

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Jennifer Miller (Applicant)
AND Red Bull New Zealand Limited (Respondent)
REPRESENTATIVES Hamish Evans, Counsel for Applicant
Marcella Thomas, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 16 April 2002
DATE OF DETERMINATION 18 April 2002

DETERMINATION OF THE AUTHORITY

[1] Ms Jennifer Miller's substantive problem is her personal grievance claim of unjustified dismissal for which she seeks reinstatement and other remedies. Red Bull New Zealand Limited (Red Bull) acknowledged that it did employ Ms Miller but says that her employment ended when her fixed term agreement expired. Ms Miller also seeks interim reinstatement pending the hearing of her personal grievance. Both parties filed affidavits¹ in respect of the claim for interim reinstatement and provided comprehensive written and oral submissions at the investigation meeting. As is usual, witnesses were not questioned². The following findings are solely for the purpose of determining the claim for interim reinstatement.

Background

[2] Red Bull distributes and markets Red Bull product. In New Zealand, that is an energy drink sold in a slim line can which is packaged in a distinctive manner. The parent company is Red Bull GmbH, a company incorporated in Austria. It controls how Red Bull product is distributed and marketed in New Zealand. Red Bull employs "Brand Ambassadors" as a central part of its marketing strategy. There are brand ambassadors based in Auckland (two teams), Hamilton, Wellington and Christchurch. Part of the marketing strategy involves the brand ambassadors working in pairs to conduct samplings to introduce the product to consumers. Brand ambassadors also provide some back up to the sales representatives, but their main function is to promote Red

¹ Ms Miller also filed a signed undertaking as required by section 127 of the Employment Relations Act 2000.

² In *Clentworth v Technic NZ Ltd* [1998] 3 ERNZ 1121 Chief Judge Goddard said *I have to do the best I can to form a view of the probabilities on the basis of affidavits which have not been tested by cross-examination. I do not necessarily regard that as an evil. While the examination of witnesses orally in Court is a cornerstone of the adversary system of litigation that we use, its benefits are sometimes overstated. In my view, an experienced Judge should be able to come to a conclusion about the probabilities from affidavit evidence almost as readily as from oral evidence tested in cross-examination.* This is a case where most facts emerge clearly enough from the affidavits.

Bull product, build brand awareness, introduce new consumers and to educate consumers about the product.

[3] Red Bull employed Ms Miller as a brand ambassador from 4 October 2000. The terms of the employment are set out in a comprehensive written agreement. The agreement in its final form was sent to Ms Miller in November 2000 but not signed by her until 8 February 2001. It stipulates in several places that it is a fixed term agreement pursuant to section 66 of the Employment Relations Act 2000, with an expiry date of 3 October 2001. For example, clause 2 says that *The fixed term nature of this agreement is attributed to operational requirements of Red Bull New Zealand Limited*. In addition, Ms Miller signed a separate form acknowledging that she had been advised that the agreement was for a fixed term, when/how the employment would end and what the reasons were for the fixed term nature of the employment. Ms Miller's manager (Ms Tanya Mackisack³) also ticked a check list to indicate that she had prepared an agreement which included the fixed term and the reasons for it and that she had advised Ms Miller that it was a fixed term agreement, when/how her employment would end and the reasons for the employment ending in that manner.

[4] Ms Miller performed her work satisfactorily between October 2000 and April 2002. Both parties agree that this is not a case where there would be any ground to support dismissal or disciplinary action for misconduct or poor work performance.

[5] The other Christchurch based brand ambassador's fixed term employment agreement came to an end on 4 March 2001. A new brand ambassador was employed from 4 June 2001. During the intervening period, Ms Miller conducted her ambassadorial duties on her own and also provided support to the Christchurch based sales representatives.

[6] In September 2001, Ms Mackisack spoke to Ms Miller about employment after the end of the fixed term. As a result, Ms Miller was sent a second fixed term agreement in mid-September. It mirrored the first agreement except for the term, which was from 4 October 2001 until 5 April 2002. Ms Miller signed it on 30 October 2001. At the same time she also signed a form of acknowledgement similar to the first one. Ms Mackisack completed a further checklist as before.

[7] About early February 2002, Ms Miller's fellow Christchurch based ambassador (Ms Kirsty Dalziel) resigned. She too had been employed pursuant to a fixed term agreement but resigned before its June expiry to take up other employment. As a result, Ms Mackisack placed an advertisement in the Christchurch Press on 13 February seeking *people to represent Red Bull as Brand Ambassador's in the Christchurch region*. Ms Miller assumed Red Bull was advertising for a replacement for Ms Dalziel.

[8] Ms Mackisack came to Christchurch on 13 March 2002 to conduct interviews on 13 & 14 March. Red Bull usually held a group interview first and then individual interviews with selected candidates. Ms Mackisack scheduled a meeting with Ms Miller for 3.30 pm on 14 March. By that time she had not finished the individual interviews. The meeting began after the two women were left alone by the two other Christchurch Red Bull employees. Ms Mackisack reminded Ms Miller about the fixed term nature of the two employment agreements and then told her that Red Bull would not be offering her any further employment. Ms Miller became upset and the meeting ended⁴. Shortly afterwards, another interviewee arrived and Ms Mackisack had to attend to the interview.

³ Ms Mackisack is based in Auckland and is the manager of the brand ambassadors.

⁴ There are several evidential disputes about the meeting and what happened afterwards but it is not necessary for present purposes to expand on them.

[9] Ms Miller had pre-arranged a week's holiday but otherwise she continued to perform her duties to her usual standard until 5 April 2002, the expiry of the term specified in the second agreement.

[10] Shortly after 14 March, Red Bull made verbal offers to two of the interviewees. These offers were accepted and both women are set to commence their duties on 29 April 2002 as brand ambassadors based in Christchurch. Both have been engaged on fixed term agreements in line with Red Bull's practice.

[11] On 21 March 2002, Ms Miller's solicitors wrote to Red Bull raising a personal grievance including the claim for reinstatement. Red Bull instructed Ernst & Young who responded by letter dated 27 March 2002 to the effect that Red Bull saw the situation as no more than the expiry of a fixed term agreement.

An Arguable Case?

[12] First, it is submitted that Ms Miller had a legitimate expectation of continued employment notwithstanding the express terms of the two agreements. She says that she was lead to believe by Ms Mackisack that the agreement could be extended provided she remained *fresh and enthusiastic*; that she was offered an extension to the first agreement; that she received positive feedback as to the quality of her work; that she knew airline tickets had been booked in February for her to participate in a conference in Auckland scheduled for 9 April; and that at least one other brand ambassador had her term extended by 12 months. Ms Mackisack does not recall using the words *fresh and enthusiastic* and says she did not tell Ms Miller that she would take her on for a further 12 months should she stay *fresh and enthusiastic*. Ms Mackisack says that she may have indicated at the outset that a further 6 months might be offered if *appropriate* after the first 12 months but denies any promise of ongoing employment; that positive feedback is a normal incident of employment; and that the airline tickets were booked in error.

[13] The Court of Appeal in *Principal of Auckland College of Education v Hagg* [1997] ERNZ 116 discussed fixed term contracts in the private sector although that was unnecessary for the purposes of its decision. The Court allowed for the possibility that there might be representations at the outset or during the employment inconsistent with the termination of the relationship by expiry of a fixed term so as to deprive the employer of the ability to take advantage of the expiry date. *Vice Chancellor University of Canterbury v Purchas* [1998] 3 ERNZ 925 (CA) is an example where the representations, although not amounting to an implied term, nonetheless meant that the employer breached its obligation of trust, confidence and fair dealing by relying on the expiry date. Added to that, the Employment Relations Act 2000 requires parties to deal with one another in good faith⁵ and not directly or indirectly do anything that is likely to mislead each other. I note also that the Authority has jurisdiction⁶ in respect of pre-contractual representations. From this, I conclude that there is an arguable case at least in respect of the allegation that the agreement could be extended provided Ms Miller remained *fresh and enthusiastic*. While arguable, it could not be described as a strong case. The other allegations of fact might create a hope of renewal but do not in my view arguably found a legitimate expectation.

⁵ See section 4 (1).

⁶ See section 162.

[14] There are other issues relating to section 66 of the Act, in respect of which the case for Ms Miller is stronger.

[15] The evidence is to the effect that Ms Miller was told⁷ that Red Bull had operational reasons for each fixed term. The reasons are described in Red Bull's affidavits. First, they relate to the brand values from which Red Bull says that there is a business requirement for various specified reasons to ensure staff turnover amongst brand ambassadors. Secondly, they relate to the budget process to determine funds available for the sampling programme and therefore the employment of brand ambassadors. Red Bull's evidence is that they did not disclose the latter reason for fear of demotivating staff who might perceive a risk to their continuity of employment within their fixed terms. Ms Miller says that as she understood it, the operational requirement referred to in the agreement meant that as long as the sampling programme continued there would be a need for brand ambassadors. Neither Red Bull nor Ms Miller say that the detail of the first reasons were given to her before the agreements were entered into.

[16] Arguably, Section 66 is a code detailing when fixed term contracts are lawful. Section 66 might be seen as one of the ways in which the Act acknowledges and addresses inequality of bargaining power⁸ in employment relationships. It must also be read in the light of the objects of Part 6, one of which is to specify the rules for determining the terms and conditions of an employee's employment⁹. I note also that the Act emphasises the provision of information as a means of avoiding and resolving relationship problems. In the light of that analysis, it could be said that Red Bull has failed to meet its obligation¹⁰ to advise Ms Miller of the reasons for her employment ending on the date specified in the second agreement.

[17] *Hagg* noted the absence in the Employment Contracts Act 1991 of statutory intervention such as Parliament has now enacted. In this part of the case therefore, the decision in *Hagg* is not binding or persuasive authority. We have come much closer to the position as expressed in *Terry v East Sussex County Council* [1977] 1 All ER 567, 571:

The great thing is to make sure that the case is a genuine one, and for industrial tribunals to hold a balance. On the one hand, employers who have a genuine need for a fixed-term employment, which can be seen from the outset not to be ongoing, must be protected. On the other hand, employees have to be protected against being deprived of their rights through ordinary employments being dressed up in the form of temporary fixed-term contracts.

In striking a balance, the Authority is required by Section 66 (2) (a) to assess whether the employer had genuine reasons based on reasonable grounds for stipulating a fixed term agreement. The assessment includes but is not limited to an inquiry about the genuineness of the stated reasons. Because there must be *reasonable grounds*, the Authority must assess matters that previously were held to fall within the ambit of managerial prerogative.

[18] Ms Miller challenged whether the reasons as disclosed in the affidavits are genuine reasons based on reasonable grounds. As to the budgeting reason, many organisations produce budgets each year. It is arguable that the twelve month budget cycle said to warrant a 12 month term concluding 3 October 2001 could not be a genuine reason on reasonable grounds for a 6 month term concluding 5 April 2001. Red Bull faces a logical difficulty, the answer to which is not apparent at this stage. In addition, there appears to be an ongoing need for two brand managers based in Christchurch. Given that that the sampling programme (and therefore the work of brand ambassadors) in New Zealand has been ongoing since the product launch in New Zealand in late 1996, it is arguable that, as at 4 October 2001, there was no substance to the budgeting reason.

⁷ Orally and in writing.

⁸ See section 3 (a) (ii). Section 3 (a) (iv) might also be relevant.

⁹ Section 60 (a).

¹⁰ Section 66 (2) (b).

[19] Red Bull advanced a number of reasons that caused it to prefer a turnover in brand ambassadors. Details were set out in the affidavit of Mr Devereux. It was filed after Ms Miller's affidavit so there is no factual basis on which to challenge some of the detail. However, Mr Devereux did say that one reason was to ensure that brand ambassadors always come across as innovative, creative and easy going as required by the brand values. Other evidence for Red Bull was that these values could not be taught but were personality traits. Arguably, the traits valued by Red Bull relate more to the performance of the candidates they select to employ than to the duration of their employment. I conclude that there is an arguable case whether this is a genuine reason based on reasonable grounds.

Balance of convenience?

[20] Ms Miller seeks permanent reinstatement. If she eventually succeeds in establishing a personal grievance, reinstatement is a real possibility. Reinstatement should be ordered if practicable, no issue of contribution arises, the human relationships have not been particularly impaired so far and the indications are that Ms Miller would again become a satisfactory employee as she demonstrated during her period of notice. In this sort of case¹¹, reinstatement probably works best if achieved at an early stage. This is the strongest factor favouring an interim order¹².

[21] The other ground advanced concerns Ms Miller's financial position. Ms Miller has a substantial student loan that she is repaying through deductions from salary. As I understand the obligation, repayments are related to income so that repayments are deferred when there is no income. The result is to increase interest and delay eventual repayment of the debt. That sort of consequential loss is usually not seen as compensatable pursuant to the statutory grievance remedies but the sums involved would be quite small.

[22] Ms Miller must pay rent, power, food, telephone and vehicle running costs each week. She currently has no job and will struggle to survive financially without her income from Red Bull.

[23] For Red Bull, it says that it can meet any award of compensation/damages. There is no reason to doubt that, particularly given that it is now a 100% owned subsidiary of Red Bull Austria.

[24] The two new Christchurch based brand ambassadors are to start soon. There is the difficulty of what to do with them or Ms Miller because of the requirement generally to work in pairs. There is also the possibility of stress, disruption, discomfort, confusion or speculation amongst other staff¹³, particularly if they are drawn into the dispute.

[25] There are no firm indications that Ms Miller might cause disruption or confusion. This is not a case where a replacement employee was engaged in the face of proceedings that might result in an obligation to reinstatement the original employee. So, the real problem for Red Bull is that it might have 3 when it only wants 2 brand ambassadors. That no doubt would affect it financially but Red Bull said it could meet an award of compensation¹⁴ in any event. There remains the pairs problem, but Red Bull has various management options to deal with that, including using Ms Miller's services as was done before Ms Dalziel was appointed.

¹¹ As opposed to a situation where the parties might benefit from the perspective that can come after some time.

¹² See *Lunjevich v Attorney-General in respect of the Department of Corrections* unreported, D King, 21 August 2001, AA 114/01.

¹³ Particularly but not only in the small Christchurch office.

¹⁴ Which would include lost remuneration.

[26] Counsel for Ms Miller proposed a form of order that would permit (but not require) Red Bull to retain Ms Miller on garden leave as a way of addressing Red Bull's concerns about disruption. He also advised that Ms Miller would give an undertaking not to discuss the dispute with other Red Bull staff. An undertaking is not required. The effect of Ms Miller's reinstatement in the intervening period is a factor that will affect whether permanent reinstatement is practicable.

[27] It seems likely that the substantive case can be heard in mid June¹⁵. I consider the chances of successfully re-establishing the employment relationship would be harmed as time goes on. In this case that is the most significant feature in assessing the balance of convenience, which I conclude favours Ms Miller.

Overall Justice?

[28] Overall, the respective substantive cases as can be discerned at this stage are fairly evenly balanced. The legitimate expectation argument is not strong and Red Bull did take steps to meet the requirements of section 66 – the dispute is as to whether it complied sufficiently with section 66.

[29] Red Bull might ask how can there be permanent reinstatement when the position occupied by Ms Miller no longer exists? The Court of Appeal in *Purchas* upheld reinstatement of a fixed term employee to a permanent position but there had been no challenge to the form of remedy. In *Actors Variety etc IUOW v Auckland Theatre Trust Inc* [1989] 1 NZILR 463 the President of the Court of Appeal thought that where an employee was engaged for a fixed term inconsistent with the provisions of an award, the inconsistent provision only would be struck down. A similar approach might be appropriate where a fixed term agreement does not comply with section 66.

[30] Having further considered the issues more generally, I conclude that interim reinstatement is appropriate.

Orders

[31] Red Bull is ordered to reinstate Ms Miller to her employment pending determination by the Authority of her employment relationship problem or further order of the Authority. The parties are to liaise over how reinstatement will occur, such as by actual work or garden leave or a mixture; Red Bull is entitled to determine how reinstatement will occur if the parties are not able to reach agreement. Ms Miller is bound by her undertaking as to damages. This order takes effect as soon as practicable, but no later than Tuesday, 23 April 2002.

[32] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority

¹⁵ The Authority could have heard the matter sooner but it is also necessary to give the parties time to attempt mediation which has been scheduled for mid May.