

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Mike McRoberts, Applicant

**AND** Television New Zealand Ltd, Respondent

**REPRESENTATIVES** Garry Pollak, Counsel for Applicant  
Jennifer Mills, Counsel for Respondent

**MEMBER OF AUTHORITY** W R C Gardiner

**INVESTIGATION MEETING** 13 March 2001

**DATE OF DETERMINATION** 14 March 2001

**DETERMINATION OF THE AUTHORITY**

**Background**

Mr McRoberts' Statement of Problem was filed in the Authority on 23 February 2001. The file was assigned to me on 26 February. I met with the representatives of the parties on 5 March. This matter had not been in mediation but having heard the views of the parties via their representatives, I formed the view that mediation would not contribute constructively to resolving the matter. Mr McRoberts believes he can depart from his employment. Television New Zealand Ltd does not accept that that is so. There is no middle ground or room for compromise apparent in that equation.

We set the matter down for investigation and determination by the Authority. We agreed the date of 13 March for the investigation meeting. The Statement in Reply was received on 9 March 2001.

The employment contracts applicable to these parties were agreed to prior to the enactment of the Employment Relations Act 2000. There is some debate among practitioners as to whether such documents continue to be called contracts for the duration of their term or instead became "agreements" as at 19 August 2000. For the purposes of this determination nothing turns on an esoteric matter such as this and for my purposes I will refer throughout to the documents as contracts.

**Mr McRoberts' Problem (1) The Interpretation Dispute**

Essentially Mr McRoberts and his employer are in dispute about the application, operation and interpretation of certain provisions of their employment contract.

It is common ground that Mr McRoberts is not covered by the 30 June 1999 – 1 July 2001 Collective Employment Contract. It is common ground that he was covered by the now expired 1 November 1995 – 31 October 1997 Collective Employment Contract. It is also common ground that his Individual Employment Contract dated 20/6/2000 is labelled a “CEC – linked contract” and that it provides as follows:

*“IT IS AGREED between TELEVISION NEW ZEALAND LIMITED at Auckland and its successors and assigns (“TVNZ”) and the Employee referred to in Clause 1 (“the Employee”) that TVNZ shall employ the Employee subject to the following terms and conditions, and to the terms and conditions of the 1995/97 Collective Employment Contract.”* (my emphasis)

What this all means is that Mr McRoberts is covered by an individual employment contract. The terms and conditions of that Individual Employment Contract are to be found in part in the document dated 20/6/2000 and in part in the expired 95/97 Collective Employment Contract. While not strictly according to Hoyle, it is going to be a convenience for me from here on in to refer to the first document as the IEC and the second document as the CEC.

Mr McRoberts has been offered a job by another employer. He wants to accept that new job offer. He believes that he is able to resign from his present employment and depart from that employment earlier than 31 December 2001.

Television New Zealand Ltd, on the other hand, says that he has contracted himself to stay with them until 31 December 2001 and they wish to retain his services until that date. Television New Zealand Ltd does not accept that Mr McRoberts can depart prior to that date.

At the heart of their dispute is Clause 8 of their individual employment contract. However, for the sake of completeness, I now set out Clauses 5, 8, 10, 11 (first two paragraphs) and 14 of the Individual Employment Contract.

“5. **TERM:** TVNZ engages the Employee’s exclusive services for the following term, unless terminated earlier under the terms of this contract: *From 1 January 2000 till 31 December 2001*  
*Nothing contained or implied in this contract creates a commitment by either party to an ongoing employment relationship.”*

“8. **TERMINATION:**  
*Both TVNZ and the Employee commit to each other for the period of this contract and each party agrees that they will not terminate this contract for reasons other than the physical or mental incapacity of the Employee, provided that TVNZ may terminate this contract with or without notice if the Employee is guilty of any neglect of duty or misconduct which justifies dismissal; or is convicted of any criminal offence punishable by imprisonment.*

*If the Employer terminates this contract prior to the end of the Term of this contract, TVNZ will pay to the Employee an amount equivalent to the remuneration due for the balance of this contract to a maximum of twelve months remuneration, unless otherwise agreed.*

*If the Employee terminates this contract prior to the end of the term of this contract, unless otherwise agreed the Employee will pay to TVNZ the least of the following amounts:*

- *an amount equivalent to the remuneration due for the balance of this contract, or*
- *an amount equivalent to six months remuneration, or*
- *an amount equal to the costs incurred by TVNZ by the early termination of this contract.*

*If any individual or organisation makes any offer of employment to the Employee during the term of this contract, the Employee will advise them of the existence of this contract.”*  
(original emphasis)

**“10. NOTICE:**

*Any notice to be given by either party to the other shall be in writing and shall be delivered personally or to the address as follows:*

*TVNZ: PO Box 3819, Auckland  
The Employee: As specified in “Clause 2”*

**“11. COMPLETE AGREEMENT:**

*This contract, including the terms and conditions of the Collective Employment Contract, contains all enforceable conditions of employment and supersedes all previous agreements and contracts (of service or for services) dated prior to this contract between TVNZ and the Employee. This contract shall not be changed or modified except by written agreement of the parties.*

*The Employee warrants that no prior contract or agreement of any kind entered into by the Employee will interfere in any manner with the complete performance of this contract.”*

**“14 EXCLUSIVE SERVICES:**

*The Employee agrees that during the term of this contract they shall not render business services to anyone other than TVNZ except with the approval of TVNZ. The Employee agrees to devote their best efforts to the business of TVNZ and to the faithful performance of the duties and responsibilities as may be assigned.”*

**Mr McRoberts’ Problem (2) Validity of the Contract**

Mr McRoberts in his Statement of Problem says that:

*“I believe I can lawfully resign.”*

That statement essentially addresses his view on the interpretation dispute (see prior chapter). Separately to that, however, he maintains that:

*“...if my contract is for a fixed term and I cannot resign as my employer has instructed me, then given that it has been “rolled over” for some years it is not a valid and enforceable fixed term contract and the enforcement of such a contract would be an abuse of a contractual provision.”*

**Mr McRoberts' Problem (3) Legality of the Contract**

Mr McRoberts then goes on in his Statement of Problem to say that:

*"Additionally I believe my contract insofar as the way in which my employer wishes to enforce it is unlawful pursuant to the Illegal Contracts Act 1970."*

**Mr McRoberts' Problem (4) His employer refuses to negotiate a departure**

I mention this only for the sake of completeness.

In his Statement of Problem Mr McRoberts complained that:

*"I have attempted to negotiate unsuccessfully with my employer about my departure. However, my employer refuses to negotiate any of the three "amounts" as specified in Clause 8."*

*and*

*"My employer refuses to negotiate an amount to terminate the contract."*

I mean no disrespect to Mr McRoberts when I say that I am not going to get worked up over this head of complaint at this time. The reality of the situation is simply this. Mr McRoberts believes he can resign and wants to get on with it. Ergo he wants to sort out with his employer what the Clause 8 "departure tax" will amount to.

In my finding Television New Zealand Ltd are not being bloody minded in declining (I use Mr McRoberts' words) *"to negotiate an amount to terminate the contract."* To do so would obviously be inconsistent with their position in this matter. Television New Zealand Ltd does not want to lose him prior to 31 December 2001 and does not accept that he has the right to resign and depart earlier than that date. Ergo, from their point of view no negotiation is called for.

Television New Zealand Ltd may be right or may be wrong in their interpretation as to what the contract provides, but it is not my finding that in refusing to negotiate an earlier departure, the employer (again I use Mr McRoberts' words) has not treated him in good faith.

**The remedy sought by Mr McRoberts**

In his Statement of Problem Mr McRoberts said that:

*"I would like the problem over my contract resolved by the Authority by determining the application, operation and interpretation of the agreements and conducting an enquiry into my employer's actions and conduct towards me and enquiring into and/or determining the "amount", if any, I am to pay to my employer when I resign."*

Let me deal with the last part of that first. I explained to Mr Pollak (and Ms Mills) at our 5 March preliminary meeting, that in the event I determined that Mr McRoberts could resign, I would not be able to determine the amount, if any, he would have to pay pursuant to Clause 8. The reason for that is self-obvious.

Clause 8 provides that “unless agreed otherwise” the payment to be made is the least of:

(i) An amount equivalent to the remuneration due for the balance of the contract;

or

(ii) An amount equivalent to 6 month’s remuneration;

or

(iii) An amount equal to the costs incurred by TVNZ by the early termination of the contract.

The reality is that as Mr McRoberts has not as yet tendered his resignation, I don’t know when he will depart (assuming he is able to) and therefore I don’t know which of the first two above options is greater than the other. And additionally, I don’t know what cost will be incurred by Television New Zealand Ltd by an early termination. Finally, Clause 8 (by using the words “unless agreed otherwise”) contemplates the possibility that a departure arrangement other than the three listed above, can be agreed by the parties. And presently, stuck as they are in polarised positions, the parties are scarcely able to negotiate any form of “otherwise agreement”.

What all this means is that if I decide (as Mr McRoberts contends) that he is able to resign and depart prior to 31 December, I will not be able to determine the amount, if any, he must pay his employer when he resigns.

The reality is simply this. If I find for Mr McRoberts, Television New Zealand Ltd will either head for the Countrywide Building in Queen Street or will sit down with Mr McRoberts and identify the appropriate “departure tax” from the smorgasbord available in Clause 8 of the Individual Employment Contract.

### **DETERMINATION OF THE DISPUTE**

Fundamentally the issue between Mr McRoberts and TVNZ is a dispute. The Employment Relations Act 2000 defines a dispute as being:

*“a dispute about the interpretation, application or operation of an employment agreement.”*

In Clarke and Cleeve v Vita New Zealand Ltd, unreported oral decision AEC 21/97 dated 17 March 1997, Colgan J addressed the task with commendable brevity as follows:

*“This case is fundamentally one of interpretation of an employment contract. Accordingly, the task of the Tribunal and the Court is as has been established in a number of recent cases one of which, Northern Distribution Union (Inc) v 3 Guys Limited [1992] 3 ERNZ 903, will suffice for the purpose of reference. If the words of the contract are clear and unambiguous, resort to extrinsic evidence should not be permitted for interpretative purposes. Plain words must be given their ordinary meaning unless this would result in an absurdity. The Court’s function is to seek to ascertain not what the parties may have meant to say but rather the meaning of what they said. An ambiguity in the interpretation of a contract (and an employment contract in particular) cannot be created simply because it is contended by one party that such exists. The*

*object sought to be achieved in construing any contract is to ascertain the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they sought to express them: Lewison's The Interpretation of Contracts (1989) Para 1.02 adopting the words of Lord Diplock in Pioneer Shipping Ltd & Ors v BTP Tioxide Ltd [1982] AC 724. The Court must construe a written agreement in the light of the circumstances surrounding its making: Quainoo v NZ Breweries Ltd [1991] 1 NZLR 161.*

**My examination of the dispute is as follows:**

- (1) I say immediately that I am able to determine this matter from the words that are written in the contract and that I have not needed to resort to extrinsic evidence.
- (2) Where a Collective Employment Contract (CEC) and an Individual Employment Contract (IEC) both apply, the appropriate start point is with the parent document (the CEC). That is because it follows that what is in the CEC will apply unless it has been varied by provision(s) of the IEC.
- (3) At Clause 1.11 of the CEC provision is made for the existence of fixed term employees. The relevant provision reads as follows:

*“Fixed Term Employee shall mean an employee engaged for a specified limited term or for a specified project or to replace an employee who is on parental leave. Where there is an Individual Employment Contract for a fixed term, there shall be no expressed or implied obligation on either party to renew the contract at the end of the term.”*

There is nothing in that provision which establishes that the fixed term cannot be “unfixed” or “sooner curtailed” by either of the parties.

- (4) Clause 2.7 of the CEC is headed “Period of Notice of Termination” and provides as follows:

*“Where an employee wishes to terminate employment with TVNZ or TVNZ wishes to terminate the employment of an employee, a period of notice of four weeks in the case of no fixed term or fixed term employees, or one week in the case of casual employees is required except that this may be varied by mutual agreement. Where there is no mutual agreement TVNZ shall make a payment or the employee shall forfeit pay in lieu of such notice. Employees will normally be employed on probation for an initial period of 12 months (or longer where qualification provisions apply). Where an employee is on probation, either party may terminate the employment at two week’s notice.”* (my emphasis)

This clause envisages that fixed term contracts can be “unfixed” or “sooner curtailed” by either of the parties.

- (5) I now turn to the IEC.
- (6) At Clause 5 the IEC contracts the parties to work with one another for a two-year period, 1 January 2000 to 31 December 2001.

- (7) Nevertheless, IEC Clause 5 also contemplates earlier cessation of the employment by including the words:

*“Unless terminated earlier under the terms of this contract.”*

- (8) Clause 10 of the IEC also contemplates an earlier cessation of the employment. Clause 10, “Notice”, provides as follows:

*“Any notice to be given by either party to the other shall be in writing and shall be delivered personally or to the address as follows:*

*TVNZ: P O Box 3819 Auckland  
The Employee as specified in Clause “2”*

If the “fixed term” could not be unfixed or sooner curtailed, then there would be no need whatsoever for reference in the contract to the giving of notice.

- (9) All of which leads us to Clause 8 of the IEC, which provides as follows:

***“TERMINATION:***

*Both TVNZ and the Employee commit to each other for the period of this contract and each party agrees that they will not terminate this contract for reasons other than the physical or mental incapacity of the Employee, provided that TVNZ may terminate this contract with or without notice if the Employee is guilty of any neglect of duty or misconduct which justifies dismissal; or is convicted of any criminal offence punishable by imprisonment.*

*If the Employer terminates this contract prior to the end of the Term of this contract, TVNZ will pay to the Employee an amount equivalent to the remuneration due for the balance of this contract to a maximum of twelve months remuneration, unless otherwise agreed.*

*If the Employee terminates this contract prior to the end of the term of this contract, unless otherwise agreed the Employee will pay to TVNZ the least of the following amounts:*

- *an amount equivalent to the remuneration due for the balance of this contract, or*
- *an amount equivalent to six months remuneration, or*
- *an amount equal to the costs incurred by TVNZ by the early termination of this contract.*

*If any individual or organisation makes any offer of employment to the Employee during the term of this contract, the Employee will advise them of the existence of this contract.” (original emphasis)*

Paragraph one commences with a Statement of Intent to the effect that both parties commit to each other for the period of the contract and goes on to record that the parties agree not to terminate the contract for reasons other than the physical or mental incapacity of the employee.

At that point there is then a proviso which allows one party (the employer) to terminate the contract if the other party (Mr McRoberts) is guilty of certain bad things. In many ways the first paragraph reads like a marriage vow where both parties commit to each other “till death do us part” but one party then goes on to say that “nevertheless, I can throw you out if you become ugly, can’t cook or won’t iron my shirts.”

If Clause 8 consisted only of the first paragraph, there would be a stronger argument available to TVNZ that Mr McRoberts (physical or mental incapacity aside) cannot curtail the contract prior to 31 December 2001. However, the Clause consists of more than paragraph one.

Paragraph two provides that if TVNZ terminates the contract prior to full term, TVNZ must pay Mr McRoberts for the balance of the remuneration. It is difficult to imagine that TVNZ would do that in the event of a termination per the proviso to paragraph one, i.e. for neglect of duty, misconduct which justifies dismissal or conviction of criminal offending punishable by imprisonment. But even if they did so, it cannot sustainably be argued that paragraph one contains the only reasons by which TVNZ could sooner curtail the contract.

Why is paragraph two there? What does it do? What does it mean? Paragraph two recognises, notwithstanding the good intentions expressed at the outset of paragraph one, that events (other than those noted in paragraph one) could supervene and result in termination at the initiative of the employer. An obvious example would be redundancy. TVNZ itself, in evidence and in submissions, state that Mr McRoberts has become part of the “brand” of the programme he is employed on and acknowledge that the programme is “discretionary” and that its future “cannot be guaranteed.”

So, in the same way that bride and groom vow to stay together forever (but the Matrimonial Property Act provides for a different outcome), TVNZ and Mr McRoberts commit to each other for 2 years at paragraph one, but at paragraph two (in recognition of the fact that TVNZ may yet end the relationship earlier) they provide for a penalty should that occur.

I am reinforced in my view by what then follows at paragraph 3, i.e.

*“If the employee terminates this contract prior to the end of the term of this contract, unless otherwise agreed the employee will pay TVNZ the least of the following amounts...”*

Why is that provision there? If the only grounds available to Mr McRoberts to earlier curtail the contract are physical or mental incapacity, is it conceivable that in departing early in such distressing circumstances, he would also have to stump up money as per one of the bullet point provisions of Clause 8? And it is not an answer to the question to say that the clause has an “unless otherwise agreed” provision!

In my finding, paragraph three is the mirror of paragraph two. Despite the best intentions expressed by the parties at the commencement of paragraph one, paragraph three acknowledges the inherent difficulties in requiring specific performance, recognises the reality that Mr McRoberts may decide to sooner curtail the relationship, and provides a penalty should he elect to do so.

(10) **My determination of the dispute between the parties is as follows:**

**Question** Can Mr McRoberts resign his position with TVNZ and, as a consequence, cease his current employment prior to 31 December 2001?

**Answer** Yes.

**Question** Is there any penalty faced by Mr McRoberts if he resigns his position and as a consequence ceases his current employment prior to 31 December 2001?

**Answer** Yes there is. Unless the parties agree otherwise, Mr McRoberts will have to pay TVNZ the least of the following amounts:

- an amount equivalent to the remuneration due for the balance of the contract, or
- an amount equivalent to six months remuneration, or
- an amount equal to the costs incurred by TVNZ by the early termination of the contract.

For reasons stated earlier (see page 5), I am not in a position to identify which of the three will apply. If Mr McRoberts goes ahead with his intention to resign and departs early, TVNZ will then have all the necessary facts available so as to be able to sit down with Mr McRoberts and crunch the numbers with him.

**Is the contract unlawful pursuant to the Illegal Contracts Act 1970?**

Mr McRoberts' basic position is that he is entitled under the terms of the IEC to resign and leave his present employment prior to 31 December 2001.

Despite that basic position (i.e. the dispute) Mr McRoberts, via his Statement of Problem, advanced two alternative arguments with the aim of achieving the same result.

One such argument was expressed as follows:

*"I believe my contract insofar as the way in which my employer wishes to enforce it is unlawful pursuant to the Illegal Contracts Act 1970."*

As I have found against (I use Mr McRoberts' words) "*the way in which [his] employer wishes to enforce [the contract]*" it follows that I do not find the contract to be unlawful pursuant to the Illegal Contracts Act 1970.

At the investigation meeting TVNZ, while denying that the contract was illegal, nevertheless advanced views (as did Mr Pollak) as to what reasonable notice would be, as between the parties, in the event of a finding of illegality. Ms Mills contended for six months, Mr Pollak for one month. I only mention this for completeness. As I do not find the contract illegal, I do not need to further address the reasonable notice alternative.

### **Is the contract a valid and enforceable fixed term contract?**

Completing the trifecta, Mr McRoberts claimed in his Statement of Problem that:

*“I believe that I can lawfully resign and furthermore if my contract is for a fixed term and I cannot resign as my employer has instructed me, then given that it has been rolled over for some years, it is not a valid and enforceable fixed term contract...”*

Historically these “*it’s ongoing employment, not a fixed term*” cases have placed the boot on the other foot. By which I mean that the cases have involved employees who wanted to stay on in their employment and employers saying, “*No, your employment has ended by effluxion of time.*” See for instance Actors Industrial Union of Workers v Auckland Theatre Trust [1989] 2 NZLR 154, Smith v Radio I Ltd [1995] 1 ERNZ 281 as well as the many cases of Hagg.

I do not find those (and similar) cases of any assistance or relevance because in Mr McRoberts’ case I am not dealing with a situation where the employer is closing the door on the employee at the expiration of a purported fixed term.

In reality, the validity or otherwise of the fixed term aspect of the contract is irrelevant.

Perhaps (if push came to shove on 31 December 2001) Mr McRoberts could sustainably argue for continuity of his employment. However, that is not the issue here. There exists a current contract. It contains a termination clause which the parties have been in dispute over. That clause (along with other clauses such as “telephone allowance” and “annual and other leave” and “Sky TV reimbursement”) are valid and that is so whether the contract can or cannot validly turn into a pumpkin on 31 December 2001.

### **Costs**

In the first instance I ask Ms Mills and Mr Pollak to confer and hopefully resolve this issue as between the parties. If they are unable to do so I shall be sad but will then sort it out for them. If that is what it comes to, I make the following schedule available.

- (1) Mr Pollak shall have 21 days from the date of this determination in which to file cost submissions with the Authority. I ask him to send a copy to Ms Mills at that time.
- (2) Ms Mills will then have 14 days in which to file response submissions. I ask her to send a copy to Mr Pollak at that time.

The investigation meeting, go to whoa, was completed in four hours.

### **Orientation Guide**

Practitioners and parties tend to look first to the back page of decisions/determinations to see who won or who lost. In this particular case, you need to turn back to page 9.

**W R C Gardiner**  
**Member of Employment Relations Authority**