

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Alison Schneller (Applicant)
AND Ranworth Healthcare Limited (Respondent)
REPRESENTATIVES Michael O'Brien for Applicant
Tony Drake for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 15 September 2005
20 September 2005
SUBMISSIONS RECEIVED 30 September 2005 from Applicant
5 October 2005 from Respondent
DATE OF DETERMINATION 27 October 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Alison Schneller was employed by Burtons Healthcare Limited in 2002 as the Legal and Quality Assistant. The position was part-time and was an ongoing position. In July 2003 there was a change of ownership when Eldercare New Zealand Limited purchased the company.

[2] Ms Schneller was advised in writing on 8 July 2003 that under the new ownership her position together with her salary, holidays, sick leave and other entitlements would remain unchanged. A letter of offer by Eldercare New Zealand Limited was provided to Ms Schneller, also on 8 July 2003. Ms Schneller signed accepting that offer on 10 July 2003.

[3] In August 2003 Eldercare New Zealand Limited was renamed Abano Healthcare Group Limited. Abano Healthcare comprises three businesses: Ranworth Healthcare Ltd; Burtons Healthcare and Health Partner. Ms Schneller continued to work for Burtons Healthcare.

[4] Ms Schneller was offered and accepted employment with RHL under the terms of a fixed term employment agreement. Ms Schneller's employment came to an end after the date stipulated

on the fixed term agreement. Ms Schneller says the ending of her employment constitutes an unjustified dismissal.

[5] RHL says the fixed term agreement came to an end due to the agreement reaching its natural conclusion and that the ending of the employment relationship was not a dismissal.

Justification

[1] The Authority is required to test the justification of the ending of the employment relationship pursuant to section 103A of the Employment Relations Act 2000 which states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was 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 or action occurred.

[2] Therefore the key issue for this determination is whether, in all the circumstances the actions of RHL and how RHL acted was what a fair and reasonable employer would have done. The emphasis provided by s.103A is on the employer. I have considered the test for justification under the following headings:

- the circumstances known at the time the employment ended;
- the process followed by RHL; and
- whether the decision to enforce the ending of the agreement on 25 February was what a fair and reasonable employer would have done.

Credibility

[6] During the course of the investigation meeting Ms Karen Schneller's credibility was put in issue. On 4 April 2005 Ms Karen Schneller signed a written affidavit confirming under oath that the information she provided in that statement was true and correct. This affidavit was filed in the Authority as a statement of Ms Karen Schneller's evidence. Prior to asking questions of Ms Karen Schneller at the investigation meeting Ms Schneller confirmed, again under oath, that her witness statement was the truth. During the investigation meeting Ms Schneller recanted some of that evidence. Where Ms Schneller's evidence given during the investigation meeting is contrary to her statement signed in April 2004 I have preferred the evidence in the signed statement. That evidence was provided soon after the events with which this matter is concerned occurred and is therefore a more contemporaneous account than the evidence proffered at the investigation meeting some 7 months after the event. Ms Karen Schneller confirmed that she was in dispute with Ranworth Health at the time she signed the statement but that she was given every opportunity to read the statement and had made alterations to it before signing it under oath.

The circumstances known at the time the employment ended

[7] The Employment Relations Act at section 66 provides for employees and employers to enter into fixed term employment agreements provided the employer has genuine reasons for entering into such an arrangement. The employee must be informed of how the employment will end and the reasons for the fixed term agreement.

[8] During the month of December Ms Karen Schneller, Ms Schneller's sister, was appointed to the position of General Manager, Ranworth Healthcare Ltd which she took up on 1 January 2004.

[9] Also during December 2003, Ms Schneller entered into discussions regarding her position with Burtons Healthcare coming to an end. In order to assist in finding alternative employment for her sister, Ms Karen Schneller, with the approval of the Board, offered Ms Schneller a temporary position with RHL assisting with an audit of the Gisborne operation. Ms Schneller took up this temporary position in mid December.

[10] During the later part of December further discussions about possible job opportunities took place between Ms Schneller, Ms Karen Schneller and the outgoing general manager Mr Graham Menary. The result of these discussions was the offer of temporary employment to undertake a compliance and quality role with RHL.

[11] Ms Schneller claims her employment was at all times with Abano Healthcare Group Ltd, it was continuous employment and her employment status was at all times that of a permanent employee with an expectation of ongoing employment.

[12] I pause to note at this juncture that Ms Schneller is a qualified lawyer and has completed her degree to masters level with experience in employment matters. I do not accept Ms Schneller's claims that her employment, under the umbrella of Abano, first working in the Burtons business unit and then with RHL was the same employment situation. Ms Schneller was paid all outstanding holiday pay at the end of December 2003 as required for an employee terminating their employment with a company. Ms Schneller was then offered a written employment agreement which was subject to discussion between herself and her sister, various clauses were altered and added, and the discussions were held over the period of about 6 weeks. Ms Schneller has filed her grievance

against RHL, she has not sought to have Abano cited as a respondent. I have taken this to indicate that Ms Schneller knew that at all times after January 2004 her employment was with RHL.

[13] Ms Schneller was offered employment with Ranworth Healthcare Ltd in January 2004. The offer of employment was confirmed in writing on 3 March 2004 and contained a written individual employment agreement. Ms Schneller signed her acceptance of the offer on 5 March 2003. From documents provided to the Authority, I have concluded that the agreement was drafted on or about 23 December 2004 and as already mentioned, was the subject of discussion and alterations during January and February 2004.

[14] The individual employment agreement is stated as being for a fixed term period commencing on 19 January 2004 and ending on 18 January 2005. The purpose of the fixed term agreement was "...to meet the temporary business needs of the employer".

[15] Ms Schneller says the reason for the fixed term agreement was due to concerns about nepotism. She says that a concern about nepotism does not constitute a genuine reason for entering into the fixed term agreement and therefore, she was entitled to treat the term as ineffective (pursuant to Employment Relations Act s.66(6)).

[16] RHL say the business needs discussed with Ms Schneller included dealing with issues relating to establishing quality systems and ensuring compliance in the area of employment law and health law. The written terms of the employment agreement included a one-off payment of a \$3,500 bonus if the projects specified were completed by October 2004. Mr Menary told the Authority that the role was not ongoing as it was to establish systems which once established would require nothing further. Ms Karen Schneller told the Authority that at the time the fixed term agreement was being discussed the organisation was facing some key issues. There had been incredible organisational change, significant people in the organisation had resigned, there were significant financial issues and two major fraud investigations were taking place.

[17] Ms Karen Schneller told the Authority that she did discuss nepotism with Ms Schneller at the time of entering into the fixed term agreement but that it was in the broadest sense. Ms Schneller had worked for her sister previously when she had worked in the Burtons business unit and the relationship between the two was well known by the executive management team. There is no evidence that during those employment relationships neither the Management team nor Ms Karen Schneller raised issues about nepotism in the workplace.

[18] In an email dated 8 March 2004 Mr Richard Keys, a Director of RHL asked Ms Karen Schneller whether the role Ms Schneller was being appointed to would be contested to cover off the nepotism issue. Ms Karen Schneller advised Mr Keys that it was agreed prior to offering Ms Schneller the role that the independent scoping of the role had been considered adequate to cover that issue. Documents produced to the Authority show that Ms Claire Turner from Red Consulting Group was advising Ms Karen Schneller on the scoping of the position.

[19] I am satisfied that the purpose of the fixed term agreement was, as discussed with Ms Schneller, to establish compliance with the Health Practitioner Competence Act, preparation of a new standard individual employment agreement, and negotiation of an expired collective employment agreement. Ms Karen Schneller and Mr Menary confirmed that it was considered it would take about 12 months for the work, as outlined, to be completed. Ms Karen Schneller, in her emails to Ms Turner points out the "...significant project with the employment agreement changes in April 04 and we have discussed the scope and timeframe of this project with [Ms Schneller]...".

The process followed by RHL

[20] In mid December 2004 Ms Schneller met with Ms Robin Cooper an independent consultant engaged by Abano Rehabilitation Ltd to review the management roles and structure of the company including its subsidiary companies. The notes from that meeting show that Ms Schneller advised Ms Cooper that her role was a fixed term ending in mid January 2005. The notes indicate that the discussion also covered off the projects Ms Schneller was to complete in the 12 months of the employment. Ms Cooper told the Authority that at the meeting Ms Schneller told her she [Ms Schneller] hoped another fixed term agreement might be offered to her after the present one expired as there was still work to be completed but that there had been no discussion with her about that. The notes taken at the meeting support this evidence.

[21] Ms Schneller says that at the meeting she raised an issue as to the genuineness of the fixed term agreement. Ms Cooper does not recall it being raised. Having reviewed the evidence, I am satisfied that it is more likely than not that Ms Schneller did not raise the issue about the genuineness of the fixed term agreement with Ms Cooper. Ms Cooper's notes taken at the meeting appear to be very full notes. I am doubtful something as important as Ms Schneller raising the genuineness of her fixed term employment agreement would have been missed out of the notes.

[22] On 11 January 2005 the Executive Management met. One of the stated purposes of the meeting was to keep the team focussed on actions and deadlines because budgeting for the following year was about to commence.

[23] The minutes of the meeting show the position of Ms Schneller was discussed. Both Ms Karen Schneller and Mr Keys confirmed that the impending expiry of Ms Schneller's employment agreement was included in these discussions. Ms Karen Schneller says she sought approval to extend the agreement but that the rest of the team were not in favour of that. The action point arising from that discussion was for Ms Karen Schneller to ...Analyse cost/benefit of in-house legal advisory role.

[24] On 14 January 2005 Ms Schneller met with Ms Cooper and Mr Neil James where the three discussed the relationship of her current role with that of other management roles in the organisation. The notes produced to the authority do not show that there was any discussion about the impending expiry of Ms Schneller's employment agreement and this is consistent with Ms Schneller's evidence that the fact of the fixed term agreement did not come up. Ms Schneller told me that Ms Cooper told her the organisations needs were being reviewed.

[25] Mr Tim Tenbenschel, Ms Schneller's partner, told the authority that Ms Schneller came home after the meeting concerned that she had not been involved in the review process and during the weekend became concerned about her employment status. I have concluded that Ms Schneller's concerns were as a direct result of the impending expiry of her fixed term agreement and the fact that no new contract had been discussed with her.

[26] On 17 January 2005 the executive management team met for a 2 day planning meeting. On the first day of this meeting Ms Schneller's fixed term agreement was once again discussed. The agreement was due to expire the following day but as there were some specific tasks that were still outstanding it was agreed that Ms Karen Schneller would contact Ms Schneller and offer Ms Schneller a four week extension to the agreement to allow the outstanding tasks to be completed. It was also agreed that Ms Karen Schneller would confirm the arrangement in writing.

[27] It is common ground that Ms Karen Schneller contacted Ms Schneller by telephone at or about 5.00pm that afternoon. At the investigation meeting Ms Karen Schneller told me she advised Ms Schneller that her role was no longer required and that she would meet with her to discuss it once she was back in the office. In her written statement Ms Karen Schneller says she confirmed

with Mr Keys that she had contacted Ms Schneller and had agreed to a 4 week extension of the term of Ms Schneller's employment agreement. It is this evidence that Ms Karen Schneller now says is wrong and that she does not recall discussing an extension with her sister on that day. Mr Keys has given evidence which supports Ms Karen Schneller's statement that she advised him that she and Ms Schneller had agreed to an extension of four weeks. As already stated at the beginning of this determination, I prefer the evidence from Ms Karen Schneller's written statement and have concluded that it is more likely than not that she did discuss and gain agreement from Ms Schneller that her employment would continue beyond the 18th January 2005.

[28] It was Ms Schneller's evidence that during the telephone conversation Ms Karen Schneller also advised Ms Schneller that information that the impending expiry of the role of legal compliance adviser would be made known to area managers the following day.

[29] On 26 January 2005 Ms Karen Schneller wrote to Ms Schneller confirming a conversation that day that Ms Schneller's employment agreement was extended for four weeks and would now terminate on 25 February 2005. The letter set out the specific projects requiring completion before 25 February. Ms Karen Schneller said at the investigation meeting that the outstanding projects outlined in the letter were developed in discussion with Ms Schneller.

[30] The letter also advised Ms Schneller that as the projects, which attracted the payment of the incentive bonus, were largely completed on time she would receive the full bonus of \$3,500.

[31] Ms Cooper told the authority that she assisted Ms Karen Schneller in drafting the letter dated 26 January. The action point from the minutes of the 17 January meeting required Ms Karen Schneller to confirm the extension to the employment agreement in writing. On enquiry with Ms Karen Schneller, Ms Cooper was told this had not been done. Ms Cooper offered to do a draft letter for her.

[32] At the investigation meeting Ms Karen Schneller says she never wrote the letter dated 26 January 2004. I find that evidence to be not credible. The signature on the letter is that of Ms Karen Schneller. Irrespective of who drafted the letter, on signing the letter Ms Karen Schneller has taken responsibility for the contents of the letter.

[33] On 18 February 2005 Mr Zoltan Varadi updated area managers and four other key managers on developments within the organisation and staff movements including that Ms

Schneller would be leaving the organisation that week. Ms Schneller reacted to this notification by email to Ms Karen Schneller where she expressed surprise that staff were being informed that Ms Schneller was leaving. Ms Schneller's response is surprising given that it was her evidence that she knew on 17 January 2004 that area managers were being informed that Ms Schneller was leaving the business.

The ending of the relationship

[34] I find that Ms Schneller entered into a fixed term agreement which meets the tests set out in section 66 of the Act in that the purpose of the fixed term agreement was for genuine reasons and those reasons and the way the agreement would end was known to Ms Schneller both when she entered into the agreement and when it was due to expire.

[35] Some of the projects which were to be completed during the 12 month term of the agreement continued to be outstanding by 18 January 2005 and therefore it was reasonable for RHL to seek to extend the agreement to allow those projects to be completed.

[36] I have found that the extension was more likely than not discussed and agreed with Ms Schneller on 17 January and confirmed in writing on 26 January. Again, the tests associated with section 66 of the Act have been met. Ms Karen Schneller confirmed in her letter of 26 January 2005 the discussed held with Ms Schneller that the extension was to allow Ms Schneller to complete the stated tasks and that the agreement would end on 25 February 2005. Ms Schneller's employment ended as agreed on 25 February 2005.

I find that Ms Schneller was not dismissed, rather her employment ended as a result of her fixed term employment agreement reaching its natural conclusion. I am unable to assist Ms Schneller further.

Costs

[37] The parties are to attempt to reach agreement on the matter of costs, failing which leave is reserved for the matter to be put to the Authority.

Vicki Campbell
Member of Employment Relations Authority