

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 336
3008552

BETWEEN STEPHEN WARREN
Applicant

AND T R GROUP LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Catherine Stewart and Ellen Taylor for Applicant
Andrew Scott-Howman for Respondent

Investigation Meeting: 24 and 25 July 2017

Determination: 26 October 2017

DETERMINATION OF THE AUTHORITY

- A. Stephen Warren’s fixed term agreement with TR Group Ltd was valid.**

- B. TR Group unjustifiably dismissed Mr Warren.**

- C. TR Group is ordered to pay Mr Warren within 28 days of the date of this determination:
 - (i) \$10,207.37 gross as lost wages; and**
 - (ii) \$6,000.00 as compensation.****

- D. TR Group breached its duty of good faith to Mr Warren and is ordered to pay a \$2,000.00 penalty of which \$1,500.00 (75%) is to be paid to Mr Warren, within 28 days of the date of this determination.**

E. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.

Employment relationship problem

[1] Stephen Warren is originally Australian. He worked internationally for many years in the information technology industry. Mr Warren came to New Zealand in October 2016 hoping to find work and have his wife then move from the Philippines to join him.

[2] T R Group Limited (TR Group or the company) specialises in purchasing, renting and leasing trucks. It also provides driver training in heavy vehicles through its Master Drive business.

[3] A former colleague of Mr Warren was now working for TR Group as lead developer. She contacted him to see if he was interested in a Project Manager/Business Analyst (PM/BA) role with the company.

[4] Mr Warren was interviewed by Andrew Crabb, TR Group's Chief Information Officer who is in charge of TR Group's IT team, and Brent Gillett, senior PM/BA. Mr Warren was offered and accepted a four month agreement, working on the Master Drive project. His employment finished on 31 March 2017.

[5] Mr Warren challenges the validity of the fixed term agreement and his dismissal. He initially applied for interim reinstatement but this was later withdrawn. TR Group denies that Mr Warren was unjustifiably dismissed.

[6] An investigation meeting was held on 24 and 25 July 2017 where I heard evidence from Mr Warren, Mr Crabb and Andrew Roberts, TR Group's People Care and Development Manager.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

- [8] The issues for determination are:
- (a) Was the fixed term contract valid?
 - (b) Even if it was, did TR Group terminate Mr Warren's employment prior to the purpose of the fixed term contract (completion of the Master Drive project)?
 - (c) Was Mr Warren's dismissal unjustified?
 - (d) If Mr Warren was unjustifiably dismissed, what remedies (if any) should he receive, including consideration of reinstatement?
 - (e) Did TR Group breach its duty of good faith to Mr Warren, regarding prejudice shown to him for obtaining legal advice and asserting his rights?
 - (f) If so, should a penalty be imposed on TR Group?

Roles

[9] There was considerable reference in the course of Mr Warren's employment and the Authority's investigation meeting to the project manager and business analyst roles, their differences and overlapping responsibilities.

[10] Broadly speaking, in the IT industry, project managers are responsible for the overall management and oversight of a project, and ensuring that stakeholder expectations are met. They would often be involved from the very beginning of a project, including having input into the design and planning of the project plan. Business analysts are primarily focused on processes and would usually be responsible for a portion of the project deliverables.

[11] The two roles may have somewhat different skill sets. There is debate within the industry over where the line is drawn between the two roles. Some companies, particularly with smaller IT teams, will employ people in joint PM/BA roles.

The IT Team

[12] In late 2016 before Mr Warren's arrival, TR Group's IT Team employed in New Zealand two developers, two project managers/business analysts, and two infrastructure specialists. There was also a third developer contractor based in the Philippines. In the past the company had also had a BA on a short term contract to assist with a project.

[13] Generally the IT Team ran two projects, so that each of the two PM/BA staff would have a project. Sometimes there was overlap so one project was still being finished whilst another one had already started. At this time the other PM/BA had two projects of his own, and Mr Gillett, who had been working on Master Drive and was now being encouraged to get onto the Fleet Operations (FLOPs) project.

[14] Master Drive is one of TR Group's business arms. It is a driver education business. Its processes were being moved from largely paper-based to IT based.

Advertising of business analyst role

[15] Mr Roberts became involved at the time Mr Crabb decided that he and Mr Gillett wanted to advertise for a business analyst. The thinking was that a fixed term business analyst position would support Mr Gillett so that he could be freed up to run two projects at once (FLOP and Master Drive). There was pressure from the business to move the FLOP project forwards.

[16] The business analyst position was advertised through a recruitment company.

[17] Mr Roberts described TR Group's usual recruitment process, which involved spending a considerable amount of time interviewing potential team members. Usually a three step process was used involving technical and cultural interviews followed by a lunch or dinner to meet the team and get their input.

[18] Having been contacted by his former colleague, Mr Warren understood that he was applying for a fixed term PM/BA role. Mr Warren had not seen the BA advertisement prior to these proceedings. As he was only going to be with TR Group for a few months the company decided to forgo the usual vetting process. However, it was accepted that Mr Warren was not told this. This lack of knowledge of the advertised role and the short circuiting of the usual recruitment process was perhaps the start of misunderstandings to follow. Added to this was Mr Warren's lack of awareness of the employment environment in this country.

Interview

[19] On 21 November 2016 Mr Crabb and Brent Gillett (senior PM/BA) met with Mr Warren. It was a relatively brief and high level interview.

[20] The TR Group representatives were aware that Mr Warren was in the process of applying for another role at Air New Zealand, which had a distant start date. During the discussion Mr Warren says that he was asked if his preference was for a full time permanent role or a fixed term position and he expressed a preference for a full time permanent role.

[21] I am satisfied that this was not an offer to give him one or the other, whichever he wanted. It would be highly unusual that an employer would suggest that those two options were available and allow an employee to effectively choose from them, at least if there was only one role. Rather TR Group was trying to get an indication of where he was at with his various opportunities.

[22] Mr Warren says that Mr Crabb replied that at first he would be on a fixed term role, then if he performed well he would get a full time role. Mr Crabb denies making a promise about other work. However, the TR Group acknowledged that it saw Mr Warren as a find, in that it was getting more than it had hoped for. The pay which he was later offered reflects that.

[23] I am not satisfied that Mr Warren was given a promise of a permanent position but I find that he was given an indication that if his performance on the Master Drive project was good there was a prospect of on-going work for him.

[24] At the interview, reference was made to another job candidate who also had strong, but different, skills and Mr Warren saw himself as competing against her. I find his suggestion that he was told that he and the other candidate were going to be competing in two different short term roles for a permanent position, unlikely. The other candidate did not start work at TR Group.

Offer of employment

[25] Having found Mr Warren and getting more than it had hoped for, the TR Group decided that Mr Warren was able to run one of the projects, enabling Mr Gillett to be freed up to run the other one.

[26] Mr Warren was offered a four month PM/BA role as he was seen, along with Mr Gillett and the other current PM/BA, as being able to perform basic business analyst work as well as managing projects. Mr Warren was to perform almost all of the work required on the Master Drive project as well as managing the project.

[27] The position description referred to delivery of “projects” (plural) and discussed first year’s accountabilities and measurements. TR Group’s standard job description was used and not adapted to Mr Warren’s situation.

Pay rate

[28] There was some discussion at the interview about comparative pay rates and Mr Crabb mentioned market rates for BA or PM roles in New Zealand, having obtained information relatively recently for the other PM/BA appointment.

[29] Mr Crabb’s experience was that people on fixed term employment agreements were generally paid a higher rate than a permanent employee but less than a contractor for the same role.

[30] Mr Warren was offered the role at \$90 gross per hour, although he was actually paid a salary based on \$90 per hour for a 40 hour week. The other two PM/BAs at TR Group were paid substantially less than that.

[31] Mr Warren’s high salary was explained on the basis that he had skills and experience which appeared to enable him to take on the completion of the Master Drive project by himself, rather than requiring much input from Mr Gillett. Also, he was able to start straight away, rather than having to give notice elsewhere. In addition TR Group wanted to encourage Mr Warren to stay and finish the project.

[32] Mr Warren considered that the rate offered reflected the fact it was a combined project manager and business analyst role, not just one or the other. He would not have known what the other two TR Group PM/BAs were on. He thought the rate was comparable with what others in the industry were getting, although this was based on his knowledge from work overseas, not in New Zealand.

[33] A representative of the recruitment company which TR Group used, later told Mr Warren that fixed term contract rates were often similar to those of permanent

employees, whereas contractors generally received rather more. Mr Warren did not previously appear to have a sense of whether and why contractor and employee rates could be different.

Contractor references

[34] Although TR Group had considered the possibility of making Mr Warren a contractor rather than an employee, that was not what happened. During pre-employment discussions Mr Crabb referred to the job as a contractor role. Mr Warren discussed this with his brother who he was staying with.

[35] The employment agreement does to some extent reflect that background in its reference to Mr Warren as a “fixed term employment contractor” throughout the document. TR Group did not argue that he was actually an independent contractor.

Validity of fixed term agreement

[36] Under s 66 of the Act employers and employees may agree to a fixed term employment arrangement under certain conditions. The employer is required by s 66(2) to have:

- (a) genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way¹; and
- (b) advise the employee of when and how his or her employment will end and the reasons for the employment ending in that way.

[37] Mr Warren claims that the fixed term agreement was not valid as it:

- (a) was not for genuine reasons (s66(2)(a));
- (b) was for the purposes of establishing suitability for permanent employment (s66(3)(a)); and
- (c) did not state the way it would end and the reason for it ending (s66(4))?

Reasons for fixed term agreement

[38] TR Group says, and included in the letter of appointment, that the purpose of the fixed term agreement was to complete the remaining activities of the Master Drive project. That project was also mentioned as the work they were looking to cover, during the 21 November 2016 interview.

¹ For example, on a specified date; see list in s66(1)(a) of the Act

[39] Mr Warren accepts that he knew that he was not a permanent employee however, then went on to say that he felt that he was a permanent employee, so that if he performed well he would get a permanent role. Mr Warren accepts that at the interview he was told that he was being employed for the Master Drive project. However, he dismisses the reference in the covering letter to completion of that project as the purpose of the arrangement, as a “one-liner”. For the sake of completeness I note that it is actually two lines.

[40] Mr Warren attempted to suggest that projects did not necessarily have a finish point. He had the impression that a certain amount of activities for the project would be completed within the four month period and those which could not be would be put into a general backlog and staff would move onto another project. I found aspects of Mr Warren’s evidence in this area confusing. He was reluctant to accept under cross examination that he was employed on a fixed term agreement relying on references in the position description to “projects” and “first year”.

[41] The question of whether there was a genuine reason for entering into a fixed term agreement must be assessed at the time that the agreement was entered into.² I find that completion of the Master Drive project was a genuine reason based on reasonable grounds for the adoption of a fixed term agreement. It was a discrete piece of work which TR Group required.

Establishing suitability

[42] Mr Warren claims that was offered a fixed term agreement as a way of assessing his suitability for a permanent role. Section 66(3)(b) of the Act states that establishing suitability for permanent employment is not a genuine reason for a fixed term agreement under s 66(2)(a).

[43] Mr Crabb denies that Mr Warren was told that if he performed well he would become a permanent employee. Mr Roberts, who is responsible for human resources at TR Group, was affronted or disappointed by the suggestion that the company could have used the fixed term agreement to establish suitability for a permanent

² *Wright v V Farms Ltd* [2012] NERA Auckland 122 at [25]

appointment. He saw that as against the company's ethics. Mr Roberts has been with TR Group for a long time, whereas Mr Crabb was relatively newly appointed.

[44] I have found that there was mention of the possibility of more permanent employment if Mr Warren performed well. However, while assessing suitability for that prospect would not be a genuine reason for the fixed term agreement I have found that there was a genuine reason in existence, namely the completion of the Master Drive project. The requirement for a genuine reason in s 66(2)(a) of the Act is therefore satisfied.

Advice about employment ending

[45] On Mr Warren's behalf it was submitted that the employment agreement did not contain advice about when or how his employment would end and the reasons for it, as is required by s 66(4) of the Act. This argument was based on the absence of a clause in the written employment agreement specifying those things.

[46] The agreement does refer to it being a fixed term agreement or contract and Mr Warren being a "fixed term employment Contractor". Clause 3.1 specifies that the employment is to commence on 28 November 2016 and cease on 31 March 2017.

[47] The agreement document therefore specifies the date when employment would end. It did not specify the reasons for it being a fixed term agreement. However, a covering letter of offer dated 24 November 2016 was provided with the employment agreement. There was no dispute that Mr Warren was sent and received the letter. The letter includes the following:

The purpose of this Fixed Term Employment arrangement is to complete the remaining activities in the Master Drive project.

[48] TR Group relied on this clause to complete its obligations under s 66(4) of the Act, saying that the parties' contract was formed of three relevant documents; the letter of offer, standard terms of employment and position description. Reference is made to *Greens Industries Ltd v Barton*³.

³ [2005] NZELC 97,995

[49] It is not uncommon for important aspects of an employee's appointment to be contained in a letter of offer, rather than in the employment agreement document itself, especially where that agreement is standard across an organisation. I accept that the three documents made up Mr Warren's employment terms.

[50] Encompassing the advice required by s 66(4) of the Act in a letter of offer which comes with the employment agreement is sufficient to meet the requirement of that subsection.

[51] The content of the advice here was sufficient to meet the requirements of when or how Mr Warren's employment was to end and the reason for that.

Conclusion on validity of fixed term agreement

[52] There was a genuine reason based for Mr Warren's employment on a fixed term and the requirements of s 66 were satisfied. He was therefore employed on a valid fixed term agreement.

Discussions on pay rate and possible job elsewhere

[53] Mr Warren began work on 28 November 2016. He felt that he was fitting in well at TR Group and that the company wanted him to stay. He worked solely on the Master Drive project.

[54] Informal discussion occurred between Mr Warren and Mr Crabb about what Mr Warren would be paid at Air New Zealand if he went there. He reported a figure which was considerably less than what he was on at TR Group. Mr Crabb sent through industry benchmarks from a recruitment agency, showing pay rates for various IT jobs. Salaried business analyst roles were given a medium quartile of around \$85,000 and project manager/team lead \$100,000⁴. Independent contractor roles showed hourly rates of about twice as much.

8 December meeting

[55] About a week after Mr Warren started at TR Group, he received a meeting request from Mr Gillett for an 8 December 2016 meeting with him and Mr Crabb. The subject was "TR Group – plans for the future" and the email read: "Wanted to

⁴ There was no project manager entry which did not have the team lead reference

include you in the discussions for next year and the potential permanent role for a BA.”

[56] Mr Crabb and Mr Gillett were discussing whether to recruit an additional resource for the FLOPS project, being a dedicated business analyst to work under Mr Gillett.

[57] In an email of 9 December 2016 the Lead Developer⁵ refers to Mr Gillett’s request for another business analyst to help him with the FLOPS project. She reports her response at a meeting on the subject⁶, including that Mr Warren should be considered for a permanent job due to his good technical skills.

[58] During the 8 December 2016 meeting with Mr Warren, Mr Crabb said there were a number of IT projects. He mentioned that there was a backlog of projects and once another project was completed they could roll over into one of the backlog projects. Mr Warren gained a sense that there were other projects which he could work on.

[59] Mr Warren was told that the other candidate referred to previously was not starting. Mr Gillett raised the possibility of a permanent role and Mr Crabb replied that Mr Warren was ticking all the boxes so far. There was a misunderstanding between the parties as to the nature of that role. Mr Warren thought that the permanent work was PM/BA work, despite the meeting invite referring to a “potential permanent role for a BA”. He seems to have been influenced by the fact that in addition to his fixed term PM/BA role there were two other PM/BAs, rather than any solely BAs at that point.

[60] At the meeting Mr Warren expressed interest in a permanent role. The email from the Lead Developer notes that Mr Warren told her after the 8 December 2016 meeting that he would like to be considered for the permanent role. This is in the course of the email discussing the proposed new business analyst role.

[61] I do not accept that Mr Warren was given an indication that a PM/BA role would be available to him. He may well have thought that was what was being discussed, but the email invite as well as the Lead Developer’s email indicate that

⁵ Mr Warren’s former and current colleague

⁶ Mr Warren was not present

what TR Group had under discussion was a BA role to assist Mr Gillett. I am not satisfied that an objective observer would have seen a PM/BA role as what was under discussion.

[62] As they were walking away from the meeting Mr Warren sought from Mr Crabb the guidelines for an review of his performance. This was in the context of hoping that he would get a permanent role. Mr Crabb replied that he was happy to review Mr Warren and later provided him with TR Group's annual performance review document.

[63] Mr Crabb says TR Group offers feedback, regardless of employment status, so that employees (permanent and fixed term) and contractors are offered feedback.

[64] On the basis of the comments outlined above Mr Warren withdrew his application for employment with Air New Zealand. He discussed this with the Lead Developer who later included it in the 9 December 2017 email to Mr Crabb about that and other concerns she had.

[65] Mr Gillett was then away on leave until late January 2017. Mr Crabb decided to leave the possibility of a dedicated BA role until after everyone returned from the holidays.

February 2017

[66] Mr Warren continued to see his work as progressing well. However, on 9 February 2017 he let Mr Crabb know that the Master Drive (pattern) website was not going to go live a few days later on 13 February 2017 as had been hoped.

[67] Later that day Mr Warren emailed Mr Crabb asking whether there was any news "if I will be considered to continue working with TR Group post March 31?. Looking forward to any updates on this topic". Mr Crabb replied:

I need to spend time with Brent on this and also get feedback from those you have been working with re how your interactions have gone – as it's obviously a large part of the BA/PM role.

I also need to assess what's required to complete this project, your performance and a number of other factors...

I will endeavour to close off by end Feb to give you some surety ahead of 31 March so you can plan either way.

[68] On Mr Warren's behalf it was argued that the reference there to the BA/PM role supported that as what had been under discussion at the 8 December 2016 meeting. However, equally I consider that it could be a reference to how Mr Warren was going in his current role, namely the fixed term PM/BA role.

[69] Mr Warren's performance was being assessed, and that information was going to feed into a decision about whether to offer him a potential new role of BA if it was created. However, having established the fixed term role for a genuine project based reason, I am not satisfied that using information about his present performance in terms of possible performance in a newly developed role can be said to be unjustified. This is particularly so using an assessment process which involves providing feedback to the employee and allowing them to comment.

[70] In about late February 2017 Mr Gillett told Mr Crabb that he did not think that a dedicated BA to work with him was needed, because he was capable of performing all the work on the FLOPS project.

[71] In late February or early March 2017 Mr Warren sent Mr Gillett his spreadsheet indicating that he assessed there being at least 130+ days work to go on the Master Drive project.

2 March meeting

[72] Mr Crabb and Mr Gillett met with Mr Warren on 2 March 2017 to discuss several matters.

[73] Mr Warren saw this meeting as primarily about his performance. The other two men said that they had nothing negative to say about his technical ability. He had performed excellently when it came to producing the product and working well with software developers. However, in terms of a permanent position, interaction with the regional managers and business users also needed to be judged and 360-degree feedback from regional managers was not positive.

[74] Mr Warren was told that there was no permanent job available. Mr Crabb was referring to the BA job, although this may not have been Mr Warren's understanding,

given his previous sense of what the possible permanent job was. As the BA job was never adopted at this time, there was no position description or the like to assist with clarity.

[75] Mr Crabb saw the meeting as primarily to discuss the remaining deliverables on the Master Drive project and the time required to deliver. TR Group concluded there was substantially less work required to finish the project than Mr Warren had estimated. This was later finalised in a spreadsheet as 24.5 days' effort to finish the project although there was no evidence that Mr Warren was shown that spreadsheet.

[76] Both parties agree that Mr Warren was offered the possibility of extending his contract to allow him to finish the project, until about May 2017.

[77] Mr Warren says that he was upset and shell shocked by the performance feedback at the meeting. Wanting to understand better, he emailed Mr Crabb asking for a copy of the 360 feedback. Mr Crabb responded by sharing what he described as the general themes. There was a list of some concerns, and then Mr Crabb also stated that Mr Warren had some very obvious strengths.

Obtaining representation

[78] Mr Warren did not respond to the offer of an additional three to five weeks' work. At this point he sought representation from barrister Catherine Stewart. She wrote to TR Group on 9 March 2017 raising concerns about the validity of Mr Warren's fixed term agreement and maintaining that as a result of not satisfying the requirements of s 66 of the Act, his employment was effectively for a permanent position of indefinite duration. An urgent meeting was requested to try to resolve matters amicably and expeditiously.

[79] Mr Roberts replied on behalf of the TR Group, saying that the letter had caught them very much by surprise as Mr Warren had not raised any of the points previously. TR Group denied that there was a "try before you buy arrangement" and that the fixed term agreement was valid. A meeting was agreed to.

16 March 2017 meeting

[80] Mr Warren, Ms Stewart and Ellen Taylor, had a lengthy meeting with Mr Crabb and Mr Roberts. The meeting was recorded and I have listened to it as well as being provided with a transcript.

[81] By way of introduction statements were made that TR Group was attempting to get an understanding of Mr Warren's point of view and reach an outcome. On Mr Warren's behalf Ms Stewart also expressed his desire to reach a mutually acceptable agreement.

[82] However, the meeting became tense at times. Mr Roberts attempted to ask Mr Warren questions about his experience at TR Group and what he was happy and unhappy with. Ms Stewart intervened on occasions, not considering the lines of questioning relevant or appropriate and wanting to focus on the fixed term agreement question. An issue arose about whether Mr Warren was willing to speak himself or would rely on Ms Stewart to do that for him.

[83] TR Group offered Mr Warren an extension of his current PM/BA work until 5 May 2017 to finish the Master Drive project. There was mention of the possibility of a BA position for Mr Warren but then it was said that the company did not have one. Ms Stewart made it clear that Mr Warren wanted the extension but also wanted to reserve his rights around the fixed term agreement issue.

[84] Mr Crabb concluded that it was a bit hard to extend the contract because of all the uncertainty and that he personally would "love to wrap it all up". TR Group concluded that it would consider Mr Warren's willingness to continue with the project.

Events after 16 March 2017 meeting

[85] TR Group appointed Andrew Scott-Howman, who wrote on 20 March 2017 to Ms Stewart. The company was said to have complied with its obligations and its position was that Mr Warren's agreement would end on 31 March 2017, as set out in the fixed term agreement. The representatives continued to correspond.

[86] On 23 March 2017 Mr Crabb called Mr Warren to a meeting for a performance review. Mr Crabb regarded the review as generally good, with some suggestions and the only negative comments being about some people finding Mr Warren difficult to work with. Mr Warren did not see the review as being as positive as previous indications about his performance.

[87] On 28 March 2017 Mr Warren developed a migraine and left work. This continued the next day so he took leave the next day and provided a medical certificate.

[88] Mediation was scheduled for 30 March 2017, the day before the fixed term agreement expired. However, TR Group's representative was unable to attend due to a weather related flight cancellation. Mediation was rescheduled for 26 April 2017.

31 March 2017

[89] Mr Warren attended work and was called into a meeting by Mr Crabb. Mr Warren's perspective was that he was told that he was no longer welcome at TR Group's offices and told to leave early that day. Further, Mr Crabb expressed that he was betrayed by the way Mr Warren had handled the situation and upper management had wanted him to finish up as soon as they heard he had got lawyers involved. Mr Warren made a contemporaneous note of events that day.

[90] Mr Crabb says that he was not usually at work on Fridays but came in that day due to it being the end of the financial year. The TR Group computer network was down following a major outage the day before, and Mr Crabb and Mr Gillett decided there was little point in Mr Warren remaining at work, so he was allowed to go early with a reassurance that he would be paid in full for the day.

[91] Elements of frustration were expressed during the 16 March 2017 meeting, and during the investigation meeting. Those elements and Mr Warren's note, led me to accept that Mr Crabb made negative comments about Mr Warren having involved lawyers, rather than raising issues with TR Group first.

[92] Mr Warren proceeded to get his belongings and left the building at about 3pm.

[93] Mr Warren had instructed his lawyer to try to reach an interim work arrangement as mediation had not been able to occur. An interim arrangement was reached on 31 March 2017 at a reduced rate of pay equivalent to an \$80,000 salary. Both sides reserved their positions regarding their claims.

[94] However, the parties appear to have had different understandings on whether this was a continuation of Mr Warren actually providing work or whether it was just TR Group paying Mr Warren. He turned up for work on 3 April 2017 and was told that TR Group's understanding was that he was not to continue actually working. On the company's instructions Mr Warren remained off work but was paid until the mediation on 26 April 2017, at the reduced rate.

Mediation and offer of BA position

[95] Mediation did not result in the parties reaching agreement. Following mediation, TR Group offered Mr Warren a role of business analyst, at an annual salary of \$80,000.

[96] Mr Warren says the role was at a more junior level and at a very substantial amount less than his previous pay. TR Group says that it felt sorry for Mr Warren and thought it was the right thing to do to offer him a role in the way which had been talked about prior to Christmas. It was prepared to create a role supporting Mr Gillett even though it did not need an ongoing BA. There were various processes going on which required documentation, which is a pure BA function, and Mr Crabb thought he could use someone on that.

[97] Mr Warren chose instead to accept a role he had been offered in Hamilton which was on a slightly higher level of pay (\$82,500) for only 37.5 instead of 40 hours a week, and more seniority than the BA role at TR Group.

Termination prior to completion of purpose

[98] Mr Warren claims that even if the fixed term agreement was valid, the agreement was terminated before its purpose was complete and that he was therefore unjustifiably dismissed.

[99] I detected at least implied criticism on behalf of Mr Warren that TR Group had not estimated or calculated the length of the purpose/project properly. Although the length of the purpose should be consistent with when the employment is to end, it seems unrealistic for employers to be able to estimate to the day or hour the length of time of the project, in this case some months in advance.

[100] TR Group offered to extend Mr Warren's contract for completion of the work it considered needed to be done on the project. However, once Mr Warren got Ms Stewart involved a condition was imposed on that offer at the 16 March 2017 meeting which required him to agree not to pursue a claim about the fixed term agreement. When he did not agree to that he was told that his employment was terminated on 31 March 2017 as per the fixed term agreement.

[101] At that point the Master Drive project had not been completed. A fair and reasonable employer could not have imposed that condition on Mr Warren's extension of employment and then withdraw the offer once that condition was not accepted. I find that Mr Warren was unjustifiably dismissed. I now go on to look at remedies.

Reinstatement

[102] Mr Warren seeks reinstatement with TR Group. However, he does not want the offered business analyst position on \$80,000 gross a year. He wants a PM/BA position on a salary of \$187,200.

[103] The difficulty is that I am not satisfied that there is a permanent PM/BA position for him to be appointed to. The Master Drive project is now finished. I do not consider that it is practicable and reasonable to reinstate Mr Warren in those circumstances.

Lost wages

[104] Mr Warren claims various amounts of lost wages. The first is \$8,246.15, being the difference between the \$187,200 salary and what he was paid on the reduced rate of \$80,000, for the period from 3 to 24 April 2017.

[105] Mr Warren also seeks payment of lost wages from the day after mediation onwards. For the first day 27 April 2017 he was unemployed and seeks \$512.87

gross. From 1 May up to 1 July 2017 onwards he seeks the difference between his salary in his new role and the \$187,200 salary, at \$17,450.00 for two months.

[106] Although s 128(2) of the Act refers to a three month period for lost remuneration awards, that depends on the employee having “lost remuneration as a result of the personal grievance”⁷. Mr Warren’s unjustified dismissal relates only to the failure by the TR Group to allow Mr Warren an extension to his employment to continue working until the project was complete. In those circumstances the loss of wages is limited to period until 5 May 2017 when the extension finished.

[107] I award Mr Warren the sum of \$10,207.37 gross as lost wages, being one day at the full rate of \$512.87 and 25 days at the daily rate of difference \$387.78 totalling \$9,694.50.

Compensation

[108] Mr Warren suffered financially as a result of the termination of his employment. At that stage his wife was not working, having relocated from overseas, and did not obtain employment until 26 April 2017. Mr Warren broke the rental agreement he had an Auckland property in order to move south of Auckland to cheaper accommodation.

[109] Mr Warren also lost confidence and self-esteem and felt depressed as a result of losing employment and income. He feels embarrassed and has limited his interactions with other people, preferring not to go out.

[110] Mr Warren was much affected by his departure from TR Group, , however, I must only award compensation for humiliation, loss of dignity and injury to feelings which were caused by the TR Group’s actions and the grievance here is limited to the non-extension of his fixed term agreement for a five week period. I award Mr Warren \$6,000.00 compensation for his unjustified dismissal.

Contribution

[111] I have considered contribution but find that Mr Warren’s conduct did not contribute to his dismissal. I therefore make no deduction for contribution.

⁷ S 128(1)(b) of the Act

Breach of good faith

[112] Mr Warren claims that TR Group breached its duty of good faith to him by becoming prejudiced against him when he obtained legal advice and asserted his rights. On his behalf it was said that this was the attitude of an employer who does not like to be challenged. TR Group was said not to be active and constructive in maintaining a productive employment relationship.

[113] Mr Warren says that Mr Crabb's attitude towards him changed with Mr Crabb seeming to deeply resent that Mr Warren had asserted his legal rights. The particulars which Mr Warren relies on are:

- (a) The requirement after Mr Warren obtained representation, that he waive his rights to challenge the fixed term contract if he wanted the extended Master Drive work;
- (b) The more negative picture at the 23 March 2017 performance appraisal than previous indications. Mr Crabb commented that now that Mr Warren had raised the issue about his fixed term contract he never would connect well with the General Manager.
- (c) On 31 March 2017 Mr Warren was told by Mr Crabb that he was no longer welcome at the office and was told never to come back. (denials by Mr Crabb not credible);
- (d) TR Group's objection to having Mr Warren at work after the interim arrangement had been reached between representatives.

[114] Without evidence from the representatives as to what was agreed, I am unable to conclude what was agreed in detail regarding the interim arrangement. Either position was a credible alternative.

[115] Mr Robert says that the company regarded the approach of Mr Warren's team at the 16 March 2017 meeting as aggressive and combative, and not involving a sense of trying to work the issues out.

[116] I find that TR Group did breach its duty of good faith to Mr Warren by becoming prejudiced against him when he sought legal representation and asserted his

rights. I do consider that this is an appropriate matter on which to award a penalty. It is important that parties to the employment relationship can seek assistance or representation and assert rights without the other party turning against them. However, I also take into account in setting the level of the penalty that part of the matters relied on have already founded the unjustified dismissal claim and Mr Warren has been compensated for that.

[117] I order TR Group to pay a penalty of \$2,000.00 for its breach of the duty of good faith and order \$1,500.00 of that (75%) to be awarded to Mr Warren and the remainder to be paid to the Crown.

Costs

[118] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Warren shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. TR Group shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[119] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards

Nicola Craig

Member of the Employment Relations Authority