

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 175  
5640160

BETWEEN                      JAN-OWE WALLBERG  
Applicant

A N D                              KAPSCH TRAFFICOM  
LIMITED  
Respondent

Member of Authority:        Rachel Larmer

Representatives:              Applicant in person  
Eddie Bluegum, Counsel for Respondent

Investigation Meeting:        19 June 2017 at Auckland

Written Record of Oral        19 June 2017  
Determination:

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**WRITTEN RECORD OF ORAL DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]     Today's investigation meeting involved three preliminary matters:

- a.    Was Mr Wallberg a fixed term employee?
- b.    Did Kapsch engage in unfair bargaining?
- c.    Should Mr Wallberg be given leave to raise his disadvantage grievance out of time?

**Was Mr Wallberg a fixed term employee?**

[2]     During the investigation meeting today Kapsch conceded that the two fixed term employment agreements it had given Mr Wallberg did not meet the requirements

of fixed term engagements as required by s.66 of the Employment Relations Act 2000 (the Act).

[3] I therefore find that Mr Wallberg was a permanent part time employee, not a fixed term employee.

**Did Kapsch engage in unfair bargaining?**

[4] After hearing the evidence given by Mr Tellegen and Ms Tracey Gordon, Kapsch's Vice President Finance Oceania and reviewing the relevant documentation Mr Bluegum conceded that Kapsch had not advised Mr Wallberg of his right to take legal advice on the intended employment agreement.

[5] This omission by Kapsch is a breach of s.63A(2)(b) of the Act which requires an employer to advise an employee of the employee's right to take independent legal advice on the intended employment agreement before the employee accepts the offer of employment.

[6] Section 68(2)(d) of the Act says that unfair bargaining occurs if an employer fails to comply with its s.63A(2)(b) of the Act obligation to advise an employee of the right to take independent legal advice on the intended employment agreement.

[7] Accordingly I find that Kapsch's failure to comply with s.63A(2)(b) and s.68(2)(d) of the Act means it has engaged in unfair bargaining in relation to the two fixed term employment agreements it gave Mr Wallberg.

[8] Mr Wallberg seeks compensation under s.69(1)(a) of the Act for Kapsch's unfair bargaining. I will address that claim later as part of resolving the substantive issues because the parties indicated a wish to have further mediation assistance.

**Should leave be granted to Mr Wallberg to raise his disadvantage grievances out of time?**

[9] Kapsch reduced Mr Wallberg's hours of work from 25% of FTE to 10% of FTE on 04 April 2016 when it gave him a second purportedly fixed term employment agreement to sign.

[10] Mr Wallberg raised a disadvantage grievance relating to what he claims was a unilateral reduction in his hours of work and therefore pay. However his disadvantage grievance was raised 117 days after it occurred.

[11] Mr Wallberg seeks leave to raise his disadvantage outside of the 90 day time limit specified by s.114(1) of the Act. Kapsch opposes that application.

[12] Section 114(4) of the Act gives the Authority a discretion to grant leave to Mr Wallberg to raise his personal grievances out of time if it is satisfied that there are exceptional circumstances which gave rise to the delay and if the Authority considers it just to do so.

[13] Section 115 of the Act sets out examples of exceptional circumstances.

[14] Section 115(c) of the Act states that for the purposes of s.114(4) of the Act, then the failure of an employment agreement to contain a problem resolution clause as required by s.65 of the Act is one of the exceptional circumstances that may result in leave being granted.

[15] I find that neither of the two employment agreements Mr Wallberg was provided with contained an employment problem resolution clause in the terms required by s.65 of the Act.

[16] I am satisfied that failure to provide a compliant employment problem resolution clause amounts to an exceptional circumstance because it was likely to have resulted in the delay in Mr Wallberg raising his disadvantage grievances.

[17] I do not accept Kapsch's submission that the Authority should decline to exercise its discretion to grant Mr Wallberg leave to raise his disadvantage claim out of time.

[18] The Authority's discretion must be exercised on a principled basis. Mr Wallberg says he was not aware of the need to raise a grievance until the Ministry of Business Innovation and Employment call centre told him to on or about 28 July 2016. Mr Wallberg raised his disadvantage grievance promptly on 29 July 2016.

[19] I find that Kapsch is not prejudiced by the short delay. I therefore consider it just to exercise the Authority's discretion to grant Mr Wallberg leave to raise his disadvantage grievances regarding Kapsch's reduction of his FTE hours out of time.

[20] Accordingly, I find that the Authority does now have jurisdiction to consider Mr Wallberg's disadvantage grievances in regard to those concerns.

**What if any costs should be awarded?**

[21] Mr Wallberg represented himself so there is no issue as to costs because he did not incur any legal costs.

**Rachel Larmer**  
**Member of the Employment Relations Authority**