IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 76/10
5092966

	BETWEEN	ROBERT GEORGE TOOTILL Applicant
	AND	ALMADALE PRODUCE LIMITED[1] Respondent

Member of Authority:	P R Stapp
Representatives:	Mr Tootill in person Phillip Drummond for Respondent
Investigation Meeting:	24 March 2010 at Palmerston North
Determination:	26 April 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Tootill commenced work with Almadale Produce Limited (Almadale) as a vegetable harvester in the week commencing Monday 7 May 2007. He was interviewed by Mr Clive Smyth, a director. Mr Tootill claimed that he verbally agreed with Mr Smyth that the employment would be for 6 months. Mr Smyth denied ever offering 6 months employment to Mr Tootill. Mr Tootill signed off an individual employment agreement on 8 May 2007 that purported to be for a fixed term (the first agreement). Mr Smyth decided not to sign the first agreement because Mr Tootill had raised an issue about the rate and holiday pay. Mr Smyth decided that the first agreement was not clear enough and he presented another agreement (the second agreement) to Mr Tootill. Mr Tootill has disputed that he agreed to include holiday pay in the rate.

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[1] Under s 221 (b) of the Employment Relations Act 2000 I have amended an error and the parties consented to the respondent's correct name being cited as **Almadale Produce Limited**.

[2] Mr Smyth informed Mr Tootill that the continuation of his employment had to be on the terms of the rate of pay inclusive of holiday pay. Mr Tootill would not accept he had agreed to that (letter dated 28 May 2007).

[3] On 18 June 2007 Mr Tootill was advised in writing that his employment would cease on "9 June 2007 (sic)" with a day's notice to end on 19 June 2007.

[4] The parties went to mediation with the Department of Labour on 8 August 2007 in regard to the dispute over the rate of pay and payment of holiday pay.

[5] Mr Tootill filed a statement of problem in the Employment Relations Authority on 27 January 2010 claiming that his dismissal following the wages dispute was unfair. Mr Tootill has relied on a document produced for the purpose of mediation that included his claims (used in the Authority without any opposition from the respondent and accepted that it contained the applicant's claims). Mr Tootill followed it up with an open letter outlining that he had changed his employment relationship problem from a dispute over wages to unfair dismissal. Almadale has relied on the purported fixed term employment agreement coming to an end. In the alternative Almadale submitted that the employment would have ended because of redundancy, but accepted that not all the procedures would have been followed. It claimed that Mr Tootill had not mitigated his losses and has not established a claim for compensation.

Issues

[6] Was there a genuine fixed term employment agreement: Did the agreement state in writing how it would end?

[7] Did Mr Smyth offer Mr Tootill 6 months' employment?

[8] Does Mr Tootill have a personal grievance?

[9] If there is a personal grievance what remedies apply, including accounting for any contributory conduct?

The law

[10] Section 66 of the Employment Relations Act 2000 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.*

The facts

[11] Mr Tootill and Almadale had a dispute over the rate of pay and treatment of holiday pay. The company presented two employment agreements purporting to be for a fixed term. The two agreements made provision for a wage rate: one not clearly stating that the rate was inclusive of holiday pay, and the second one clarifying the rate of pay and holiday pay where the rates had been separated out. Pay slips produced itemised the rate of pay and holiday pay separately. The parties remained in dispute. During the Authority's investigation meeting Almadale offered to pay Mr Tootill $276.55 to dispose of that issue. Mr Tootill did not decline the offer and Almadale has undertaken to pay the sum.

[12] Mr Tootill's employment ended with one day's notice on 19 June 2007 in writing (18 June 2007) with the reason that the yam harvest had ended, bringing to an end a purported fixed term employment agreement.

Determination of the issues

The wage dispute

[13] Mr Tootill has claimed his dismissal related to the wage dispute. Almadale denied that claim relying instead on the purported fixed term agreement to end the employment because the work had concluded.

[14] It was common ground that only about a quarter of the crop on a small part of the acreage had been harvested. Mr Smyth decided that mechanical harvesting was necessary. Mr Smyth explained that a high labour content is required at the commencement of the season as yams are initially hand picked and can be affected by frost. There is an overlap between the labour requirement and completing the harvest

by machinery, and labour content will vary. There is less labour required as the crop is completed by machinery.

[15] There is a linkage between Mr Tootill's claim and the decision to end the employment given that Mr Smyth issued a letter dated 28 May 2007 stating that:

> *I am happy to continue to employ you at the correct hourly rate consistent with the other staffing rates and the offer for employment remains open on those terms and conditions only.*

[16] In other words take it or leave it.

[17] The dispute over the wage rate and holiday pay had not been resolved by the time Mr Tootill's employment was ended by Mr Smyth. Almadale has relied on a lawyer's letter dated 22 June 2007 to separate this matter from the employment ending. The letter on behalf of the company advised Mr Tootill that he could take the dispute to the Employment Relations Authority. However, that letter was sent after the employment had ended on 19 June.

[18] The dispute on the wages has now been disposed of and Almadale Produce Limited has undertaken to pay Mr Tootill $176.55. I will confirm this in an order later.

Six months term of employment

[19] Mr Smyth and Mr Tootill disagreed that there was any agreement on working 6 months. At the Authority's investigation meeting I observed both of them giving their evidence and answering questions. Mr Smyth appeared relaxed, laid back and casual about the matter, and denied that he had offered Mr Tootill 6 months work. Mr Tootill was focussed and very definite about his understanding about what he says had been agreed. Their appearance was not enough for me to reliably test credibility or for me to rely on their word, but I hold that the documentary evidence produced supports Mr Smyth more than Mr Tootill:

- The two employment agreements did not make any provision for a specified term of 6 months.

- Mr Tootill acknowledged the employment agreements did not say 6 months employment.
- Mr Tootill acknowledged he had an opportunity to get independent advice and he did not propose any changes or suggest including his understanding of the offer.
- Mr Tootill signed the first agreement without raising any issue about it.
- It is probably not likely that Mr Smith would have agreed to an arrangement outside the employment agreement. There was no other evidence to support any such agreements on any other matters. There was no request to put the arrangement in writing.
- There were no other witnesses to corroborate any such arrangements.
- Mr Tootill's correspondence did not refer to any offer of 6 months work until the matter was filed in the Authority and he produced an undated "To Whom It May Concern letter". The document dated 5 August 2007 only referred to him "looking forward to at least six months work". This is more consistent with an understanding and a belief as opposed to any actual agreement.

[20] It is therefore probable that Mr Tootill has come to believe what he says instead of being able to establish an y agreed arrangement for 6 months employment.

Fixed term

[21] Almadale cannot rely on the fixed term agreement to end the employment without cause because it did not properly provide the way in which the employment would end (see: s 66 (4) of the Act). I accept that the agreement made provision for one day's notice but it failed to provide for the notice to be provided in writing, the advice of the employment ending in writing and the details that Mr Smyth referred to in his evidence about the circumstances surrounding the change in harvesting methods. The open ended way in which the employer has provided in the employment agreement and the written detail of the way in which the purported fixed term would end was simply not adequate, I hold.

[22] S 66 of the Act summarised requires the employer to provide: for the close of a specified date or period or on the occurrence of a specified event, or the conclusion

of a specified project. The terms provided by Mr Smyth in both agreements do not meet the requirement of s 66(1) (a) and (b) and (c) of the Act in an adequate way to provide the reasons for the fixed term. In other words the term used to end the agreement: *"when the employer determines that available work associated with the crop has been concluded"* was not adequate considering the detail Mr Smyth provided in his evidence, when he:

- Made a reference to *harvesting* (paragraph 4: written statement)
- Said that *the work would only be available for the yam harvest which required additional labour and that the work would end at any time depending upon the rate of harvest and when the frost kicked in which enabled machinery to take over the remaining part of the harvest* (paragraph 5: written statement).
- Said employment would end as a result of yams having been matured and to harvest the yams mechanically (paragraph 13: written statement).
- Said that Mr Tootill's employment ended first because Almadale attempts to give some preference where it can to workers who have worked in previous seasons. There was nothing about that in the employment agreement.

[23] Although Mr Tootill signed the employment agreement and agreed to one day's notice and the term used to end the agreement, ("*when the employer determines that available work associated with the crop has been concluded"*), he was entitled to know the full circumstances as given by Mr Smyth at the Authority's investigation meeting. Otherwise this agreement is open to abuse, given the employer's discretion and the vague way it was stated it would end.

[24] Indeed it appeared to me that Mr Tootill was not aware of all the detail now provided, and thus there could not have been an agreement on the way the employment would end, as required under s 66 (4) of the Act.

[25] How the employment would end needed to be specified to complete the requirements of s 66 (4) of the Act. The parties had a dispute on the length of the employment, although clearly it would have been seasonal, and the applicant accepted that. This was supported by one day's notice, the purported fixed term arrangement

and the words in that agreement; *"when the employer determines that available work associated with the crop has been concluded"*. There do appear to be reasons available that Almadale would have been able to use and to rely upon to offer genuine fixed term employment, but it is required to provide adequate detail and to get the paper work correct to properly satisfy the requirements of s 66 of the Act. Indeed Mr Smyth accepted that his failure to put a start date in the second agreement had to do with inadequate attention to detail. I am not satisfied that it was not possible to put a start date in the employment agreements that were offered, given that the two agreements had not been signed off after work had started.

[26] Mr Smyth and Mr Tootill could not reliably tell me the start date of the employment. Although it does not matter now, I had requested Almadale to provide wage and time and holiday records during the telephone conference setting up the arrangements for the investigation meeting. A dispute over the actual start date would have been avoided if Mr Smyth had provided me with the proper records required to be kept under the Employment Relations Act 2000 and Holidays Act 2003. I had to make do with the pay slips provided instead.

[27] Employers need to note that pay slips and accounting programme print outs are not necessarily wages and time records and holiday and leave records, unless the details of s 130 (1) of the Employment Relations Act 2000 and s 81 of the Holidays Act 2003 are included.

Mr Tootill's dismissal

[28] In conclusion, the employment agreement relied upon was not a genuine fixed term employment agreement and did not meet the requirements of s 66 of the Act. The employer's unilateral decision made by Mr Smyth to end the employment without Mr Tootill having the opportunity for input, comment and to be consulted was unfair, and not the action that a fair and reasonable employer would have taken (see: section 103A of the Employment Relations Act applied). It is understandable why Mr Tootill has been suspicious of the reasons for his employment being terminated. There was no discussion with him, no other options explored and no alternatives considered. The employer's failure leads to a personal grievance: Mr Tootill was unjustifiably dismissed. The employer did not rely on redundancy at the time as a

reason to justify the decision to terminate Mr Tootill's employment. This is supported by the failure of the employer to follow any proper redundancy process and consultation at the time and before another person was transferred to the pack house and 10-12 more were laid off two weeks later.

[29] The real reason for the termination of Mr Tootle's employment is set out in paragraphs 15 and 16 of this determination: he either accepted the terms offered to him or his employment would terminate. In other words take it or leave it.

Remedies

[30] Mr Tootill is entitled to remedies. He is not entitled to 6 months pay because there was no agreement that he would be employed for that length of time. Moreover, Mr Tootill obtained other employment in that period.

[31] Mr Tootill claimed 5 weeks lost pay. He did not support his evidence of looking for other work and applying for two jobs that were challenged by the respondent. He started in a new job on 15 August 2007 at a saw mill in the Coromandel, but could not start there a week earlier because of the arrangement he accepted for mediation in Palmerston North. His new employer was not prepared to let him start early as he had to travel from the Coromandel to attend mediation.

[32] Also, I am satisfied that Mr Tootill would not have had guaranteed employment at Almadale because of the harvesting arrangements and seasonal employment, another employee being laid off at the same time supposedly for the same reasons that the harvest work had concluded (although no details and documents to support this were provided by Mr Smyth), another person was transferred to the pack house and 10-12 more were laid off two weeks later. Therefore, I award Mr Tootill a further two weeks wages to coincide with the other workers being laid off.

[33] He did not contribute to the situation. I have rejected the arguments submitted by the employer about contribution because they have no basis and are tenuous at the least. If anything, one of the issues raised about three cartoons Mr Tootill had drawn, during his employment, had more to do with work place practices at the time. The employer has risked adding to Mr Tootill's humiliation and hurt feelings by putting

forward the detail. In any event I was satisfied that Mr Tootill drew the cartoons to say something about his employment that has nothing to do with the current case. Mr Tootill's feelings have been hurt because of the way in which he was dismissed and the employer's failure to justify the reasons. His claim for $2,000 was modest, and I award him $2,000 under s 123 (1) (c) (i) of the Act. This reflects Mr Tootill's intense and clearly felt feelings about the impact that his dismissal had on him, the timing of him raising his grievance when he originally only had an employment relationship problem on the wages, and that he has been dealing with the employment relationship problem on his own.

[34] Mr Tootill has not been able to establish his claim for $2,000 made for relocation costs and finding work and having to live in his car. This is because he did not verify any costs he sought when challenged to produce receipts and invoices by the respondent.

[35] There is no issue on legal costs. Mr Tootill has been successful. Costs would ordinarily follow the event. Therefore, Almadale will have to meet its own costs for legal representation, preparation and attendance. Mr Tootill represented himself. He is not entitled to costs for his preparation and attendance, except that Almadale is to pay Mr Tootill the filing fee.

Concluding comment on industry practice

[36] It can only be hoped that this is an isolated occurrence where Mr Smyth is responsible for his own lack of attention to detail. However, Mr Smyth informed me that the employment agreement Almadale has been using is a standard issue employment agreement provided through a producer organisation. As a consequence of this employment relations problem the industry needs to take a close look at the requirements needed to ensure any fixed term arrangements are properly provided for under s 66 of the Act, given the seasonal nature of the industry. Employers should not treat the requirements for detail in a perfunctory way but instead cover eventualities to the level of detail required eg to refer to the harvest and factors associated with the completion of the harvest including any change from manual labour requirements to mechanical methods and that the employment will end with written notice. Also this employment relationship problem provides an alert for employers to comply with the

detail required in wages time and holiday and leave records and the prescribed circumstances in which holiday pay can be included in the hourly rate. The Department of Labour web site would be a useful resource for information on these matters: see www.dol.govt.co.nz.

Summary of the Authority's orders

[37] Almadale Produce Limited is to pay Robert Tootill the following:

(1) By consent $276.55 gross wages and holiday pay under s 131 of the Employment Relations Act.

(2) $1,104 gross being two weeks lost wages under s 123 (1) (b) and s 128 of the Act.

(3) $2,000 compensation under s 123 (1) (c) (i) of the Act.

(4) $70 filing fee under clause 15 of Schedule 2 of the Act.

P R Stapp
Member of the Authority