

[5] Mr McVey has provided the required undertaking as to damages, although I mention for the sake of completeness that the usefulness of that undertaking has been put into question by Atlas which alleges that Mr McVey is impecunious.

[6] Atlas resists Mr McVey's application on the footing that his employment was on a genuine fixed term basis, that the nature of the project which Mr McVey managed was for a discrete time and had now been completed, that there were no other similar positions which Mr McVey could fulfil in Atlas and that the effect of any order from the Authority to reinstate Mr McVey on an interim basis would be to require Atlas to create or manufacture a position which it did not actually have.

Does the applicant have an arguable case?

[7] Mr McVey contends that:

- (a) There was no legitimate fixed term employment agreement; or
- (b) The fixed term employment agreement was displaced by a subsequent permanent employment agreement; or
- (c) He had an expectation of ongoing permanent employment with Atlas at least on a conditional basis and that the relevant conditions were met

[8] Atlas submits that:

- (a) There is no arguable case based on the provisional evidence advanced by affidavit that Atlas promised Mr McVey employment after the expiry of the fixed term agreement;
- (b) The argument the agreement for a fixed term is illegitimate is fanciful; there was, it is contended, a project which is time-specific and Atlas is entitled to exercise its right to engage Mr McVey in terms of s.66(1)(c) of the Act for just that purpose; and
- (c) As a matter of fact there was no continuing role beyond the end of the fixed term engagement.

[9] Ms Shakespeare, counsel for Mr McVey, reminded the Authority that its equity and good conscience jurisdiction set out in s.157 of the Act entitled the Authority to conclude that the fixed term agreement reached between the parties was not a genuine fixed term employment agreement because it did not correctly represent the bargain between them.

[10] The Authority accepts that it is available to it to reach such a conclusion where such a conclusion is warranted. However, I am satisfied on the balance of probabilities that the overwhelming thrust of the affidavit evidence provided to me in this matter confirms that there was a genuine commercial reason for the agreement between the parties being fixed term in nature because Atlas required Mr McVey to manage a project, namely the opening of a bar called Fat Eddie's, with a particular timeline which, in practical terms, was reflected in the length of the fixed term employment agreement. The factual position was that once the bar was open the job was complete which in my judgment is precisely the situation intended to be provided for by s.66(1)(c) of the Employment Relations Act 2000.

[11] It follows then that I do not think the affidavit evidence available to me at this preliminary stage supports the thesis that the fixed term employment agreement offered by Atlas and accepted by Mr McVey was in any sense of the word a sham. The real issue for investigation in respect of whether or not Mr McVey has an arguable case is the question whether Mr McVey was offered and accepted some permanent role with Atlas. This is the strongest of the three submissions advanced by Ms Shakespeare on Mr McVey's behalf and has always been the cornerstone of Mr McVey's argument. Mr McGinn, for Atlas, concedes as much in his submissions while not accepting that the argument constitutes evidence of an arguable case.

[12] Whether or not Mr McVey was offered and accepted a permanent position with Atlas depends principally on an analysis of the relevant documentary evidence. Two documents are particularly important. The first of these is Mr McVey's initial response to Atlas' intimation of a job offer. In responding, Mr McVey makes certain points in an email dated 19 December 2006 and in the course of summarising the elements of the proposed job, it is contended for Mr McVey that he identifies elements of continuity of employment which supports his argument.

[13] Ms Shakespeare relies in particular on phrases such as "*... to be reviewed at the end of the contract*" in relation to the payment of salary as evidence for the view that Mr McVey anyway was proposing a continuing employment relationship. Taken in the context of an email which very plainly sets out the terms and conditions for a fixed term employment agreement, this phrase may not be of any particular significance, especially when Mr McVey is unable to point to any response from Atlas (save for one exception which I will come to shortly) which indicates its view that there was to be any continuing employment relationship after the end of the fixed term.

[14] The only piece of documentary evidence which Mr McVey can point to as evidence for the view that Atlas had contemplated that the end of the relationship might not be the end of the fixed

term agreement is a document which again Mr McVey prepared but which contains writing on it which, it is common ground, was put there by Mr Hunt of Atlas.

[15] The document I am referring to is another email generated by Mr McVey and by agreement dated 18 January 2007 which sets out in some detail the amendments which Mr McVey would like to have agreed in respect of the proposed individual employment agreement.

[16] In particular, in the present context, there is a paragraph headed “*Fixed term agreement*” which concludes with the following statement:

It is the understanding of the parties that should the projects undertaken by/ entrusted to Joe McVey be sufficiently advanced at the date of expiry of this agreement, he will be offered permanent employment as the Hospitality Director with Atlas Securities.

[17] Beneath that sentence, there are the following words in Mr Hunt’s handwriting: *not agreed, possibly* and then those words are crossed out by Mr Hunt.

[18] Mr McVey says that the effect of that information was to create in his mind the belief that Mr Hunt had considered his sentence about turning a fixed term agreement into a continuing employment relationship, had written “*not agreed*” and then “*possibly*” and then crossed all three words out to record that he had decided that there was in fact to be a continuing employment relationship.

[19] Mr Hunt offers a perfectly feasible alternative meaning to the sequence of events which has the opposite effect to the one that Mr McVey is trying to draw. It is common ground that the email of 18 January 2007 was a document which the parties discussed on that date or very soon after that date. It is also common ground that there was discussion about the issue of whether the fixed term agreement was to change into a continuing employment relationship.

[20] Atlas’ position seems to be that it always had it in its contemplation that there **might** be further work for Mr McVey in the future, but it was never in its contemplation that any additional work would of necessity be contiguous with the pre-existing fixed term agreement. What it contemplated was further project work for further discrete projects which may or may not have come to fruition and which in the result were not in fact available at the time that the fixed term agreement with Mr McVey expired by effluxion of time.

[21] Having considered the evidence before me, I am persuaded that Mr McVey’s application clears the relatively low threshold on the *arguable case* test.

Balance of convenience

[22] This test requires the Authority to consider the relative inconvenience to each party. In a practical sense, the Authority must weigh the relative hardship to Atlas of having Mr McVey returned to the employment against the hardship potentially suffered by Mr McVey in not placing him back on Atlas' payroll.

[23] The affidavit evidence available suggests that Mr McVey is in gainful employment, albeit not using his skills base. He is to be commended for that. Clearly the role that he is presently fulfilling is not professionally sustaining for him and must be seen as short term. It does, however, ensure that he has some income.

[24] Against that, returning Mr McVey to employment with Atlas has the curious conundrum that it is by no means clear to the Authority what role Mr McVey could be returned to. Having reached the conclusion that the role that he fulfilled was genuinely fixed term in nature, it follows that that particular position has literally disappeared with the completion of the work of bringing the Fat Eddie's bar to a successful conclusion. There is no other role within Atlas, save for one that is, as it were, manufactured exclusively for the purpose of providing Mr McVey with employment pending the disposition of his substantive employment issues.

[25] I do not think it a proper exercise of the Authority's discretion in a matter such as this to require Atlas to create a role for Mr McVey simply to ensure that he has a better income than he presently enjoys.

[26] It follows that I find that the balance of convenience favours Atlas.

Overall justice of the case

[27] Standing back and evaluating the case on the currently untested evidence before the Authority, I am required to look at the overall justice of the case as between the parties.

[28] The untested affidavit evidence before me suggests a dysfunctional working relationship with a gradual deterioration in the relationship between Mr McVey and the only other employee of Atlas at the time, Mr Hunt. Were Mr McVey to be granted interim reinstatement to some role at Atlas, there would need to be a resolution of the employment relationship problem between Mr McVey and Mr Hunt which is one of the cornerstones of Mr McVey's substantive personal grievance action.

[29] Further, Mr McVey did not enjoy good working relationships with some other key stakeholders in the immediate vicinity of the Atlas group of companies and there is affidavit evidence before me of the difficulties with those relationships. Insofar as Mr McVey would of necessity have to engage with those other parties were he to continue in some role with Atlas that was analogous to the role that he previously had, those relationships too would need to be the subject of further work.

[30] Again, it seems difficult to contemplate providing interim reinstatement to Mr McVey in circumstances where the employment relationship was so difficult that Mr McVey was forced to take sick leave at the end of his fixed term engagement by reason, it seems, of workplace stress. I note for the sake of completeness that Mr McVey's affidavit evidence (untested, of course) was that the principal cause of the stress was the uncertainty around his future with Atlas. Were Mr McVey able to be tested on that evidence, it could be put to him that the stress was more about the unsatisfactory workplace relationships than any perceived uncertainty about his future.

[31] These factors, taken together satisfy me that Mr McVey is not entitled to equitable relief and militate against the Authority exercising its discretion in his favour. The overall justice does not favour Mr McVey.

Determination

[32] The application is declined.

[33] Because I am unable to offer the parties a proximate date for the substantive matter to be heard by me, I will arrange for the substantive matter to be transferred to another member who can offer the parties earlier dates. A telephone conference will be convened by the new member to confirm the date for the Authority's investigation of the substantive matter.

James Crichton
Member of the Employment Relations Authority