmith and Les Pester were free to see me... The door remained open at all times, I had no idea what the meeting was about and I was not aware that the respondent was considering making decisions that ultimately affected my employment.

I had no time to prepare for this meeting and I certainly was not given any prior warning regarding the changes they had determined before the meeting. I was told that I was no longer required to work and they cited budgetary constraints as their reason. In total disbelief I turned to Les Pester and said, "So that's it, no more work" and he replied, "Yes". I had the company property removed from me by Chris Goldsmith and I was escorted from the premises immediately through the main office...

[18] Mr Pester states that his failure to have his proposal for a third animal control officer position approved (by that time) and a lack of additional funding precluded the continuation of the Council's arrangement with Ms McGregor. He believes he was capable of acting unilaterally given the arrangement that had been discussed late September and confirmed in the letter of 1 October. He does, however, add that he wanted to thank Ms McGregor for the job that she had done and to wish her well for the future and states that was the reason he called her to his office on 24 December 2010. He says that he offered to write a reference and also encouraged her to spend the next six months trying to obtain a Level 2 National Certificate in Animal Control as this would place her in a competitive position should approval finally be given for the employment of a third animal control officer in the next financial year.

[19] Both Mr Pester and Mr Goldsmith deny escorting Ms McGregor from the premises but they accept she appeared shocked and upset by the advice that the arrangement would not continue. They say she went silent, did not partake in the discussion and that it was she who wanted to leave immediately.

[20] Ms McGregor's challenge, which ultimately led to this investigation meeting, was raised soon thereafter.

Issues for determination

[21] There are two issues that require determination. They are:

- i. What was the nature of Ms McGregor's relationship with the Council – casual, as stated in the employment agreement, or something different; and
- ii. Was there a dismissal and if so, can the Council justify it?

Determination

[22] Underpinning Ms McGregor's application is her belief that notwithstanding her initial engagement as a casual, the nature of the arrangement changed during the meeting that occurred late September. That such changes can occur is well accepted; see, for example, *Barnes (formally Kissell v Whangarei RSA (Inc.))* [1997] ERNZ 626 and, more recently, *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225.

[23] To ascertain whether or not the arrangement had changed requires an examination of issues such as intent, work patterns and the obligations imposed on the parties.

[24] In this case the written agreement characterises the relationship as casual and contains a definition of casual that is consistent with a normal understanding of such an arrangement. That definition recognises that casual engagements are offered on an ad-hoc and irregular basis and that there is no obligation that the employee accept any particular offer of work.

[25] I must express a doubt that the arrangement ever complied with the definition. From the outset the work was rostered, with an expectation that Ms McGregor be available five days a week (predominately Tuesday to Saturday) and that she work at least two hours on the weekdays. While there was some flexibility over the actual hours worked each day, and especially the Saturday, even the start time was set and there was a discussion during the investigation meeting over a process whereby the time was altered. Given the rationale for the agreement, namely the temporary

replacement of an absent permanent, I am of the view that notwithstanding the label applied this always had the appearance of a fixed term arrangement.

[26] The fixed term nature of the arrangement was, from my perspective, confirmed by the agreement under which it was continued from late September. I reach this conclusion given the evidence of Messrs Pester and Goldsmith, which I accept given the support of the key contemporaneous document. The letter of 1 October 2010 clearly advises that the arrangement, which was still labelled casual, will continue *until around Christmas only*. That is clearly an arrangement of finite tenure. When I combine the finite tenure with consistent days of duty, fixed start times and consistent patterns in respect to the length of daily attendance which totally undermine the idea this remains a casual arrangement, I conclude that it became fixed term if it were not already so.

[27] In reaching this conclusion, I do not suggest that Ms McGregor is making a misleading claim. I conclude, given her evidence and obvious desire to continue her work with the dogs, that it was case of mistakenly hearing (or otherwise interpreting) Mr Pester's comments as a message she wanted to hear.

[28] The Council was of the view that it had a casual arrangement that could be terminated at will and they felt justified in doing so given a lack of on-going funding that was required to support Ms McGregor's retention. They acted on their belief and attempt to justify the decision accordingly.

[29] The conclusion that the arrangement was really fixed term in nature means that this is, in fact, a dismissal and not the expiry of a casual engagement means that approach will prove deficient. This is a dismissal and the Council is required to justify it.

[30] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, that the question of whether a dismissal is justifiable

... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[31] That test is used as the cause of action arose prior to the present test coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments

are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[32] Whilst I have just said that the test of justification applicable as of 1 April 2011 is not that to be applied here, I believe it appropriate that it be referred to. I do so given a view that the new tests' content, or at least subsections (b) to (d) inclusive, succinctly codify that which case law has, for many years, considered the basic requirements of a fair process. The new provision requires that:

(3) In applying the test in subsection (2), the Authority or the court must consider—

...

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[33] There was no simply no compliance with the above requirements, indeed nothing that vaguely complies though that is not, in the circumstances, surprising.

[34] Nor can the Council rely on the fixed term nature of the relationship. Section 66 of the Employment Relations Act 2000 specifies that a fixed term can only be relied upon to justify a dismissal if there is a written agreement that expressly provides a statement about the way the employment will end and why. The letter of 1 October fails in this regard (it does not give a definitive rationale but instead talks about a review which will not have applicability until some future date, namely the commencement of the 2011/12 financial year) and there are no other compliant documents though, once again, this is not a surprise given that the Council did not consider this to be a fixed term arrangement.

[35] In such circumstances I must conclude that the dismissal was unjustified.

[36] I do not accept the unjustified action claim. It is clear that the Council never considered this to be a permanent arrangement and, as indicated above, I accept their evidence in that regard along with the rationale proffered in support. It defies logic to therefore consider they would have offered training consistent with an ongoing

permanent relationship. Again I consider Ms McGregor mistaken and having been enticed into her understanding of the arrangement by her desire to attain a permanent role at the pound. That said, I am not surprised she had the view she did given the evidence confirms the Council indicated approval of, and support for, her quest to gain the required qualifications.

[37] The conclusion Ms McGregor's dismissal was unjustified means a consideration of remedies is required. The Statement of Problem advised that she sought reinstatement, lost wages, unpaid holiday pay and an unspecified amount as compensation for humiliation etc (s.123(1)(c)(i) of the Act).

[38] The claim for reinstatement is, in this instance, pursued with some vigour. At the time the cause of action arose, and at the time the application was filed, reinstatement was a prime remedy. It no longer is, with the change occurring as a result of amendments to the Act effective 1 April 2011 (see s.125 of the Act).

[39] In this instance I conclude it appropriate to proceed on the basis that reinstatement remains a prime remedy. I do so given s.7 of the Interpretation Act 1999 and the fact there is nothing in the Act which provides that the amended s.125 be applied retrospectively.

[40] The previous s.125 provides that reinstatement, when sought, be granted *wherever practicable*.

[41] I do not consider it practical in this instance and reach that conclusion for three reasons:

- i. First, a considerable period of time had passed between the dismissal and the progressing of this claim. That, in my view, mitigates against reinstatement;
- ii. More importantly, there is no position to reinstate to. Notwithstanding the debate as to whether the arrangement was casual or fixed term, there can be no doubt that it was going to come to an end as there was no finding capable of supporting its continuance; and

- iii. The replacement that was being considered, and for which funding was subsequently provided, required a qualified animal control officer. While Ms McGregor clearly sought the requisite qualifications and the Council appears to have supported her quest, she did not complete the task and would therefore be precluded from being reinstated to the new position.

[42] Turning to wages. Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration.

[43] The fact I have concluded that this was a fixed term arrangement but that the Council can not rely on that to justify the dismissal means that there is an on-going loss that must be addressed. Ms McGregor gave no evidence in chief about attempts to seek replacement employment and when asked during the meeting her answer was that she had been making attempts, albeit unsuccessfully. Against this I noted her evidence that she had not given up the hope of reinstatement to the pound and her partner's evidence that she put her life on hold. This leaves me questioning the extent of her efforts and the extent to which she complied with her duty to mitigate. In such circumstances I consider an award of three months appropriate.

[44] During her period of employment Ms McGregor worked an average of 10.22 hours per week. Her average weekly hours would, if applied over a three month period, result in a loss \$2924.10. I consider that an appropriate award.

[45] Now to compensation. Ms McGregor gave considerable evidence about the shock she felt at her termination and the effect it had had on her. Indeed I must say that even if I were to accept the Council's views about tenure and its rights, the evidence would lead me to conclude the unheralded announcement of cessation to an employee whose efforts the praise was somewhat brutal. Against that I must balance the fact that the outcome should not, had she read, comprehended and questioned the letter of 1 October, come as the shock it did. In the circumstances, and given the evidence, I consider an award of \$4000 appropriate.

[46] The claim regarding holiday pay was not discussed or pursued in the investigation meeting. Suffice to say that Ms McGregor's employment agreement

reflects the provisions of the Holidays Act 2003 and requires an additional payment of 8% of gross earnings. If that sum has not been paid, it should.

Orders

[47] For the reasons given the following orders are made:

- (i) The respondent, Waimakariri District Council, is to pay to the applicant, Ms Paula McGregor, the sum of \$2,924.10 (two thousand, nine hundred and twenty four dollars and ten cents) as reimbursement of wages lost as a result of the unjustified dismissal;
- (ii) The Council is to pay the applicant a further \$4,000.00 (four thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- (iii) The Council shall, if it has not already done so, pay holiday pay in accordance with Ms McGregor's employment agreement.

Costs

[48] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event that Ms McGregor wishes to seek a contribution toward her costs, she is required to file an application within 28 days of this determination. A copy shall be served on the Council which should file any response it may wish to make within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority