



New Zealand Employment Relations Authority Decisions

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Thompson v Tauranga Environment Centre Charitable Trust [2011] NZERA 245; [2011] NZERA Auckland 184 (6 May 2011)

Last Updated: 16 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA AUCKLAND 184
5316372

BETWEEN MELISSA THOMPSON,

applicant

AND TAURANGA ENVIRONMENT

CENTRE CHARITABLE TRUST,

respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions received:

James Wilson

Tim Oldfield for the applicant Kerry Single for the respondent

29 November 2010

6 December 2010 from the applicant

16 January 2011 from the respondent

Determination:

6 May 2011

DETERMINATION OF THE AUTHORITY

Melissa Thompson's employment relationship problem

[1] Melissa Thompson ("Ms Thompson") commenced her employment with the Tauranga Environment Centre Charitable Trust ("the Trust") on 10 May 2005 working for 20 hours a week as an RMA (Resource Management Act) Advisor. At the commencement of her employment she signed what was purported to be a fixed term agreement expressed to expire on 31 August 2005 but was subsequently reemployed on a series of fixed term agreements. In the May/June 2009 Ms Thompson was advised that her employment with the Trust would terminate on 30 June 2009 at the expiry of her (current, purported) fixed term agreement.

[2] In her statement of problem, filed with the Authority in August 2010, Ms Thompson said that her dismissal was unjustified because the Trust relied on an unlawful fixed term agreement to terminate her employment and did not act in good faith because it failed to fully explore alternatives to dismissal, such as redeployment. In that statement of problem Ms Thompson sought compensation for hurt and humiliation, lost wages, payment of \$240 for *time and lieu* she says she was owed at the time of her dismissal, and costs. (The Trust has since agreed to pay Ms Thompson the \$240 *time in lieu* she sought and this matter is no longer an issue that I need to determine)

[3] In reply the Trust says that Ms Thompson's employment was justifiably terminated in line with the temporary employment agreement that she was offered and continued to work under.

The issues for determination

[4] The first issue for determination is whether, as purported by the Trust, Ms Thompson was employed for a fixed term. If she was employed for a fixed term, a secondary question is whether the way in which the Trust terminated Ms Thompson's employment was, in the words of section 103A of the Employment Relations Act (the Act), what *fair and reasonable employer would have done in all circumstances*. If she was not on a fixed term then, again, the manner of Ms Thompson's dismissal must also be considered in terms of the test for justification as set out in section 103A.

[5] If, having determined the questions set out above I find that Ms Thompson has a personal grievance against the Trust, I must then determine what, if any, remedies she is entitled to receive.

The law in respect to fixed term employment agreements

[6] The Employment Relations Act (the Act) says, at section 66: **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) ...

(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 effect 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.

The employment agreements

[7] The situation in respect to Ms Thompson's written employment agreements is somewhat confused. She says that following the expiry of the original fixed term agreement in August 2005 she was reemployed on further fixed in agreements although some of them had no expiry date and some of them were unsigned. She says that on 21 March 2007 she signed an agreement for the period July 2006 to June 2007. The last agreement she says she signed was on 5 September 2008 which was expressed to be from 1 July 2008 to 30 September 2008. This agreement, under the heading **term of agreement**, said:

This contract shall be for a fixed term between the dates set out in the schedule attached hereto

The parties confirm that the reason for the fixed term contract as communicated to the Employee is as set out in the schedule attached.

The schedule attached to the agreement indicated that the dates of employment were from 1 July 2008 to 30 September 2008. Despite the wording in the body of the agreement the schedule did not set out the reasons for the contract being for a fixed term, accept that the job description under the heading **Duration of contract and hours of work**, said:

The contract is fixed term ending 28 August 2005 and will be extended if funding is secured. (my emphasis)

It seems, from the inclusion of the date of August 2005, that the job description was simply a copy of that attached to Ms Thompson's original employment agreement and all subsequent agreements.

[8] On 30 September 2008 Ms Thompson received a letter from the Trust advising her that her fixed term contract finished on 30 September 2008 but that the Trustees would like to offer her a one-month extension to finish on 31 October 2008.

[9] Following a period of uncertainty, including the suggestion that Ms Thompson's job should be advertised, she consulted the Community Law Centre who advised her that she was in fact a permanent employee and not a fixed term employee. This opinion was conveyed to the Trust. On 28 October 2008 the Trust presented Ms Thompson with a new "fixed term" agreement. This agreement said:

Term of Agreement

(a) This agreement shall be for a fixed term from 1 October 2008 to 30 June 2009.

(b) ...

(c) The parties confirm that the reason for the fixed term agreement as communicated to the employee is due to the funding from the Ministry for the Environment (as set out in the schedule attached)

The attached schedule set out:

The position is for a fixed term. The reason for this is that the funding secured for the position is for the period to 1 October 2008 to 30 June 2009 (reference section 3 below). As a consequence your employment will cease on 30 June 2009

Salary funding source

MfE RMA Education and advisory Services Agreement for funding reference AF - EA-08-322 [10] Ms Thompson did not sign this agreement. Although Ms Thompson had discussions with the Trust regarding this proposed agreement in November 2008, she did not communicate the reasons for not signing in writing until requested to do so in February 2009. On 17 February 2009 Ms Thompson wrote to the Trust setting out a number of points regarding the proposed agreement, the first of which was:

Term of agreement - *My first concern is that this is a fixed term agreement justified by uncertainty around Ministry of the Environment funding. As I have been employed consistently for nearly 4 years, there is obviously an ongoing need for the service and the work I do and therefore a fixed term agreement is not justified.*

Every position is dependent on some form of funding, whether it be by sales in the case of retail, government funding in the case of publicly funded services. All jobs depend on the employer being able to pay for the position through what ever income sources the employer has, so it is irrelevant that the secure funding is only till June 2009.

[11] In response to this letter the Trust wrote to Ms Thompson on 2 March 2009 saying:

. This funding is for projects and specific services that have a fixed term and in many cases for short periods. Hence the reason for making it very clear that we can only offer a fixed term of employment, along with delivering the outcomes required by the funder.. It would be irresponsible for the Trust to create an expectation of employment for positions delivering a service that have a finite period. Until we are able to build a revenue stream, tagged funding for projects and specific services is our financial lifeblood.

The initial employment agreement was given to you on 28 October 2008, via your legal representative. We followed this up by arranging meetings.. As a result of these meetings we have made amendments to your job description, have offered to make amendments to the employment agreement and have been at lengths to explain what the Trust can and can not offer. A revised agreement and job description was produced 4 December 2008. Yet after a number of requests, we only received a response from you on 17 February 2009.

[12] Despite this letter, Ms Thompson did not sign the new agreement.

The termination of Ms Thompson's employment

[13] On 1 May 2009 the Trust wrote to Ms Thompson saying:

As you are aware, your position at the Tauranga Environment Centre is dependent on funding from various sources. We are aware of the funding applications that you have lodged this year and previous years, and the fact that at present, there is no funding for your position at the Centre after 30 June 2009.

With the lack of long-term funding there is a possibility of the position becoming redundant. In the event that you do not gain funding beyond 30 June a decision must be made regarding your position, as the centre's financial reserves are not sufficient to support your position beyond the funding term, being 30 June 2009.

With this serious situation potentially arising we the Board of Trustees, wish to enter into consultation with you about the possibility of redundancy and any alternatives that we or you might consider possible.

The timetable we propose is that we meet on Wednesday, 13 May at 10.30 a.m. to discuss the proposal. You may bring a support person or representative with you to that meeting.

[14] In fact two meetings took place. The first on 15 May 2009 which, it appears was taken up with Ms Thompson's concerns regarding the proposed employment agreement. The meeting also discussed funding for her position and ways to secure future funding. The second meeting took place on 29 May 2009. At this meeting the Trust reiterated that they believed that Ms Thompson was on a fixed term agreement which expired on 30 June 2009 and gave Ms Thompson's formal notice that her position would cease on that date. It was also apparently explained that if the Trust were successful in obtaining further funding Ms Thompson would be invited to apply and be considered for that position along with any other applicants. Ms Thompson offered to take outstanding annual leave until the question of funding was resolved. However the Trust did not accept that proposal and confirmed that Ms Thompson's employment would terminate on 30 June 2009.

[15] Although Ms Thompson continued to work following this meeting, from 15 June 2009 she took sick leave because of the stress that she was under at work. Her employment with the Trust terminated on 30 June 2009.

Discussion

Was Ms Thompson on a "fixed term " agreement?

[16] For a number of reasons the answer to this question is no! Firstly, with the exception of the last, unsigned document, the employment agreements offered to Ms Thompson did not meet the minimum statutory requirements to qualify as fixed term as set out in section 66 of the Act. They did not set out *the way in which the employment will end or the reasons for ending the employment in that way*. In terms of section 66(6)(a) Ms Thompson was entitled to *treat that term as ineffective* and the Trust could not *rely on any term agreed ... to end (Ms Thompson's) employment if (she) elect(ed), at any time, to treat that term as ineffective*.

[17] Secondly on several occasions Ms Thompson was allowed by the Trust to continue working after the expiry of a purported "fixed term". The last of these occasions was that, when her agreement "expired" on 30 June 2007 (an agreement that was not actually signed until March 2007) she was not given, and did not sign a new agreement but continued to work. In September she signed a new "fixed term agreement, which, on its face, ran from 1 July 2008 to 30 September 2008 (As set out above this agreement did not meet the statutory minimum requirement to be a legitimate fixed term agreement). Under these circumstances, Ms Thompson was entitled, even if the employment agreement had legitimately met the minimum statutory requirements, to assume that her employment was permanent, irrespective of what had gone before.

[18] The Trust argues that Ms Thompson continued to work after they had offered her a new fixed term agreement in October 2008. This argument ignores the fact that Ms Thompson had indicated in September that she believed that she was a permanent employee. After receipt of the proposed new agreement she made it clear to the Trust that she was not prepared to sign an agreement that reverted her to fixed term status. If the Trust were convinced that Ms Thompson was on a fixed term, and they were set on continuing to employ her only on that basis, they should have given her a new agreement well before the old agreement expired, and advised her that she would have to stop work at the end of September 2008 (or at least the end of October at the end of the one month extension) unless or until she had signed the new agreement. I acknowledge that this course may have caused Ms Thompson to challenge her employment status at that time but there were processes available to the parties, including mediation, to address that dispute.

[19] At the time of the termination of her employment by the Trust, Ms Thompson's employment was not for fixed term

Was Ms Thompson's dismissal justified?

[20] It may be that the Trust could have followed a formal process and declared Ms Thompson's position redundant. In fact their letter of 1 May 2009 to Ms Thompson they said they *wish(ed) to enter into consultation with you about the possibility of redundancy and any alternatives that we or you might consider possible*. The Trust however then chose rely on the fixed term nature of Ms Thompson's employment to terminate her services. It is well established that the justifiability of a dismissal must be judged against the reasons the employer relied on at the time. I have found that Ms Thompson's employment was not for a fixed term. The Trust were not able therefore to rely on that term to end her employment.

Determination

[21] It follows from what is set out above that **Ms Thompson's dismissal was unjustified and she has a personal grievance against the Trust.**

Remedies

Contribution

[22] Having found that Ms Thompson has a personal grievance against her former employer, the Tauranga Environment Centre Charitable Trust, I must now consider what remedies, if any, she should be awarded. However before I do so I am required in terms of section 124 of the Employment Relations Act (the Act) to consider whether or not Ms Thompson *contributed to the circumstances which gave rise to (her) personal grievance*. If she did I am required to reduce any remedies accordingly.

[23] Ms Thompson did nothing more than insist on her legal entitlements in terms of the Employment Relations Act. She cannot be considered to have contributed in any way to the circumstances which gave rise to her personal grievance.

Recovery of wages

[24] Ms Thompson has requested that she be awarded compensation for the wages she lost as a result of the termination of her employment. Section 66(5) of the Act provides

(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 effect the validity of the employment agreement between the employee and the employer.

The employment agreement that was offered to Ms Thompson in October 2008 (and previous agreements) provided

Termination

*Except where otherwise provided, one month's notice of termination of employment shall be given by either party but this may be varied by agreement. **Redundancy***

(a) The employer may during the term of this agreement after consultation with the Employee decide that the position occupied by the Employee is redundant for their requirements.

(b) If such redundancy occurs the Employer may terminate the agreement upon giving the employee two weeks notice. No other redundancy compensation will be payable by the Employer.

In calculating the amount of wages Ms Thompson has lost it is appropriate to consider what she would have received if the Trust had, after proper consultation declared her position redundant. Firstly I must record that I accept the Trust evidence that the funding for Ms Thompson's position ceased at 30 June 2009 and that no alternative source of funding was evident at that time. Under those circumstances, had they followed due process they could justifiably have dismissed Ms Thompson by reason of genuine redundancy.

[25] On 1 May 2009 the Trust advised Ms Thompson that

(we) wish to enter into consultation with you about the possibility of redundancy and any alternatives that we or you might consider possible.

On 29 May 2009 they advised her that her employment would cease on 30 June 2009. In other words, if the Trust had chosen to make Ms Thompson redundant she would have been given both *one month's notice of termination of employment* and *two weeks notice of redundancy*. **Ms Thompson lost no wages as a result of her unjustified dismissal**

Compensation for hurt and humiliation

[26] Ms Thompson was clearly distressed by the way her employment with the Trust ended. That stress resulted in her finishing work some 2 weeks early and being in receipt of a sickness benefit until November 2009. She is entitled to be compensated for that stress. Taking into account the level of her stress, the nature of the dismissal and the part time nature of her employment, **the Trust is to pay Ms Thompson, in term of section 123(1)(c)(i) of the Act, \$3000.00, without deduction, for the hurt and humiliation caused to her by her unjustified dismissal.**

Costs

[27] **Costs are reserved** and the parties are requested to attempt to settle this matter between themselves in the first instance. If they are unable to do so Ms Thompson may file and serve a submission in respect to costs within 28 days of the date of this determination. The Trust will then have 14 days in which to file and serve a response.

Summary

[28] By way of summary of the findings and orders set out in this determination:

- **At the time of the termination of her employment by the Trust, Ms Thompson's employment was not for fixed term**
- **Ms Thompson's dismissal was unjustified and she has a personal grievance against the Trust.**
- **Ms Thompson lost no wages as a result of her unjustified dismissal**
- **The Trust is to pay Ms Thompson, in term of section 123(1)(c)(i) of the Act, \$3000.00, without deduction for the hurt and humiliation caused to her by her unjustified dismissal.**

- **Costs are reserved**

James Wilson

Member of the Employment Relations Authority

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