

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

<b>BETWEEN</b>	Julie Varney (applicant)
<b>AND</b>	Tasman Regional Sports Trust (respondent)
<b>REPRESENTATIVES</b>	Sarah Kissling for the applicant Rosalind Webby for the respondent
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION MEETING</b>	Nelson, 16 May & 30 July 2003
<b>DATE OF DETERMINATION</b>	12 August 2003

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problems**

1. Ms Varney says the respondent (the Trust) unjustifiably dismissed her and in a way that caused her humiliation, etc – statement of problem received 21 October 2002. She claims lost earnings for the period 30 June to 31 December 2002, compensation of \$10,000 for humiliation, etc and costs.

2. Ms Varney also says her previous employer breached s. 64 of the Employment Relations Act 2000 (the Act) by not advising her she could obtain independent advice before signing her employment agreement with the Trust – witness statement received 18 May 2003.
3. The Trust rejects the first claim – statement in reply received 5 November 2002.
4. The parties underwent mediation but the employment relationship problem remained.

### **Investigation**

5. The parties agreed to a one-day investigation commencing at 9.30 a.m. on Friday 16 May 2003 in Nelson. As it happened, and for reasons outside of the Trust's control, its principal witness and chief executive officer, Neville Male, had to depart the investigation at short notice at midday. By agreement the investigation resumed on 30 July.
6. The parties usefully provided witness statements and relevant documents in advance to each other and the Authority.
7. The parties are to be commended for their informed and helpful contributions to the investigation. At its conclusion the parties' representatives agreed to provide written submissions by Monday 4 August. As it happened the applicant's submissions were not received until midday Monday 11 August.

### **Background**

8. Much of the relevant information is not in dispute. I am satisfied that the following, taken from the documentary material provided by the parties and their evidence during the investigation, is an accurate summary of key events.
9. The applicant has 15 years experience in occupational health as both a practitioner and as a manager of occupational therapy services. Ms Varney has also lectured in communication studies at the School of Occupational Therapy, Otago Polytechnic.
10. Prior to working for the Trust, Ms Varney had been employed by the Nelson Marlborough District Health Board (the Board) as a senior occupational therapist for a

period of two and a half years in a part-time capacity. Part time work was, and remained, important to the applicant as it provided her with flexibility to care for her two primary school-aged children and to study part time towards a degree in commerce.

11. The respondent is a regionally based, charitable Trust that has the role of getting more people more active more often. It pursues its goal by promoting, encouraging and facilitating people taking part in sport, recreation and any other activity that is good for their health.
12. As part of its activities the Trust also facilitates the local delivery of the Green Prescription Programme (the programme). The programme is possibly best known by its advertising promotion "*push play*". Put simply, the Green Prescription Programme attempts to use exercise as an alternative or supplement to conventional medical treatments.
13. In an advertisement dated 3 March 2001 the Trust advertised the part-time position of Green Prescription Programme Manager (the position). Ms Varney says that, at the time of applying for the position, she stressed to Mr Male she was interested in only working part-time hours because of her commitments. For its part the job advertisement stipulated, amongst other things, that the position was for 28 hours per week "*... but it is anticipated that this may increase*".
14. Ms Varney applied for and was appointed to the position. The Trust offered the applicant employment in a letter dated 29 March 2001. That letter also set out the terms and conditions of her employment. Ms Varney says that was the first time the first time the Trust, and Mr Male in particular, explained to her that the position was for a fixed-term of 48 weeks, subject to the continued funding of the programme.
15. Ms Varney started her employment on 9 April 2001. She signed off the agreement offered to her in May following some changes to it. The applicant says it was, at that time, her clear understanding that the position would continue beyond the agreed fixed-term if funding was available.

16. Funding for the position during Ms Varney's tenure and afterward was obtained from Sport and Recreation New Zealand (SPARC), formerly the Hillary Commission, the Trust's own resources and – subsequently – from the Board.
17. The applicant and the Trust agreed that Ms Varney's 48-week fixed-term employment was set to expire on 9 April 2002.
18. Mr Male kept the employees – including the applicant – abreast of funding developments as they emerged (e.g. Mr Male's circular of 6 March 2002 to Trustees and staff).
19. In a memo dated 25 February Mr Male specifically advised Ms Varney,

*“You are aware that current funding sustains (your) position until 30 June 2002, and that there is a strong likelihood that funding will ‘roll over’ until 31 December 2002.”*
20. In the same memo Mr Male linked that funding situation to a proposal that the parties, *“think about amending the employment contract so that a new term is agreed upon ...”*
21. The parties dispute whether agreement was then reached between them on extending Ms Varney's fixed-term agreement from 9 April to 30 June 2002. Mr Male says there was a meeting in his office on 26 April that resulted in such an agreement. Ms Varney denies that claim. If there was an agreement it was not recorded in writing. It is a fact that Ms Varney continued in her employment with the Trust through to 30 June.
22. The applicant wrote to the Trust a letter dated 29 April in which she, amongst other things, acknowledged *“... that (my) position seems to be expanding”*, recorded her concern that *“... I will not be able to fulfil all of the obligations of my position with these imminent expansions (as already) I am feeling particularly stretched in my current role”* and proposed a reduction of her hours to 18 per week while the Trust employed another (part time) worker.

23. Problems began to emerge in the employment relationship during 2002. Personal file records made by Mr Male detail some of the issues that increasingly separated the parties and put them in conflict. The first, dated 3 May, refers to an early April agreement (disputed by Ms Varney, as explained above) that, as funding for the position was in place until 30 June, the present agreement in place would continue until that time. It also records Mr Male's intention to discuss with the Trust's chairman, Dr Moore, the applicant's proposed reduction in hours.
24. The second file record, dated 13 May records Mr Male's confidence the Trust's submissions to the Board would result in support funding for the programme. It records Mr Male's advice to the applicant that it had always been the Trust's intention to make her position a full-time one, and that the time to do so was propitious because of the prospect of increased funding. It also records Ms Varney's advice she would not be interested in a 40-hour full-time position and that the parties agreed her employment would continue until 30 June under existing terms and conditions.
25. A further meeting followed on 17 May. Mr Male's file note of the same day records the parties' pronounced differences. The parties then entered into an exchange of correspondence. Mr Male sent a letter dated the same day to the applicant. It purports to confirm another agreement, this one reached on 10 May, to extend Ms Varney's existing agreement under its current terms and conditions to 30 June. The chief executive officer asked the applicant to treat his letter as an addendum to the agreement, to sign it and to return it to him by 23 May. That did not happen. Instead, by letter dated 23 May, Ms Varney disagreed with the terms expressed in Mr Male's letter. The reply took issue with the legality of the 48-week clause and suggested instead that her agreement was open-ended particularly as her employment had continued after the fixed-term had expired. Ms Varney also referred to the obligation of good faith and fair dealing. Mr Male replied by letter dated 27 May taking issue with the applicant's position. Ms Varney's replied by letter dated 4 June. It stated an intention to continue to undertake her work on an ongoing basis. A further letter followed by Mr Male dated 7 June reiterated the Trust's position. It also said Ms Varney's proposal to reduce her hours had been considered but it and her stated intention to work on was not acceptable. The letter advised that the 28-hour a week

position would no longer exist after 30 June, but that a new 40-hour a week position would be advertised shortly and the applicant was invited to apply for it.

26. Communication between the parties then fell away. Ms Varney did not apply for the new position, which was duly advertised and filled. She continued instead in her position until 30 June at which point her employment ceased. The applicant says she was distressed by the respondent's failure at that time to arrange a farewell or to put in place arrangements that would bridge her departure and the arrival of the new appointee.
27. According to the applicant she experienced various employment relationship problems throughout much of her time with the Trust. She says these problems worsened both during and before the events described above, from February 2002 onward. During the investigation Ms Varney attributed these problems to Mr Male's incompetence, his bullying manner and a propensity to tell lies. The applicant said she initially doubted her own skills, but became sufficiently concerned by her chief executive officer's behaviour to make inquiries to satisfy herself it was not attributable to excess drinking. Ms Varney says she satisfied herself that was not the case.
28. The applicant gave an example of her problems: at Mr Male's request Ms Varney prepared a draft report for her previous employer, the Board, in respect of the programme. It drew a response shortly afterward (19 March) from Mr Male that he thought, "*we may be on different wavelengths ... as what you have suggested requires more detailed explanation ...*". He sought further comment from the applicant. Ms Varney became concerned about the draft as the final report was required by the Board at about the same time she would be absent on leave. She says Mr Male agreed to email his changes to her. Because the report did not arrive she telephoned Mr Male only to receive contradictory denials and advice about the draft and other matters. On her return to work she approached Mr Male further about the draft and was told there was no hurry. Some time later Ms Varney discovered the report had gone through to the Board. She was dismayed by, amongst other things, the fact she had no opportunity to see the report in its final form, that her chief executive officer's actions went against their understanding and that – in its final form – the report had been submitted with Mr Male's name copied over her own.

29. By letter dated 21 May Ms Varney filed a formal complaint against Mr Male with the Trust, by directing her letter to its chairman. She copied her complaint to Mr Male and to one of the Trust's funding bodies.
30. In her letter Ms Varney identified the various problems she was experiencing with Mr Male. These included poor communication, his failure to work toward common goals, keeping her uninformed, a failure to provide the applicant with business cards, emails, for bills not being paid, lack of support and a division within staff. In her letter, and in light of the prospect of increased funding, Ms Varney reiterated her proposal to take on another part-time person, so as to provide a total of 40-hours per week for the programme.
31. In his reply dated 9 June Dr Moore expressed his confidence in the Trust's chief executive officer without responding to the specifics of the applicant's complaints. He referred to there being no other serious indications of staff discontent and expressed the hope that Ms Varney could resolve her problems "*through goodwill and the channels provided in your employment contract*". Dr Moore concluded his letter with the view he thought it inappropriate that the applicant had sent her criticism of Mr Male to the Trust's funding agency.
32. Ms Varney displayed strong antipathy toward Mr Male. The investigation unearthed nothing about Mr Male's conduct to justify the applicant's view of him.
33. I also note here that Clause 13 of Ms Varney's employment agreement provided for the referral of personal grievances to the Employment Relations Service in the event of unresolved differences. If mediation did not resolve these differences then the agreement envisaged the matter going on the Employment Relations Authority. It is not clear why the parties, and particularly the applicant, failed to take these steps early in the employment relationship, so as to give themselves – and herself – a reasonable opportunity to address their concerns before the relationship came to an end on 30 June 2002.
34. This was an instance where good faith required prompt action – it could and should have been taken.

## Findings

35. By way of the following objective but disinterested third-party reasoning I find against the applicant's claims. First, while I accept the respondent was in breach of s. 64 of the Act I find it was a technical breach. There is no evidence it disadvantaged the applicant in anyway. Proof of the latter lies in the fact Ms Varney prolonged the negotiation process over her terms and conditions of employment and obtained changes to them consistent with her wishes.
36. Second, I am satisfied the respondent did not unjustifiably dismiss the applicant. I reach this conclusion on the basis that – consistent with s. 66 of the Act – the Trust had genuine and reasonable funding reasons for specifying the closure of Ms Varney's employment (i.e. initially 9 April and then 30 June 2002): *Clarke v Norse Skog Tasman Limited*, unreported, AC 42/03, Colgan J, 26 June 2003.
37. I am reinforced in reaching this conclusion by Ms Varney's acknowledgement that, at the time of negotiating her terms and conditions of employment, she was advised the position was for a fixed term.
38. The contract she signed clearly provides it is "*subject at all times to sufficient funding being granted*" (clause 6).
39. The applicant was also plainly advised the term of her employment was subject to ongoing funding. She was regularly appraised by way of updates of the funding situation. Ongoing employment was clearly spelt out to her as being by way of further fixed terms subject to the same restraint. This was because of the Trust's operating realities, i.e. it was largely dependent on episodic financial grants from other bodies and held limited funds of its own.
40. There is no evidence to support the applicant's expectation of ongoing employment or that she was assured of the same. All of the written documentation presented to the investigation indicates the applicant was aware her position's future depended on episodic funding arrangements. Reference to the same is made by Ms Varney in her February 2002 draft report to the Board.

41. Third, I am satisfied the applicant's valid fixed-term employment agreement properly ceased on 30 June following a short extension from 9 April. While the parties did not enter into a written agreement in respect of the extension, Ms Varney was clearly advised of it and its status quo terms. Her actions are evidence of acceptance of the same. The termination date of 30 June was similarly clearly signalled.
42. While ongoing funding for the position was in place from before 1 July, it was fair and reasonable in all the circumstances for the Trust to anticipate further funding and to use it to extend the position into a full-time one.
43. The extension after 9 April is not, I find, proof of an agreement between the parties that Ms Varney was employed on an indefinite basis. The applicant elected not to apply for the full-time position, despite being invited to do so by the Trust, for reasons personal to herself, i.e. the value to her and her family of her continuing to work on a part-time basis only.
44. By way of a letter dated 31 July 2003, and in response to an enquiry from the Authority after the last investigation date, Mr Male confirms he explored the applicant's proposal with the Trust's chairperson. They instead arrived at a decision to instead seek a full-time appointment. The reasons for that decision are set out in Mr Male's letter. It was copied to the applicant for comment. Even though it is not clear if the reasons cited by Mr Male were clearly conveyed to the applicant at the time I see no benefit in resuming the investigation a third time with the attendant additional costs for the parties and the public, for this matter to be further explored. I am satisfied it is unnecessary to do so. I find the given reasons to be objective and operationally-sound, relating as they do the benefits of one manager ensuring continuity in all aspects of the programme's work, the financial costs of duplication, and consistency with the original proposal which eventually won Board support. Ultimately, it was a decision for the Trust to make, following – in this instance – discussion with the applicant and reasonable consideration of her views: *G N Hale & Son Limited v Wellington Caretakers etc IUW* [1991] 1 NZLR 151, etc.
45. The Trust's decision was consistent with the clear notice contained in the 3 March 2001 advertisement that lead to Ms Varney's appointment, that it was anticipated the position's 28 hours per week "*may increase*".

46. Fourth, the evidence is equally clear that – during this period and before – the parties had individually and jointly looked at what would happen after 30 June. During the 9 April – 30 June period Ms Varney and Mr Male actively explored the future of the position occupied by the applicant. Ms Varney was aware of the Trusts' efforts to obtain additional funding for the position she occupied. Her letter of 29 April acknowledged that *"the position seems to be expanding"*. That appreciation clearly prompted Ms Varney to put forward a proposal that her hours be reduced and another part-time employee be taken on.
47. There is no basis for suggesting the decision was deliberately taken by the respondent so as to thwart Ms Varney's otherwise reasonable request to enjoy ongoing, but reduced, part-time employment.
48. Finally, I do not accept that the termination process in anyway humiliated, etc the applicant. The evident difficulties between Ms Varney and Mr Male by the 30<sup>th</sup> of June inevitably caused strains that in turn impacted on the detail of departure. Those difficulties arose out of the strong dislike exhibited by Ms Varney to Mr Male and she must accept responsibility therefore for their consequences.

### **Determination**

49. For the reasons set out above I find against Ms Varney's application.
50. As requested by the parties, costs are reserved.

**Denis Asher**

**Member of Employment Relations Authority**