

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 94/09
5115548

BETWEEN BRIAN LESLIE STEPHENS
 Applicant

AND CLARKE ELECTRICAL
 LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Jenny Guthrie, Counsel for Applicant
 Jen Wilson, Counsel for Respondent

Investigation Meeting: 7 October 2008 at Dunedin

Submissions received: 22 October 2008 from Applicant
 24 October and 4 November 2008 from Respondent

Determination: 3 July 2009

DETERMINATION OF THE AUTHORITY

[1] The applicant, Brian Stephens, is a registered electrical service technician who says he was unjustifiably dismissed by the respondent because a fixed term employment agreement had expired and, at that time, the position held by Mr Stephens was said to be surplus to the respondent's requirements. Mr Stephens says the dismissal was unjustified on both substantive and procedural grounds. He seeks reimbursement of 13 weeks lost wages, compensation for hurt and humiliation in the sum of \$7,500 and costs.

[2] The respondent's position is that the requirements set out in s.66 of the Employment Relations Act 2000 were not met in that the fixed term agreement between the parties was not recorded nor were the reasons why the employment was fixed term and how it was to end set down. It says the reasons were known to Mr Stephens as there was a thorough discussion with him prior to the employment agreement being drafted and provided to him. Further, it says that in spite of this

defect, Mr Stephens' position was surplus to the company's requirements at the time the agreement was severed on the ground of redundancy.

[3] Accordingly, the respondent declines Mr Stephens' claim for lost remuneration as the position held by the applicant ceased to exist, and also rejects the claim for compensation for hurt and humiliation. It does so on the basis Mr Stephens was aware, or ought to have been aware, of the fixed term nature of the employment he accepted, that the dismissal was justified substantively, that it was the applicant's own post-dismissal behaviour which gave rise to his hurt and humiliation and the respondent is unable to pay *substantial compensation*.

[4] The parties attempted to resolve their differences in mediation but were unable to do so.

Essential facts

[5] Bruce McCormick and his wife Karen purchased the business of C J Clarke Electrical in late 2005. It consisted of two separate divisions of operations, an electrical division and a cleaning supplies division. The electrical division undertook general work as well as servicing whiteware and small appliances. The McCormicks accept that at the time of purchase the business was somewhat run down but still well regarded in the marketplace. The McCormicks expended some significant funds in upgrading the vehicle fleet, computer system and phone system. These improvements were funded by the sale of their family home. Shortly after buying the business, Mr McCormick was diagnosed with a kidney disease and this restricted his personal input to the business and its redevelopment.

[6] Following the resignation of a longstanding qualified electrician, the respondent advertised for an electrician in the *Otago Daily Times*. Mr Stephens answered the advertisement even though he was not a registered electrician. However, in the course of initial discussions, the applicant indicated he had experience in the repair of commercial dishwashers. Knowing there was a lack of expertise in this area of servicing, the respondent decided to interview the applicant. In the course of these interviews, the applicant was told the company was interested in his commercial dishwasher experience and the applicant spoke about his training on Hobart and Starline commercial products.

[7] Mr McCormick checked with the applicant's referees and this check highlighted that previous employers had experienced some difficulty in respect of Mr Stephens' *temper problems*.

[8] Concerned about these comments, the respondent decided to re-interview Mr Stephens and an open discussion ensued regarding reports from his previous employers. The McCormicks say the discussion was frank and both were impressed how the applicant handled the discussion. Their view was *we concluded that perhaps with the right employer these problems could be put behind him and we offered him a chance to redeem himself*. The respondent says that the position offered was for a fixed term of six months which would be sufficient time to determine whether there was a viable market in the commercial dishwasher area. The McCormicks say *the term of six months was discussed with the applicant and agreed to before the individual employment agreement was drafted*. They also say the offer of employment was subject to the applicant signing a good behaviour bond attached to the agreement. The respondent utilised their standard individual employment agreement which was adjusted only in regard to the good behaviour clauses and the fixed term period. The respondent later learned that the legislation required this type of agreement to include the reason for the fixed term arrangements and a description of how the employment would come to an end.

[9] The respondent says that on 6 June 2007, Mr Stephens came to meet the other staff at a morning tea and later returned to uplift the IEA. Mr McCormick says he took Mr Stephens through the agreement clause-by-clause and then the applicant took it home. Mr Stephens started work the following day and signed his IEA on 7 June 2007. It appears there were no objections or requests for further discussion about any of the terms included in the agreement.

[10] The respondent makes the point that it had created a new position and a timetable to establish its viability or otherwise, but as Mr Stephens did not meet its requirements for a qualified registered electrician, it continued its search to employ one.

[11] Prior to employing the applicant, the company had been passing commercial dishwasher work to another electrician. However, it felt there was sufficient work in Dunedin to justify its employing the applicant. This was particularly so in the light of the companies with which it was dealing on the cleaning supplies side of the business.

[12] The applicant says he was particularly busy during the whole time that he was employed by the respondent and provided documented evidence to support this position. The respondent does not disagree with this but says Mr Stephens was given domestic work experience with other servicemen and the opportunities to service washing machines and other equipment that previously he had little experience in. Further, it says that it was becoming clear that Mr Stephens' skill and training were not of a sufficiently high standard to meet the needs of customers in the commercial dishwasher market. There was also some evidence as to difficulties arising between the applicant and the company's cleaning supplies representative. This was further compounded by the erosion of confidence in Mr Stephens' ability to competently repair commercial dishwashers on the part of a company which worked in close association with the respondent.

[13] Without going into the detail, it is clear from the end of year 2007 financial accounts the cleaning supplies operation was making progress but the electrical division was sliding backwards. Following detailed analysis of the financial figures, the respondent concluded early in November 2007 that it could no longer continue its involvement in the commercial dishwashing area and that area of the business would be closed. It says as a direct result of this the decision was taken not to renew the applicant's agreement.

[14] The respondent spoke with the applicant on Thursday, 8 November 2007 advising that its attempts to break into the commercial dishwasher market had been unsuccessful and gave him verbal notice of termination. The McCormicks say they explained the reasons behind the decision but that the applicant became quite upset, going so far as to blame the cleaning division representative for the lack of work in this area.

[15] Despite this, the applicant was offered the choice of working on or being paid four weeks in lieu of notice. Mr Stephens said he wished to continue to work out his notice period. At this meeting, the applicant also says Mr Stephens mentioned he had been offered a job with another electrical operation and indicated he intended to visit them to follow up this prospect.

[16] There were a number of incidents during the period in which Mr Stephens was working out his notice. The major issue was an altercation in the offices of EcoLab the day following the giving of notice. This incident led the respondent to set up an

investigation meeting to be conducted by an employment specialist from the Employers' Association. However, due to a range of difficulties, including the McCormicks' intended and booked holiday to Australia and the unavailability of the applicant's selected support person, the meeting never took place.

[17] This is because, upon Mr and Mr McCormick's return from Australia, a staff member handed Mr McCormick a note from the applicant indicating he would take up the offer of being paid out for his notice period and would complete work on that day, 27 November 2007. The respondent agreed that he could finish that day.

[18] For a range of reasons not germane here, the decision was made to put the business on the market and it was sold towards the end of August 2008.

[19] Finally, as a result of the advertisements placed, the respondent employed two qualified registered electricians, one (Bob) in the period just prior to notice being given to Mr Stephens and the other a few weeks following the applicant's departure. When the applicant queried why two new people were being employed, Mr McCormick told him that one would be working on creating electrician-type work for both of these employees and the other, Aaron, would be working on small commercial appliances like coffee machines as well.

The issues

[20] To resolve this matter the Authority needs to make findings on the following issues:

- Was the employment a genuine fixed term arrangement; and
- Did the agreement meet the requirements of s.66 of the Employment Relations Act 2000; and
- Was the applicant's position genuinely surplus to the respondent at the time of dismissal; and
- Was an appropriate consultation process conducted between the parties prior to the termination of employment; and
- Was the dismissal unjustified; and

- If so, to what, if any, remedies is the applicant entitled; and
- Did the applicant contribute to the circumstances which gave rise to the dismissal; and
- If so, to what extent are remedies to be adjusted?

The test

[21] The test to be applied in this matter is set out in s.103A of the Act

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.

The investigation meeting

[22] At the investigation meeting, the Authority heard from the applicant himself and from his wife, Heather Stephens. On behalf of the respondent, both Mr and Mrs McCormick presented their evidence supported by that of Wendy Wilson who was present at the time of the altercation in the EcoLab offices in November 2007.

[23] Each witness was attentive and genuine in its response to the Authority and counsels' questions and I record my appreciation for their openness in assisting the Authority in clarifying the issues around this matter.

Analysis and discussion

[24] The respondent has acknowledged its failure to adhere to the requirements of s.66 of the Act, but as noted above, it insists Mr Stephens *knew or should have known the employment offered him was for a fixed period*. That acceptance assists the Authority to some extent. However, it overlooks the respondent's apparent purpose which was to attempt, using the applicant's proffered skills and knowledge, to attempt to break into the commercial dishwasher market in Dunedin. It appears, Mr Stephens was told that his ongoing employment was dependent on that objective being reached. Mr Stephens said his understanding of the six month stricture in the agreement related to a *good behaviour bond*. If Mr Stephens is confused over this, and I accept this may well be the case, it likely arises from the lack of clarity as to the reasons for the six

months fixed term arrangement and the uncertainty around how the period of employment was to end.

[25] The applicant's understanding was that as long as he proved himself capable of working harmoniously with those he dealt with in his job, once six months had passed with no significant discord, his ongoing employment would be as secure as any employment.

[26] In reviewing the evidence before the Authority, I think it more probable than not that the respondent's objectives which led to the hiring of Mr Stephens were squarely put to him in terms of the commercial dishwashing market. What I am unsure of is to what extent his own personal performance in contributing to the profitability of the organisation was set out prior to the agreement being entered into by the parties. Overall, I think it is fair to say the trial nature of the exercise the respondent was embarking on needed to be recorded both in the agreement and perhaps by way of performance measuring systems under which the progress towards the objectives sought could be measured and evaluated.

[27] The evidence of Mr McCormick was *there were no concerns about his performance or behaviour prior to the notice of termination of employment*. That evidence clearly establishes the company's essential satisfaction with Mr Stephens' compliance with the behavioural aspects of his employment. It is noted that the EcoLab incident occurred immediately following notice being given to the applicant that his employment would cease within four weeks.

[28] The employment in October 2007 of a registered electrician, Aaron, was not directly related to the respondent's inability to secure sufficient profitable work within the commercial dishwasher market, but arose from its need to replace the registered electrician whose resignation is referred to above in this determination. I think it significant that Mr McCormick's evidence was when he heard *from De Longhi's head man that Aaron was coming to Dunedin, and did Mr McCormick want him*, Mr McCormick told his De Longhi contact that Aaron would be welcomed *with open arms*. This was in spite of Mr McCormick telling the Authority that at the time he employed Aaron, he (Mr McCormick), was unsure of the newcomer's actual qualifications and whether they covered all or most of the work the respondent undertook for its customers.

[29] There is little doubt, on the evidence, that Mr Stephens was employed only after he made the McCormicks aware of his experience in the commercial dishwasher arena. As noted above, the respondent was farming out any inquiries it had in this area to another electrician and clearly saw the opportunity to retain this business in-house. Again on the evidence, it is clear that this was not a green fields opportunity and would bring the respondent into competition with its then service provider. That, however, is a business decision, and as such one open to the respondent to make.

[30] There was some evidence before the Authority indicating some low level conflict between the staff of the respondent involving Mr Stephens and some rumours were doing the rounds. Significantly, Mr McCormick said he *never got to the bottom of anything*. For his part, the applicant told the Authority he felt aggrieved at not being given the opportunity to put his side of the story when these minor matters arose.

[31] In spite of the difficulties, Mr Stephens appears to have plugged on with his work and it is evident from the respondent's own evidence that Mr McCormick had no significant concerns about the applicant's performance or behaviour before the dismissal. The poor performance of the electrical services division as a whole which became evident following the analysis in August and September 2007 of the financial accounts for the year ending 31 March 2007, and led to the respondent falling back on the deficient fixed term agreement in a redundancy setting.

[32] While I appreciate how Mr Stephens came to the view that Aaron was hired as his replacement, I do not agree with that view. The company advertised for a registered electrician. Although not qualified to that level, Mr Stephens applied and, as a result of discussion, was hired for his commercial dishwasher experience and ability to service domestic appliances. The company continued its attempts to recruit registered electricians and Aaron's appointment resulted from those efforts.

[33] It is clear that the respondent largely abandoned its foray into the commercial dishwashing market and attempted to refocus its electrical division on traditional areas of appliance servicing. On the facts before the Authority, it appears that that division remained something of a millstone and was a factor in the McCormicks' decision to sell the business.

[34] Returning to the issue of the agreement itself, while I accept the McCormicks' evidence that the nature of the applicant's employment in the light of its objectives in the commercial dishwashing market were explained, the respondent's failure to record the purpose of the fixed term arrangement and how it was to end is a major difficulty. Section 66(3)(b) of the Act rules out the use of fixed term arrangements to establish the suitability of the employee for permanent employment. The respondent would have been better to have considered, in the light of its objectives, to employ Mr Stephens on a probationary basis.

Determination

[35] Returning to the issues set out above in this determination, I find:

- The employment of Mr Stephens under a fixed term arrangement was unlawful;
- The agreement did not meet the requirements of s.66 of the Employment Relations Act 2000;
- The applicant's position, given the inability of the respondent to break into its target market, and given the applicant's limited electrical qualifications) was genuinely surplus to the respondent at the time of the dismissal;
- There was no consultation process relating to possible redundancy conducted by the respondent and that affected the applicant detrimentally as is evidenced by his verbally aggressive behaviour on the day following his being given notice;
- The dismissal was unjustified because the fixed term arrangements did not comply with the requirements of the Act and because the respondent failed to consult with Mr Stephens and discuss the reasons behind the decision to terminate his employment;
- The applicant did not contribute to the circumstances which gave rise to the dismissal;
- The applicant has a personal grievance and is entitled to remedies.

Remedies

Lost remuneration

[36] Having found the dismissal unjustified on procedural grounds but substantively justified, the applicant's claim for lost remuneration becomes a little complex. The Court of Appeal in *Waitakere City Council v. Ioane* [2004] 2 ERNZ 200 addressed this issue in the decision of Young J (as he then was) expressed the position in this way:

[22] *I agree with the judgment of Anderson P but wish to add comments about the approach which should be adopted for the assessment of compensation in cases where a dismissal is held to have been unjustifiable on procedural grounds.*

[23] *It is likely, to say the least, that a fair process would have resulted in Mr Ioane's justifiable dismissal.....*

[24] *If a fair process would unquestionably have resulted in Mr Ioane's justifiable dismissal, the Council's "unfair" process was not causative of any significant loss of remuneration.*

[25] *If such an outcome (ie: unjustifiable dismissal) was likely but not inevitable, some conceptual difficulty arises.*

[26] *I favour a loss of chance approach in this situation. This would recognise the possibility or probability of justifiable dismissal amongst the contingencies which would have affected Mr Ioane's likely future employment had he not been unjustifiably dismissed.*

Had the respondent entered into a consultation process with Mr Stephens, it is possible he may have persuaded the McCormicks to retain him on some other basis. The applicant was denied this opportunity to plead his cause when Mr McCormick gave him notice of termination.

Standing back and viewing this aspect of the case, I am of the view, even had the respondent fulfilled its consultative obligations, the probability of termination was high, and in view of those circumstances, I decline the applicant's claim for remuneration lost as a result of the grievance.

Compensation

[37] The Authority accepts Mr Stephens suffered considerable upset at his dismissal. That, however, needs to be balanced by the fact that he knew or ought to have known the respondent was offering him six months work. But for the failure of

the respondent to penetrate a servicing sector it had identified, given the skills the applicant indicated he possessed, the applicant's dismissal was almost inevitable. When reviewing the job sheets before the Authority, it is clear that much of the work related to general servicing and very little to the work Mr Stephens was employed to undertake.

[38] Weighing the evidence in the case-specific context, and in the light of Mr Stephen's loss of opportunity, I award the applicant the compensatory sum of \$4000 under s.123(1)(c)(i) of the Act.

[39] I order the respondent to pay the applicant to pay the sum of \$4000 without deduction.

Costs

[40] Costs are reserved. Counsel for the parties are to confer and attempt to resolve this matter between them. If that is not able to be achieved, Ms Guthrie is to lodge and serve a copy of her memorandum within 14 days of the date of this determination and Ms Wilson her memorandum in response 14 days following the receipt of Ms Guthrie's memorandum.

Paul Montgomery
Member of the Employment Relations Authority