

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Dawn Parore (Applicant)  
**AND** Sheldon & Hammond (Pty) Limited (Respondent)  
**REPRESENTATIVES** Tony Kurta, Advocate for Applicant  
Michael J Robinson, Counsel for Respondent  
**MEMBER OF AUTHORITY** Y S Oldfield  
**INVESTIGATION MEETING** 2 October 2001  
**SUBMISSIONS** 17 October, 23 October, 25 October 2001  
**DATE OF DETERMINATION** 23 November 2001

DETERMINATION OF THE AUTHORITY

Ms Parore lodged her problem with the Authority on 23 May 2001. She was employed by the respondent from 20 October 2000 until 26 February 2001. She claims that the termination of her employment was an unjustified dismissal. The respondent denies this and says that her employment ended when her fixed term contract expired.

Each year the respondent employs several additional staff to assist in getting Christmas orders out. These temporary workers are placed on fixed term contracts to run from around October until the extra work (principally sorting and packing stock and associated warehouse duties) is complete. I accept that this situation (dealing with a short term seasonal rush) precisely fits the criteria for the use of fixed term contracts, as set out in section 66 of the Employment Relations Act 2000.

In late 2000, the respondent's Auckland office manager, Ms Dow, suggested to Mr Hayward, the respondent's Auckland manager that her friend Ms Parore would be suitable for this temporary work. Mr Hayward accepted this recommendation, and left it to her to offer Ms Parore the work over the telephone. No job had been advertised and there was no interview, but Ms Parore accepted straight away.

A few days before Ms Parore was to begin, the office assistant resigned. This meant that at the busiest time of the year, Ms Dow was left to handle all the office work by herself. Rather than try to find a permanent replacement at that stage, Mr Hayward suggested to Ms Dow that she get assistance from a newly employed temporary staff member. She did so, but the woman concerned did not prove suitable and was sent back to warehousing duties. Instead Ms Dow decided that when Ms Parore started, she could assist in the office. She advised Ms Parore of this in a telephone call the night before she was due to start, and Ms Parore agreed. She commenced work on 20 October, and entered into a fixed term contract to 17 November. It stated:

**“Position:** *Data Entry, Filing, Packing & Dispatching & duties*

**Reports to:** *Warehouse Manager and/or Office Manager*

**Duties:** *The Employee is to be employed for filing and data entry. In addition, the employee is to be employed for store packing and dispatching of stock required for Christmas sales.”*

I accept that this wording encompasses both the warehousing work initially envisaged, and the office responsibilities that ended up forming a large part of Ms Parore’s duties. Ms Parore helped in the office almost from the outset, but for at least the first month, when the warehouse was busiest, she also spent considerable time assisting the other temporary staff at packing and despatch. The despatch work was not complete by November 17 and the fixed term contracts of four temporary staff, including Ms Parore, were extended until Christmas, when the other temporary staff left the company. Because nothing had been done about a permanent appointment to the office assistant’s position, Mr Hayward advised Ms Parore that there was further work for her in the office after Christmas. She was not told exactly how long this would last, but knew, as she had from the outset, that a permanent position would be advertised. Mr Hayward knew that she was interested in a permanent job in the office and told her that she would be considered for this.

On 9 January Mr Hayward placed a newspaper advertisement that read as follows:

*“Office Assistant/Customer Services **JUNIOR***

*We require an enthusiastic all rounder with some office experience. Excellent phone manner attention to detail necessary. Youth rates apply. Written applications only please to :  
General Manager.”*

Previous office assistants had not been juniors, but Mr Hayward was of the view that the position might be more suitable for a younger person. Ms Parore did not consider a junior position to be appropriate for her and said so. She told me that from this point she did not hold out much hope of obtaining the job. This was compounded by a comment Mr Hayward made in her hearing, which was: “the next office assistant would be Miss Sheldon and Hammond.” She took this to mean that Mr Hayward wanted to employ a younger, more attractive woman.

Ms Dow however preferred a mature and experienced person for the office. As applications came in, she persuaded Mr Hayward to come round to her point of view. No interviews were conducted and on 23 January another advertisement was placed. This one read:

*“Office Assistant/Customer Services  
(Mairangi Bay Location)*

*We require an enthusiastic all rounder with office experience. Roles include:*

- 1. Telephone reception*
- 2. Data Entry*
- 3. Typing/General office duties*

*Attention to detail critical along with ability work under pressure at times. Salary \$25K-\$28K.*

*Written applications to:*

*General manager.”*

On the same day that the advertisement went in Ms Parore heard gossip that Mr Hayward already had someone else in mind for the position. She confronted him and told him that “he could not give the job to someone else because I was doing it” Mr Hayward was upset, telling her he was

dumbfounded by what she had to say (it did not accord with his understanding) and would seek advice from his lawyer.

Ms Parore did not submit a formal application. Mr Hayward told Ms Dow that he would get Ms Parore's CV from her, and interview her, once he had drawn up his shortlist. Ms Dow advised Ms Parore accordingly but it did not happen and she was not offered an interview. Mr Hayward told me that he decided not to interview her because she had very limited previous office experience and there were a number of more suitable applicants. A permanent appointee was chosen from amongst them. This person had been employed for the previous two years as a fitness instructor. When she heard this, it occurred to Ms Parore that perhaps the sentiments behind Mr Hayward's earlier comments about the desired appearance of the office assistant had influenced him in his selection.

Meanwhile, and initially unbeknown to Mr Hayward, the Australian management of the company had decided to upgrade the position to cover all Ms Dow's duties so that they would not be 'left in the lurch' if Ms Dow were to decide to leave. Mr Hayward was only advised of this after he had already made the appointment. His choice stood, and the appointee was up-skilled to take on the role the Australian management of the company desired. Hence the wording of Ms Parore's letter of termination, dated 26 February which read:

*"As you will recall, a fixed term employment agreement was entered into between Sheldon and Hammond and yourself, whereby you commenced work on about 20 October 2000. It was originally envisaged that the employment would continue up until mid-November 2000, however, it was subsequently agreed between ourselves that you would continue to work up until the time that a full time permanent employee was employed, which was envisaged to be in or about January/February 2001.*

*We also record that you have previously expressed a desire to be considered for a full time permanent position.*

*We have now decided to employ a full time office administrator to perform services in conjunction with Christine Dow...*

*We do advise that we have now ascertained a suitable candidate for this position. As you will appreciate, this permanent position which has come into being differs significantly from the temporary office assistant role performed by you.*

*In these circumstances, we hereby give to you formal notice that your fixed term, temporary employment with Sheldon and Hammond will expire on Friday, 9 March 2001 (being 2 weeks' notice.)"*

She elected not to work out her notice but to take two weeks pay in lieu of notice instead.

Ms Parore told me that she decided to bring this claim because:

- she was already doing the job, and in her opinion, doing it well.
- she was told she would be considered for the job, and believes as a result that she should have been interviewed.
- Mr Hayward's comments about looks were offensive to her.

### **The Argument.**

On Ms Parore's behalf Mr Kurta puts the following arguments:

- The respondent did not comply with s. 66 when it extended Ms Parore's employment into January 2001. The situation that justified the first fixed term contract (the Christmas rush) was over, but the respondent did not begin again and ensure that the further fixed term contract met all the requirements of s.66.
- The applicant had a reasonable expectation of continued employment, or in the alternative, a reasonable expectation of being considered for the advertised position.
- The upgrading of the permanent position to "office administrator" could not be the real reason the company did not appoint Ms Parore to it since the appointment was made before the decision to upgrade. The appointee applied for, and accepted, a job as office assistant. She was later up-skilled to do all Ms Dow's duties and the same could have been done for Ms Parore.

Mr Kurta also asks me to consider whether Ms Parore has been treated unfairly in her employment by not being considered for the permanent position.

Counsel for the respondent has argued that the facts here fall squarely within s.66(1) (b) which provides that fixed term employment can be determined on the occurrence of a specified event. The first fixed term contract was expressed to end on a particular date. However a further fixed term contract was entered into at Christmas for employment to end upon the 'event' of a permanent appointment being made to the office. Further to this, the respondent says that s.66(2) has been complied with in that:

- the purpose for this fixed term employment was genuine and reasonable. It was to provide cover for the office work during the period in which the job would be advertised and applications processed;
- it is not disputed that the applicant always knew this, and knew that her job would end once the interview and appointment process was completed. The applicant knew that she was only moved to assist in the office as a temporary measure and to assist Ms Dow.

The respondent says that the evidence does not support a finding that there was any reasonable expectation of continued employment. Ms Parore acknowledged that she was only briefly hopeful of getting a permanent position, and that was in December. She was at all times aware that a permanent employee was being sought. She was under no illusion of anything other than temporary employment.

On the issue of whether there was a reasonable expectation of being considered for the position, the respondent argues that there is no legal basis on which to support the submission that the Employer had an obligation to consider the employee for the permanent position. As to the facts, the applicant had only limited previous office experience, and did not make a formal application for the role.

In summary the respondent says that the circumstances of this case do not amount to one where the employee has been treated in an unjustifiable or unacceptable way and that the matter is simply one of a fixed term employment agreement running its course.

### **Conclusions.**

There has been no breach of s. 66 of the Employment Relations Act. The original contract was entered into, and later extended, for genuine reasons relating to extra despatch work. At Christmas, the parties entered into what was essentially a new contract, this time it was to end upon a specified event, that is the appointment of a second permanent worker in the office. This was also a genuine and reasonable use of a fixed term contract. It was not done to exclude or limit the rights of the

employee under the Act or to establish the suitability of the employee for permanent employment. The respondent's only failing in respect of this further contract was in neglecting to put it in writing, as required by s.64. This further fixed term contract was valid. It follows that there was no unjustified dismissal. The occurrence of the specified event spelt the ending of the employment. This would have been so even if Ms Parore herself had been offered the permanent job, in which case she would have entered into a new employment agreement.

Nor do I accept that Ms Parore formed any expectation of on-going employment. She acknowledged that she always knew a job (in whatever form) would be properly advertised and that someone else might be appointed as a result of that process. Because of these facts, I do not need to discuss the current position in respect of the case law on legitimate and reasonable expectation of on-going employment.

However, I accept the applicant's submission that she had a reasonable expectation of being at least *considered* for the permanent position. Mr Hayward expressly told her so. Later he told Ms Dow (who with his knowledge, passed it on to Ms Parore) that Ms Parore did not need to submit a formal application, and instead he would get her CV from her, and interview her, once he had drawn up his shortlist. Because she did not work with him directly, his failure to do this meant effectively that she was not considered at all. It was not justifiable for Mr Hayward to go back on his undertaking. In doing so he disadvantaged Ms Parore. This disadvantage did not lie in not getting the job, since it was Mr Hayward's prerogative to select another candidate, but in missing the opportunity to compete fairly with other candidates.

I also have concerns about a further and possibly related aspect of Mr Hayward's treatment of Ms Parore. These are the comments made in her presence about the desired appearance of the office worker, which I accept were offensive, and indicate an attitude which could have affected the proper exercise of his decision making during the appointment process. The Authority does not consider his statement, or the sentiments behind it, to have been appropriate in an employment context.

I am satisfied from what she told me during the investigation meeting that the applicant feels deeply aggrieved about both Mr Hayward's comments and his failure to consider her for the job. However, despite my findings on these points, I consider myself unable to remedy the distress she has felt as a result. Her concerns relate to a potential employment relationship, rather than the (fixed term) employment she already had. Although I do not think Ms Parore was treated fairly in relation to that prospective employment, I do not have the jurisdiction to order remedies for distress arising out of any kind of discrimination or breach where an employment agreement has yet to be entered into. The circumstances here are such that they are more likely to give rise to a cause of action under the Human Rights Act than under the Employment Relations Act. I can do nothing more to assist Ms Parore with her problem.

### **Costs**

The parties are invited to attempt agreement on this issue. If that proves impossible, they have a period of 21 days in which to request a determination of the issue. I can advise the parties however that on what I know of the case at present, it appears to me to be a case of the type where costs should lie where they fall.

Y S Oldfield  
Member of Employment Relations Authority