

BETWEEN ROBIN SKEGGS
 Applicant

AND RADIUS SECURITY LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Maria Dew for Applicant
 Murray Broadbelt and Barry Nalder for Respondent

Determination: 16 May 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Robin Skeggs (“Mr Skeggs”) claims he was unjustifiably dismissed by his former employer the respondent Radius Security Limited (“Radius Security”). He also claims remedies for unfair bargaining.

[2] Radius Security says Mr Skeggs was justifiably dismissed and there was no unfair bargaining. It also says that both claims are out of time.

[3] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[4] Mr Skeggs is a trustee of the Skeggs Family Trust. That Trust holds a one third shareholding in Radius Security. The remaining two third shareholding is held by its parent company Radius Health Group Limited (“Radius Health”).

[5] Since September 2004 Mr Skeggs has been a director of Radius Security with two others, Mr Scott Lee and Mr Thomas Wilson (“Mr Wilson”). Mr Wilson is also Radius Health’s Managing Director.

[6] Between July 2004 and November 2005 Mr Skeggs was employed as Radius Health's Finance Director. He resolved to leave that employment because the relationship he had with Mr Wilson had become strained.

[7] During September 2005 Mr Skeggs negotiated with Mr Dean Cates, Radius Security's Chief Executive Officer ("Mr Cates") and Mr Peter Scott, Chairman of the Board of Directors of Radius Security and a director of Radius Health ("Mr Scott"), for employment with Radius Security as its Chief Financial Officer.

[8] Mr Skeggs commenced employment with Radius on 9 November 2005. He was presented with a first agreement on 7 November 2005 which after some discussion was amended and then executed by Mr Skeggs and Mr Cates the day of his commencement on 9 November 2005. Mr Skeggs was not told he had an opportunity to take advice and nor did he choose to take advice. Mr Cates directed the accounts person put Mr Skeggs on the payroll as from 9 November 2005.

[9] Mr Cates was castigated by Mr Wilson apparently because of Mr Wilson's view that Mr Cates did not have the authority to conclude an employment agreement with Mr Skeggs. Mr Wilson directed Mr Cates that Mr Skeggs was not to be paid until a further agreement had been settled.

[10] On or about 15 November 2005 a further document was put before Mr Skeggs which had amended term and termination clauses and an amended job description. Mr Skeggs was satisfied the amended agreement reflected the intention that he and Mr Cates shared, that he would be employed after 19 May 2006 on terms to be further agreed. Again, Mr Skeggs was not told he had an opportunity to take advice, contrary to the acknowledgements at clause 35 of the Agreement, and nor did he choose to take advice. Mr Skeggs and Mr Cates signed the agreement.

[11] A day or two later, Mr Cates explained to Mr Skeggs that Mr Wilson was still not happy. Mr Wilson had inserted a new handwritten clause 37.2 which provided that the employment agreement would supercede a shareholders agreement entitling Mr Skeggs to be "finance director". Mr Wilson had also inserted his signature next to that of Mr Cates' at the execution clause. But Mr Skeggs was not happy and on 17 November 2005 he inserted his own amendment which sought to nullify Mr Wilson's additional clause 37.2. He handed the document back to Mr Cates. He continued to work but was not paid his weekly salary for the weeks ending 11 and 18 November 2005. In the meantime, Mr Wilson was taking advice.

[12] Mr Skeggs escalated matters to Mr Scott objecting to Mr Wilson's amendments. Mr Skeggs wrote an email to Mr Scott on 28 November 2005 which materially objected to the fixed term nature of the employment. He sought "redocumentation" and wrote:-

To be clear I do not accept that the Employment Agreement is a genuine fixed term agreement as the role of CFO will not come to an end in six months time. However, as we have discussed I consider that the role would not be full time after some six months, once I have restructured and caught the finance function up-to-date and up-to-scratch.

...

In particular, the IEA should not be characterised as a Fixed Term Contract for 6 months with another Agreement to follow based on part time employment but as (refer back to my e-mail of 2 Nov at 12.07pm):

- 1. A Permanent Employment Agreement;*
- 2. As we have discussed if the needs of the role changed down the track we would need to work in good faith through the usual process between an employee and employer in these circumstances; and*
- 3. Given the recent history I would insist that my Lawyer review this revised agreement, if we were to go down this route, to ensure the various terms and conditions therein are fair and reasonable and reflect market based conditions for the seniority of the role.*

I have been advised I have a personal grievance for distress and humiliation damages plus costs for the withholding of salary due and for a lack of good faith in holding that over me to pressure for the insertion of a new clause in the employment agreement.

I also would appreciate an apology from Tom for his conduct in relation to this matter.

[13] On 30 November 2005, Mr Skeggs met with Mr Scott. Mr Skeggs told Mr Scott he wished the fixed term clause removed. Mr Scott considered that removal too difficult and suggested that clause 37.2 simply be removed. Mr Skeggs is adamant he did not agree with Mr Scott that his employment was fixed term. Mr Skeggs and Mr Wilson agreed that clause 37.2 would be removed, Mr Wilson would apologise to Mr Skeggs and Radius Security would pay Mr Skeggs \$500 towards his legal costs.

[14] Clause 37.2 was deleted as initialled by both Mr Skeggs and Mr Wilson and the Agreement dated 15 November 2005 was then in its final form as from 30 November 2005 ("the Agreement"). The Agreement contained a term that the employment was for a fixed term from 15 November 2005 expiring on 19 May 2006.

[15] Mr Wilson, Mr Cates, and Mr Mike Boersen Radius Health's Financial Director ("Mr Boersen") met on or about 1 May 2006. Due to concerns about Mr Skegg's performance which

were never pursued in any formal way with Mr Skeggs, it was resolved that Mr Skeggs' employment would not continue beyond 19 May 2006. Mr Scott's views were later sought.

[16] On Wednesday 3 May 2006 Mr Cates and Mr Boerson informed Mr Skeggs that his employment would terminate on 19 May 2006 and not be renewed.

[17] Mr Skeggs continued working until his last day on Wednesday 10 May. There was a morning tea to celebrate his forthcoming wedding but there was no farewell function or announcement of his termination. The following day he left to travel overseas for his wedding on 13 May 2006. This time away had been previously approved by Mr Cates as leave prior to 3 May 2006.

[18] By letter dated 8 May 2006 Mr Cates wrote to Mr Skeggs confirming the cessation of Mr Skeggs' employment:-

Dear Robin

Re: Your fixed term Employment Agreement

In line with our advise (sic) of the 3rd May 2006 this is to formally confirm that as per the Employment Agreement between Radius Security Limited and yourself that at the expiry of your fixed term being 19th May 2006 your employment will cease.

On expiry of the contract we will require all company equipment in your possession to be returned to Radius Security's premises at 2B William Pickering Drive, Albany.

Should your services be required after this date this will be as a casual contractor on an as required basis at an hourly rate to be agreed.

Yours faithfully

Dean Cates

Chief Executive Officer

The merits

[19] In resolving the employment relationship problem, the Authority determines the substantial merits of the problem by having regard to and applying established legal principles to the facts established.

[20] There are limitation issues to be dealt with first. The termination was effective from 19 May 2006. Mr Skegg's counsel raised a personal grievance with Radius Security by letter dated 15 August 2006. That is just barely within 90 days of the termination and the grievance is not then raised out of time. A claim for remedies arising out of a claim of unfair bargaining is not a personal grievance. No limitation issues therefore arise.

[21] The issues that arise for determination are these:-

- i. whether Mr Skeggs' employment was fixed term; & if not
- ii. whether he was dismissed; & if he was
- iii. whether that dismissal was justifiable.

A fixed term employment?

[22] Mr Skeggs can only have been dismissed if his employment was not fixed term. That is because the ending of a fixed term employment is not a dismissal, but rather, it comes to an end by the "mere effluxion" of time, as the parties agree from the beginning that it will. This then is the first enquiry – whether the employment was fixed term.

[23] The law prescribes the requirements for fixed term employments. Section 66 of the *Employment Relations Act 2000* ("the Act") provides:-

66. *Fixed term employment*

- (1) *An employee and an employer may agree that the employment of the employee will end—*
 - (a) *at the close of a specified date or period; or*
 - (b) *on the occurrence of a specified event; or*
 - (c) *at the conclusion of a specified project.*
- (2) *Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—*
 - (a) *have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
 - (b) *advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*
- (3) *The following reasons are not genuine reasons for the purposes of subsection (2)(a):*
 - (a) *to exclude or limit the rights of the employee under this Act;*
 - (b) *to establish the suitability of the employee for permanent employment.*
 - (c) *to exclude or limit the rights of an employee under the Holidays Act 2003.*
- (4) *If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—*
 - (a) *the way in which the employment will end; and*
 - (b) *the reasons for ending the employment in that way.*
- (5) *Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.*
- (6) *However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—*
 - (a) *to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or*
 - (b) *as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.*

[24] There are two pre-requisites to fixed term agreements being entered into. The first is for the employer to have genuine reasons based on reasonable grounds to specify that the employment is to

end in a specified way and, second, that the employee must be advised when and how the employment is to end and the reasons for it.

[25] I find that Mr Skeggs and Mr Cates agreed that Mr Skeggs would be engaged as Chief Financial Officer to at least initially attend to restructuring the accounting system, internal processes, and correct faults. I find that it was accepted this function was likely to take roughly about six months to complete and there was no more certainty than that. I find too that it was expected that Mr Skeggs would thereafter work one to two days per week and fill his other days with contracting or consulting work. This was the substance of what Mr Skeggs proposed in his email to Mr Scott copied to Mr Cates of 2 November 2005 materially as follows:-

Dean and I have discussed remuneration and have tentatively agreed to a 2 phase remuneration structure for the role as employee:

1. Initial Phase from early Nov (next Monday?) until March/April over which time my full-time employment would be required to bring the function up to scratch (including appropriate staffing structure and training as well as reviewing and improving the billing systems and implementing the Axapta Stock module) as well as bring the work up to date (including the completion of the 2005 Annual Accounts and filing past tax returns):

- a. Salary for Role \$120,000pa – usual Leave and other entitlements*
- b. Full use of MV (current yellow beast); and*
- c. Provision of/Business Expense reimbursement: including Laptop, Cellphone, Phone Rental, Internet, etc as per requirements of role*

2. On-going Phase after initial phase to maintain function (1-2 days/week) plus Project work as required

- a. Daily Contract rate of \$800/day; and*
- b. Business Expense reimbursement as per requirements of role*

[26] I prefer Mr Skeggs' denial and find this arrangement was not because of a stated desire by him to reduce his workload because of his health.

[27] The arrangement set out in the email was purported to be translated as the "Term" provision of the Agreement at clause 2 as follows:-

2. Term

2.1 This employment agreement shall take effect from 15th November 2005 for a term of 6 MONTHS and will expire on 19th MAY 2006.

2.2 Nothing in this agreement shall prevent the parties, at or before the expiry of this agreement, from renewing this agreement or entering into a subsequent employment agreement. However, nothing in this clause shall be interpreted or understood to give to the Employee any expectation that this agreement will be renewed or that any subsequent agreement will be entered into.

2.3 This agreement is for a fixed term for the following reason;

- a. The employee currently expects at the expiry of this contract to move to a part time roll(sic) with the Employer on such terms as are to be agreed by the parties,*

expected to average 2 days per week at expiry of the contract.

b. *The agreement that flows on from this agreement shall include, agreed structure of the Finance Department, the employees revised hours, duties, and position as Finance Director (CFO). It is expected that agreement will be achieved before the expiry date of this agreement.*

[28] While sub-clause 2.2 in very unequivocal terms emphasises there can be no expectation of renewal or subsequent employment, sub-clause 2.3 oddly provides for that very expectation. Sub-clause 2.3(b) is arguably an "agreement to agree" before the expiry date. It gives Mr Skeggs' an expectation that a further agreement will be entered into before the expiry of the existing arrangement. But there was no agreement reached or any attempt to agree. There were no discussions whatsoever with Mr Skeggs about it.

[29] I find that what was actually agreed was a two phased employment, the first "initial phase" relating to work in the nature of a project (full-time) and the second "on-going phase", 1 - 2 days per week maintenance work (part-time). The wording of clause 2 attempts to encapsulate the former at clause 2.1 and the latter at 2.3. The Agreement *Appendix A Job Description* makes no distinction between the two phases.

[30] The difficulty in this case results from the parties' mutual misconception that *full-time* was synonymous with *fixed term*. It is not.

[31] Mr Wilson suggested at the investigation meeting that Mr Cates had no authority to enter into an employment agreement with Mr Skeggs. I do not consider that position assists Radius Security to resist Mr Skeggs' claims. Firstly, Mr Wilson himself signed the Agreement. Whether or not Mr Cates had actual authority to conclude an agreement, he ostensibly did and Mr Skeggs is entitled to rely on that authority. Nor am I persuaded that a defect in Radius Security's internal processes is good against "all the world" including so as to preclude a binding agreement with Mr Skeggs. I say no more about this late defence.

[32] Mr Skeggs did not succeed to part-time hours or the "ongoing phase" because Radius Security terminated the relationship effective 19 May 2006 as the expiration date, which I find, is actually a reference to the conclusion of the "initial phase" and nothing else.

[33] As a matter of fact, I find that Mr Skeggs never agreed that his employment would end. He agreed to work full time for a period and then part-time. That is not a fixed term employment. It is

a continuing indefinite one which was to be varied subsequently only by a change of the hours of work and duties. But the two phases referred to are components of the one continuing relationship. This I find was the substance of the bargain. Mr Skeggs never agreed that his employment would end. Nor did he ask for fixed term employment. And there was no advice to him preceding the Agreement's execution of the end date specifically as 19 May 2006 or the reasons for why the employment was to end that way.

[34] But he signed the Agreement with 19 May 2006 nominated as the expiry date and he chose not to take advice about the Agreement. He ought to have done so as all employees should. He was aware the Agreement referred to an express termination date at 19 May 2006 and he signed it. Should he be permitted to resile from what he has signed? How is the Authority to assist him in these circumstances? Section 66(6) of the Act confers on Mr Skeggs an election - he can elect to treat the fixed term as ineffective in certain circumstances. He asks the Authority to legitimise his election to treat the purported fixed term provision as ineffective.

[35] The various provisions of section 66 are premised upon an agreement between the employee and employer that the employment will end. But, as Ms Dew argues, Mr Skeggs' employment agreement contains many provisions indicative of an indefinite employment. Clause 6.2 provides for a review of remuneration "annually" and clause 8.2 a performance review each year. Clause 10.9 provides for sick and bereavement leave after 12 months service. Clause 13 provides for four weeks notice of termination. Clause 14 provides for a comprehensive consultation process in relation to redundancy. Clause 25 refers to warnings lapsing 12 months after issue. The appendix A job description is typical of a permanent full time role in its descriptions of the continuing tasks and duties to be performed. I agree with counsel that the discussions relating to a deleted clause 37.2 are corroborative too of a continuing employment inasmuch as that clause purported to extinguish Mr Skeggs' contractual right under a shareholders agreement to be "Finance Director". Also corroborative is the approval of Mr Skeggs wedding leave which was at the time of approval known to proceed beyond "19 May 2006". All of these matters are corroborative of my conclusion that this was an indefinite employment and therefore not fixed term at all.

[36] While I accept that in the very broadest terms, there is a statement that the employment will expire on 19 May 2006 and that is a statement of how the employment will end, and also that clause 2.3(a) is a statement of the reason (but not an explanation) for why it will end on 19 May 2006, I do not accept those statements relate to the whole employment. They relate to what was agreed in the form of the first initial phase of the employment. But this employment I find was ongoing and

indefinite. It was not fixed term. I find that Mr Skeggs and Radius Security did not reach an agreement between them that the employment would end. There being no agreement that the employment will end, the Agreement is not a fixed term one permitted by section 66 of the *Employment Relations Act 2000*. It could only be terminated for cause.

Was there a dismissal?

[37] Mr Skeggs was given notice of dismissal on 3 May 2006. That dismissal is proved by Mr Cates' letter of dismissal dated 8 May 2006.

Was the dismissal justifiable?

[38] Radius Security had no basis to terminate Mr Skegg's employment. There was no cause and it does not defend the dismissal attempting to justify it on any other basis than it was purportedly fixed term.

[39] I determine that on an objective basis, the employer's actions and how it acted, were not what a fair and reasonable employer would have done in all the circumstances at the time. **I find the dismissal on 19 May 2006 as notified on 3 May 2006 was unjustifiable.**

Resolution

[40] Mr Skeggs has a personal grievance and he is entitled to remedies in settlement of that grievance.

[41] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Skegg's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I find that Mr Skeggs did not contribute to this personal grievance.

Reimbursement

[42] Mr Skeggs would have continued to earn his salary had Radius Security not acted unlawfully. Because he did not, he had to find another income source. I accept he applied for a number of financial officer roles. In July and August 2006 he applied for a Chief Financial Officer role at Geneva Finance, Chief Financial Officer at Works Infrastructure and Chief Financial Officer at Metlifecare. His applications were not successful.

[43] In June 2006, Mr Skeggs commenced working for himself as a part-time financial consultant. It was not until after 10 October 2006 that he began to earn a similar salary to that he was paid at Radius Security. He produces proof of his earnings to the Authority.

[44] He claims his net loss of earnings from 19 May 2006 to 10 October 2006 in the total sum of \$35,700. It is true that Mr Skeggs was eventually to succeed to part-time work. I accept however that the role Mr Skeggs was performing before he was dismissed would have continued full-time beyond 19 May 2006. Mr Skeggs' former role was filled almost immediately by another chief financial officer and Mr Skeggs was contracted back to Radius Security to train that person. Mr Skeggs says that his former role continues full-time. I accept that Mr Skeggs would have continued in his role were it not for his unlawful termination and he would have continued to earn his salary.

[45] I am satisfied that Mr Skeggs has lost remuneration as a result of the personal grievance in the net sum he alleges. The sum claimed is the loss of his remuneration reduced by his earnings from consulting work. He shall have his actual loss. **I order Radius Security Limited to pay to Robin Skeggs the sum of \$35,700.00 as reimbursement.**

[46] Mr Skeggs claims interest on his lost earnings. As he has stood out of that income he shall have interest on it. **I order Radius Security Limited to pay to Robin Skeggs interest at the rate of 10% on the sum of \$35,700.00 from 10 October 2006 to the date of payment.**

Compensation

[47] Mr Skeggs gave evidence of the effect of the dismissal on him. He says it was distressing being terminated only days before his wedding. He was stunned when he was told. On 8 May 2006 he passed out while taking a routine blood test. He felt extremely stressed and his doctor recommended that he take sick leave. His health was affected with significant bouts of sleeplessness. He could not sleep thinking about what had happened to him. He says it was particularly stressful when Radius held back his final pay while he was away on honeymoon. His pay was withheld until he returned a book and a phone. This event I agree was an aggravating feature of his dismissal.

[48] Mr Skeggs' wife says Mr Skeggs became withdrawn, irritable, and could not sleep properly. She says he would lie awake for hours and began drinking more. His moods fluctuated and he was often argumentative she says. She further says Mr Skeggs was deeply upset that he could not

continue his role and he was insulted that Radius Security looked for a replacement to fill his former role.

[49] I accept that Mr Skeggs has suffered humiliation, loss of dignity and injury to his feelings. Having regard to his evidence, his wife's evidence and his period of service, **I order Radius Security Limited to pay to Robin Skeggs the sum of \$15,000 as compensation.**

Unfair bargaining

[50] Mr Skeggs and Mr Cates signed an employment agreement dated 9 November 2005. Mr Wilson did not like that agreement. He directed Mr Cates that Mr Skeggs was not to be paid until, I find, Mr Skeggs signed an agreement that was acceptable to Mr Wilson. The Agreement dated 15 November 2005 was entered into against that background. Mr Skeggs was not paid his weekly salary until 3 December 2005.

[51] I also find, and it is not disputed, Mr Skeggs was never advised he had the opportunity to take advice about the Agreement before he signed it, nor in relation to the Agreement procured by Mr Wilson.

[52] Because of these facts, I find that Mr Skeggs was induced to enter the Agreement by oppressive means, and further, that he did not have the information to seek advice as required by section 63A of the Act. These findings satisfy section 68(1)(a) of the Act. Section 68(1)(b) is also satisfied because I find that Mr Cates and Mr Wilson were both persons acting on Radius Security's behalf and both knew of the facts at paragraphs [50] and [51] above. All these findings, give rise to my ultimate finding that the bargaining for the Agreement was unfair.

[53] Having resolved the personal grievance, I consider the most appropriate remedy for this unfair bargaining, is to order Radius Security to pay to Mr Skeggs compensation in relation to it. I accept he suffered anxiety, inconvenience and humiliation by reason of the unfair bargaining, especially in relation to his salary being withheld from him. He engaged in correspondence and had to escalate the matter to have it resolved. I consider an appropriate amount of compensation to be the sum of \$2,000.00 in relation to the unfair bargaining I have found. **I order Radius Security Limited to pay to Robin Skeggs the sum of \$2,000.00 as compensation for unfair bargaining.**

Costs

[54] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Dew is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Broadbelt is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority