Employment Court of New Zealand

Tillmans Fine Furniture Limited v Rookes [2025] NZEmpC 152 (22 July 2025)

Last Updated: 23 July 2025

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2025] NZEmpC 152
EMPC 361/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TILLMANS FINE FURNITURE LIMITED Plaintiff
AND	CINDY ROOKES Defendant

Hearing:	13 May 2025 (Heard at Christchurch)
Appearances:	K Dalziel, counsel for plaintiff N Logan, counsel for defendant
Judgment:	22 July 2025

JUDGMENT OF JUDGE K G SMITH

[1] Cindy Rookes was employed twice as a sales consultant by Tillmans Fine Furniture Ltd. The first occasion was in a permanent position subject to the satisfactory completion of a trial period. The second occasion was on a fixed term employment agreement for two months that began immediately after her permanent employment ended.

[2] After the fixed term employment ended Ms Rookes raised a personal grievance alleging she was unjustifiably dismissed. The Employment Relations Authority agreed.1 It determined that the fixed term agreement did not satisfy s 66(2)(a) of the

1 *Rookes v Tillmans Fine Furniture Ltd* [2024] NZERA 504.

Employment Relations Act 2000 (the Act). As a consequence of that conclusion, the Authority held that Ms Rookes was unjustifiably dismissed and she was awarded compensation under s 123(1)(c)(i) of the Act together with lost wages.

[3] In reaching that conclusion, the Authority accepted that Tillmans had a genuine reason for offering a fixed term, but was not satisfied that was sufficient for s 66(2)(a).

The challenge

[4] Tillmans challenged the Authority's determination in a limited way, by accepting its findings of fact but claiming errors of law were made. The pleaded errors were in the Authority's conclusions that:

a. Tillmans' reasons for a fixed term agreement were not genuine and not based on reasonable grounds (and therefore the fixed term agreement breached s66 of the Employment Relations Act 2000);
b. Tillmans' views about Ms Rookes' performance and Tillmans' decision to terminate under the 90 day trial period,

invalidated the fixed term agreement; and

c. Ms Rookes' employment was one of ongoing employment.

Agreed statement of facts

[5] To assist the Court's review of the Authority's determination counsel filed an agreed statement of facts:

1. Ms Rookes was employed as a Sales Consultant by Tillmans Fine Furniture Limited (**Tillmans**) pursuant to an individual employment agreement dated 14 September 2022 and signed by Ms Rookes on 16 September 2022.
2. Ms Rookes was dismissed by Tillmans on 13 December 2022 under the 90 Day Trial Period, pursuant to the provisions of sections 67A and 67B of the Employment Relations Act 2000 with her last day of work being 17 December 2022.
3. The reason for the dismissal was that Tillmans considered Ms Rookes' product knowledge was not up to the standard required to give an optimal customer experience.
4. On 15 December 2022, Tillmans presented an offer of fixed term employment to Ms Rookes as a Sales Consultant (**the fixed term agreement**). The fixed term agreement contained the following clause:

Type of employment agreement

The employee will work for the employer for a fixed period of time.

Employment will start on 20/12/2022 and end on 25/02/2023. It will automatically end on this date without notice or pay instead of notice, unless the employer or the employee ends it earlier in line with this agreement.

The employer and employee agree there is a genuine reason for the fixed term and for employment to finish when the term ends. The reason for it being fixed term, and finishing at the end of the term, is the employee will have a reasonable amount of time to search for a new job after the Christmas/New Year holiday season finishes.

The employer has explained why employment will finish when the terms ends [sic], and the employee has had a chance to get advice on this. The employee has the legal right to work in New Zealand.

5. Having relied on the trial period (in Ms Rookes' Employment Agreement), Tillmans' Managing Director, Mr Sandford did not want to offer Ms Rookes anything more than what he considered his moral duty to help her find another job close to Christmas. So, Tillmans and Ms Rookes entered into a fixed term individual employment agreement. Mr Sandford genuinely wanted to help Ms Rookes by providing her with an income over the holiday period and allowing her time to find another job while she had one.
6. Having decided to employ Ms Rookes on a fixed term basis to satisfy a moral duty, Tillmans also avoided employment obligations beyond the fixed term i.e. it limited liability beyond what was reasonable for finding a role, it was not willing to offer a permanent role.
7. Ms Rookes signed the fixed term agreement on 18 December 2022.
8. Ms Rookes employment ended on 25 February 2023.
9. Tillmans had an ongoing and constant need for the Sales Consultant role. Ms Rookes performed the role from September 2022 to February 2023. Tillmans then intended to find someone else for the role after the fixed term expiry.

(emphasis original)

[6] It was common ground that the scope of this challenge required Tillmans to establish that there was either a material error of fact or law.2 Ms Dalziel and Mr Logan agreed that the only issue is whether Tillmans satisfied s 66(2)(a).

Fixed term agreements

[7] The Act provides for fixed term employment agreements in s 66:

2 Commonly called a non-de novo challenge; Employment Relations Act 2000, s 179(4).

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.

The Authority's determination

[8] To place Tillmans' challenge into context it is necessary to say a little more about the Authority's analysis and conclusions. The Authority posed for itself the following question:3

Did Tillmans have a genuine reason based on reasonable grounds for the fixed term as required by s 66(2)(a) of the Act? If not, then other arguments challenging the fixed-term nature of the employment become secondary.

[9] In answering that question, the Authority relied on *Canterbury Westland Free Kindergarten Association (t/a KidsFirst Kindergartens) v New Zealand Education Institute* for propositions that:

(a) a genuine reason must not only be sincerely held but must not be for an improper reason;4 and
(b) what s 66 contemplated was that fixed-term employment should be confined to special discrete projects of limited duration as opposed to situations of ongoing employment.5

[10] Recognising that *Free Kindergarten* was decided in 2004 the Authority turned to *Morgan v Tranzit Coachlines Wairarapapa Ltd*.6 *Morgan's* analysis also described genuine reasons being ones that are sincerely held at the time the agreement was entered into provided they are for "proper purposes". The Authority referred to a passage in *Morgan* where the Court considered it may be arguable that an agreement would fall foul of s 66 if the employer used a fixed term when other mechanisms were reasonably available. The other mechanisms mentioned by the Court were those that less violated the protective principles underlying International Labour Organisation Convention 158.7

3 At [42].

4. *Canterbury Westland Free Kindergarten Association (t/a KidsFirst Kindergartens) v New Zealand Education Institute* [2004] NZEmpC 59; [2004] 1 ERNZ 547.

5 *Rookes*, above n 1, at [43].

6 *Morgan v Tranzit Coachlines Wairarapapa Ltd* [2019] NZEmpC 66, [2019] ERNZ 200.

7. *Rookes*, above n 1, at [44]; and International Labour Organisation Convention Number 158, (Termination of Employment Convention, 1982–Convention Concerning Termination of Employment at the Initiative of the Employer).

[11] As to Tillmans' reasons, the Authority began by referring to the company ending Ms Rookes' first period of employment using the trial period because her product knowledge was not up to speed quickly enough.8 It found that, having relied on the trial period, Tillmans did not want to offer her anything more than what Mr Sandford, its managing director, thought of as satisfying his moral duty to help her find another job close to Christmas.

[12] The Authority accepted that Tillmans genuinely wanted to help Ms Rookes but asked itself a further question about whether that was enough to satisfy s 66(2)(a).9 To answer that question the Authority's evaluation began by referring to s 66(3) and the three reasons which the Act says are not genuine.10 In the subsequent evaluation, the Authority held that Tillmans avoided "obligations beyond the fixed term". It was conscious that every fixed term could be criticised as having such an effect, but went on to determine that the company also limited its liability because it was not willing to offer Ms Rookes a permanent position.11

[13] That analysis led to a finding that by using a fixed term:12

Tillmans escaped the obligations of permanent employment like having to follow a process to address any perceived performance shortcomings before being able to fairly dismiss.

[14] The Authority referred to Mr Sandford's evidence that he did not consider Ms Rookes suitable because her knowledge of the company's products had not grown quickly enough during the trial period. It concluded that another reasonably available and appropriate way of addressing her performance, which was the real issue, was to follow a process to deal with it.13 With that analysis the Authority considered s 66(2)(a) was not satisfied.

[15] There was a further evaluation, undertaken by the Authority in case it was wrong in reaching conclusions using the analysis just described. The company had an ongoing need for a sales consultant and intended to find someone else to fill the

8 *Rookes*, above n 1, at [45].

9 At [46].

10 At [47].

11 At [47].

12 At [47].

13 At [48].

position after Ms Rookes left. Accordingly, the Authority concluded the situation was one of ongoing employment not temporary employment and consequently did not meet s 66(2)(a).14

Plaintiff's submissions

[16] Ms Dalziel began Tillmans' case with an overarching submission that the fixed term agreement met s 66(2)(a) because of the finding that the company was genuine in offering it; meaning once the Authority reached that conclusion it was not open to determine that the fixed term was unlawful.

[17] In developing these submissions, Ms Dalziel said that the Authority had wrongly considered s 66 and the approach used was flawed, especially where the determination relied on passages from *Morgan* about alternatives less likely to infringe ILO 158. The Authority's reliance on that case was criticised as frail for two reasons. First, because Ms Dalziel considered the Court was not "firm on this point", about using alternatives, so the case was an unreliable platform for the determination. The second reason was slightly opaque. She said that there was a difficulty with the reasoning in *Morgan* because, in contemplating an employer having to use other available mechanisms instead of a fixed term agreement, s 103A(2) of the Act was not taken into account. The thrust of the submission appeared to be that a proper assessment was to consider (perhaps by analogy with s 103A(2)) what an employer could do, not what it should or must do.

[18] Ms Dalziel preferred an analysis where the question was whether the fixed term agreement was genuine and otherwise lawful under s 66 and, if that test is passed, no other mechanism could be imposed on the employer.

[19] An allied submission was to consider the circumstances in which Tillmans and Ms Rookes found themselves. Permanent employment had validly ended. After that Ms Rookes would have been unemployed and without an income just before Christmas. Tillmans wanted to help out for a short time and she wanted to accept that help. Essentially, Tillmans' challenge turned on concluding that those circumstance meant that, once the Authority decided that the company's reason was genuine, the

14 At [49].

inquiry should have stopped. To emphasize the point Ms Dalziel submitted that, if the Authority's analysis was correct, an employer could not provide short term help to anyone by using a fixed term agreement. A comparison was drawn between this case and situations where an employer might offer work experience. The criticism was that doing so would be compromised if the Authority's approach to s 66 held sway.

[20] The conclusion that s 66 was not satisfied because an on-going sales consultant's role existed was also challenged as being inadequately reasoned. The submission was that the issue to be resolved was the validity of the fixed term not whether another role existed. If the determination was correct, that meant fixed term agreements covering situations like parental leave would not be valid. Ms Dalziel preferred the approach in *Maritime Union of New Zealand Inc v Ports of Auckland* where the fixed term agreements were lawful even though the roles in the port continued to be required after a planned restructuring was completed.15

[21] The conclusion invited was that Tillmans was entitled to create a new fixed term role while it was waiting to fill the full-time one, leading to the sort of outcome that was acceptable in *Ports of Auckland*.

[22] Tillmans' case was that what happened was not exploitative or for an improper purpose.

Defendant's submissions

[23] Mr Logan's starting point was that the Authority's conclusion that Tillmans was genuine was insufficient to satisfy s 66(2), because the fixed term was used to avoid the "the normal rules of termination". Tillmans had no operational or temporary need for a fixed term position and there was no discrete project providing reasonable grounds for one. The company needed a sales consultant, it just did not want Ms Rookes which meant that re-employing her on a fixed term basis was an attempt to ensure she would not be that consultant.

15. *Maritime Union of New Zealand Inc v Ports of Auckland* [2010] NZEmpC 32, (2010) 7 NZELR 257.

[24] Mr Logan accepted an employer may be sincere, in the sense used in *Free Kindergarten*, but submitted that was not enough.16 The conclusion Mr Logan relied on from *Free Kindergarten* was that the reasons to establish a fixed term agreement must not only be sincerely held but must also not be improper. The submission was supported by his analysis of *Morgan*, where the Court commented on sincerity and/or an improper motive as likely to be helpful markers in assessing the genuineness or otherwise of the expressed reasons for a fixed term.

[25] On Mr Logan's approach, the Court must decide whether the reasons for the fixed term were genuine based on reasonable grounds from an objective standpoint and in the context of the Act. It was said that Tillmans:

(a) had failed to show there was a proper purpose for the fixed term;
(b) needed to show that the point of the fixed term was not to get around "the normal rules of termination";
(c) needed to separate what it wanted to achieve from how it sought to achieve it;
(d) was avoiding ongoing obligations once the fixed term ended; and
(e) used the fixed term to attempt to limit liability to the two-month period and to try to avoid a personal grievance.

[26] Mr Logan invited the Court to consider that the transaction was not all one way. In return, Tillmans obtained a benefit because Ms Rookes was required to work. There were, however, other ways the company could have satisfied Mr Sandford's moral duty without compromising Ms Rookes' rights.

[27] Mr Logan said Tillmans was drawing an artificial distinction about the sales consultant role. It was ongoing. He pointed to Ms Rookes' duties remaining the same throughout her permanent employment and the fixed term. He submitted that

16 *Free Kindergarten,* above n 4.

determining whether the fixed term was valid required considering the status of the role in the business.

[28] Mr Logan was critical of Tillmans' case because reliance on the genuineness of the company's reasons was too opaque and translated something that should be an objective assessment into a subjective one.

Analysis

[29] The meaning of s 66(2)(a) must be ascertained from its text and in the light of its purpose and its context.17 The text of the legislation includes indications such as preambles, the table of contents, diagrams, graphics, examples and explanatory material as well as the organisation and format of that legislation.18

[30] Section 66 recognises that fixed term agreements are lawful provided certain criteria are satisfied. Under s 66(1) an employer and an employee may agree that employment will end at the close of a specified date or period, on the occurrence of a specified event, or at the conclusion of a specified project. The fetter on the ability of an employer and an employee to enter into such an agreement is in the combined effect of ss 66(2) and 66(3).

[31] The Act does not define in s 66, or elsewhere, what is meant by having genuine reasons based on reasonable grounds. Instead, the only guidance about what that phrase means is the exclusion of certain grounds as being not genuine in s 66(3). That is, to exclude or limit the rights of the employee under the Act, to establish suitability of a permanent employment, or to exclude or limit the rights of an employee under the Holidays Act 2003.19

[32] The text of s 66(2) supports Mr Logan's submission that the test is objective. That is evident by "genuine" being supported or qualified by "reasonable grounds". The otherwise potentially open-ended nature of a genuine reason must be underpinned by being based on reasonable grounds. In combination, the text of ss 66(2) and 66(3)

17 Legislation Act 2019, s 10.

18 Sections 10(3) and (4).

19 Employment Relations Act 2000, s 66(3).

indicates that those reasons which are not genuine go beyond the limited class referred to in s 66(3). The language suggests exploitative reasons are excluded.

[33] A cross-check against the purpose of the section is difficult. The section does not contain a statement of purpose, but it is in pt 6 of the Act which deals with individual employee's terms and conditions of employment. The part has its own object in s 60. It is to specify the rules for determining the terms and conditions of an employee's employment, for employees to be given sufficient information and an adequate opportunity to seek advice before entering into an individual employment agreement. The object's particular reference to good faith behaviour and to providing protection against unfair bargaining supports the textual conclusion that s 66(2) does not accept as a genuine reason anything that is exploitative.

[34] When the Employment Relations Bill 2000 was introduced to Parliament the initial drafting of s 66 provided for "genuine reasons for doing so relating to the employer's operational requirements".20 There is nothing in the Select Committee materials explaining the change to "genuine reasons based on reasonable grounds". The only guidance available from the Select Committee report is that it appeared to concentrate on loosening the proposed legislation from what was introduced in the Bill. What was emphasised was the importance of not undermining employee rights or attempting probationary employment by using a fixed term. Otherwise, the Bill and the Parliamentary debates do not advance this discussion very far.

[35] Both counsel referred to the *Free Kindergarten* case which equated genuine with sincere.21 I agree that those words could be treated as synonyms. There are other definitions of genuine that also support the conclusion that s 66 is an objective test and is designed to avoid exploitative behaviour. In the context of s 66(2)(a), genuine could also mean real, or true, or perhaps be explained by the phrase "properly so called".22

20 See also the discussion by Heath J in *Norske Skog Tasman Ltd v Clarke* [2004] NZCA 74; [2024] 3 NZLR 323 (CA), [2004] 1 ERNZ 127 at [172].

21 *Free Kindergarten*, above n 4, at [15]; and see the discussion in the minority judgment by Heath J in *Norske Skog*, above n 20, at [173] that substance must prevail over form, if an employment agreement of "indefinite duration is, as a matter of fact, masked by a purported fixed-term contract the true position must prevail.

22 See "genuine" in The Oxford English Dictionary (online ed, Oxford University Press).

[36] The *Free Kindergarten* case involved interpreting a collective agreement enabling the employment of practice managers under fixed term agreements for three years with the possibility of a further term taking the maximum possible duration of employment to six years. The issue was whether there were genuine reasons based on reasonable grounds for specifying that practice managers could only be employed on that basis. As well as approaching "genuine" as meaning sincerely held, the Court amplified the analysis by concluding that such a definition could be unsatisfactory because some sincerely held reasons are impermissible.

[37] The Court in *Free Kindergarten* was not prepared to read s 66(3) as an exhaustive list of prohibited reasons; those reasons that exploited employees were not to be treated as genuine. The Court acknowledged that there could be situations on the borderline where reasons not intended to be exploitative had that effect. The analysis concluded with the Court holding that the reasons for the fixed term must be not only be sincerely held but must also not be for improper reasons.23

[38] In that case, the plaintiff had two reasons for the fixed term positions; to develop a career structure allowing head teachers an opportunity to gain experience and to increase the input of teaching experience into the professional services team.24 Those reasons were regarded as genuine in the sense that they were sincere and they were not amongst the "not

genuine" reasons in s 66(3). The Court accepted that all fixed term employment agreements exclude or limit personal grievance rights for particular employees but commented that one problem with them was that inappropriate reasons can be dressed up as other reasons.25

[39] The outcome in *Free Kindergarten* followed an evaluation of all the circumstances to establish whether there were genuine reasons based on reasonable grounds. Even though the Court was satisfied that the plaintiff's reasons were genuine, and real operational reasons for the policy were evident, that did not satisfy s 66. The approach being used by the employer showed that the "extreme step of resorting to

23 *Free Kindergarten*, above n 4, at [16].

24 At [6].

25 At [53].

fixed-term employment to deal with what is essentially a training or continuing education issue cannot be justified by reference to any grounds that are reasonable".26

[40] Morgan also featured heavily in submissions. The case was about the use of fixed term agreements to employ a school bus driver. The employer sought to justify doing so because it was concerned about securing a contract renewal from the Ministry of Education. The Court was satisfied that the risk referred to was speculative and the 18 years of contractual history between the company and Ministry reflected a solid pattern of stability. *Morgan* adopted a similar approach to *Free Kindergarten*, because it took into account all the circumstances before reaching its conclusion.

[41] Morgan contains an obiter comment about the role that might be played in assessing compliance with s 66 by considering ILO Convention 158. That convention has not been ratified by New Zealand but is given effect to by s 66.27 While Ms Dalziel was critical of that aspect of the Court's decision, the discussion of the ILO convention was not central to the judgment.

[42] Free Kindergarten and *Morgan* referred to other outcomes that are exploitative not satisfying s 66.28 I agree with the analysis in those cases. That outcome is consistent with the text and purpose of s 66. The combination of ss 66(2)(a) and 66(3) supports a conclusion that all of the circumstances need to be taken into account when objectively assessing whether the fixed term is genuine based on reasonable grounds. On this approach, if the Authority held that the agreement in this case was exploitative, it would fail s 66(2)(a).

[43] The difficulty confronting Tillmans' challenge is that it stops the inquiry into compliance with s 66 at the point where the Authority held that its managing director was genuine and gives insufficient weight to the balance of the test. The Authority went further than just concluding Mr Sandford was genuine. Consistent with the objective assessment required by s 66, and the approach in *Free Kindergarten* and *Morgan*, there was a wider investigation of the reasons put forward by the company. The determination weighed up all of the circumstances and concluded the company

26 At [58].

27 *Morgan*, above n 6, at [10]; and see *Norske Skog*, above n 20, at [152]–[162].

28 *Free Kindergarten*, above n 4, at [16]; and *Morgan,* above n 6, at [12].

did not have reasonable grounds; the fixed term avoided dealing with performance issues, the company had an on-going need for a sales consultant but did not want Ms Rookes and it compromised her rights under the Act in attempting to limit its exposure. Those conclusions were open to the Authority on the evidence.

[44] Ms Dalziel sought to overturn the Authority's conclusion that Tillmans was avoiding addressing performance-related issues and other obligations that would have arisen during permanent employment. She commented, correctly, that Tillmans had already evaluated Ms Rookes' performance when the trial was not satisfactorily completed. What that submission cannot overcome, however, is the compelling finding by the Authority that Tillmans' method of satisfying what it wanted to achieve deprived Ms Rookes of rights under the Act which is excluded from being a genuine reason by s 66(3). As Mr Logan submitted, the company secured five months work from Ms Rookes but in the last period of employment it attempted to insulate itself from the risks of a personal grievance by using a fixed term. The company received the benefit of her work and had the motivation been merely to assist then there were other ways that could have been achieved.

[45] Tillmans' challenge is not saved by *Ports of Auckland* because it is quite different from this case. Strictly speaking, the discussion about s 66 in *Ports of Auckland* was obiter, because a decision had already been made that the fixed term agreements in that case were inconsistent with the collective agreement. Nevertheless, there was a detailed analysis of the section in which the Court relied on the approach to s 66 in *Free Kindergarten*.

[46] The fixed term agreements in *Ports of Auckland* were justified because the company was undertaking a major review of

its operations and there was a prospect that work being performed under those agreements might be contracted out. If that happened, the stevedores concerned would have been employed by another business.29 The Court was therefore not satisfied that there was any ongoing employment with the port company. Furthermore, the Court was satisfied that the employer was not resorting to fixed terms to achieve purposes such as training or continuing education.30

29 *Ports of Auckland*, above n 15, at [63] and [67].

30 At [69]

> [47] For completeness, a brief comment is needed to address Ms Dalziel's submission that, if the Authority's decision is correct, any temporary arrangements such as work experience would be invalidated. To take that approach would be an extreme position inconsistent with s 66(1) which recognises that fixed-term agreements are lawful provided ss 66(2) and (3) are satisfied. The outcome she was contemplating is not inevitable and will depend on the particular circumstances of the employment concerned.
>
> [48] I do not accept that the Authority wrongly approached s 66(2)(a) or misapplied the evidence to that section.

Outcome

> [49] Tillmans has not established that the Authority made any material error of fact or law.
>
> [50] The challenge is unsuccessful and it is dismissed.
>
> [51] Ms Rookes is entitled to costs. In the absence of agreement memoranda may be filed.

K G Smith Judge

Judgment signed at 4.30 pm on 22 July 2025
