IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 122
5349216

	BETWEEN	JOHN WRIGHT Applicant
	AND	V FARMS LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	J Wright in person C Thomson, advocate for respondent
Investigation Meeting:	9 February 2012 at Rotorua
Determination:	11 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] John Wright says his former employer, V Farms Limited (VFL), dismissed him without reason and unjustifiably.

[2] V Farms Limited says Mr Wright was engaged under a fixed term employment agreement which terminated at the end of the specified term.

Background

[3] In early 2010 John Versteynen, the director and shareholder in VFL, identified that because of the recent felling of 28 hectares of pine trees on the dairy farm where VFL was a sharemilker extensive replacement fencing was necessary. Because that work would take time he would otherwise have spent elsewhere on the farm, he sought to employ a full time employee in the upcoming season to assist with the farming and other duties until the extra fencing work was completed. He anticipated that he would require the assistance for the full season.

[4] Mr Wright was coming to the end of a fixed term farm assistant's position where he had been employed for the 2009-2010 season, and was looking for new employment. In February 2010 he approached Mr Versteynen. Approximately a week later Mr Versteynen called him back, saying a farm assistant's position was available for the upcoming season. Mr Wright said he accepted the offer, and that nothing was said about it being for a fixed term.

[5] The parties met on 23 February 2010. Mr Wright had been employed under a standard document made available through the Federated Farmers, and brought a copy of that agreement as a basis for discussion as Mr Versteynen had not obtained one. The parties discussed the document page by page, covered over provisions not relevant to them with stickers before writing new provisions on the stickers, and made other handwritten amendments as necessary. They signed the stickered document with its amendments, and initialled each page after discussion about its contents.

[6] There was a conflict in the evidence about whether Mr Versteynen also advised that the position would be for the 2010-2011 season only, in order to cover the time when Mr Versteynen was also to be occupied with the re-fencing work. I do not accept Mr Wright's assertion that he was unaware the agreement was to be for a fixed term of one season. It is less clear whether he was told why, but I consider it more likely than not that the reason was explained either during the preliminary telephone conversation or at the 23 February meeting.

[7] The fixed term provision in the agreement read:

> *3. Term of this agreement*
>
> *3.1 Permanent agreement*
>
> *This agreement shall come into force on the 1st June 2010 and shall continue until terminated by either party in accordance with this agreement.*
>
> *(or complete the following section for fixed term agreements only)*
>
> *A fixed term agreement may only be used if the employer has genuine business reasons based on reasonable grounds for offering the position for a fixed term. All of 3.2 must be completed prior to commencing employment if the parties intend the employment to be for a fixed period, rather than permanent employment.*
>
> *3.2 Fixed term employment*

3.2.1 This agreement commences on First (1st) of June 2010.

This agreement shall terminate on the Thirty First of May 2011.

…

3.2.3 This position is for a fixed term because the job requires this length of time for job to be completed.

[8] The years specified in the agreed provision had been written on stickers, as was the explanation added to clause 3.2.3. Although he did not make such an allegation outright, Mr Wright seemed to be hinting in his written evidence that the provision was included without his knowledge. After considerable discussion during the investigation meeting Mr Wright indicated he was not making such an allegation, and I would not have accepted the allegation in any event.

[9] With the exception of a minor exchange in February 2011 over Mr Wright's lateness to work, the employment relationship proceeded relatively smoothly until an incident on 21 March 2011. Mr Wright had set up a vat that morning, only for the owner of the farm to advise him later that a seal had been pinched, causing the vat to leak milk. Mr Versteynen approached him subsequently to require an explanation.

[10] Mr Wright's account was that he explained he had not left the vat that way, and that Mr Versteynen reacted angrily. Mr Versteynen told Mr Wright he had an attitude problem, that his heart was not in the job, and that his employment would terminate on 31 May 2011.

[11] Mr Versteynen denied that he reacted angrily, although he was disappointed. He said he merely told Mr Wright he needed to take more care. At the time, that was the end of the matter.

[12] Mr Wright was to commence one week's annual leave the next day. Mr Versteynen said in evidence that he decided it would be timely to remind Mr Wright of the date of termination of the employment agreement, in order to give Mr Wright an opportunity to look for work for the new season during his time off. Accordingly on 21 March he had a separate and unrelated discussion with Mr Wright some time

after the vat incident, during which he reminded Mr Wright of when the employment agreement would terminate.

[13] I prefer Mr Versteynen's account. There was no history of animosity between the two men, Mr Versteynen had taken a lenient approach to Mr Wight's earlier episodes of tardiness, and as a result I consider it unlikely that Mr Versteynen would react as angrily as Mr Wright said he did on 21 March. Secondly, because it was acknowledged that Mr Wright would start looking for work for a new season early in the year and had done so the year before, there was nothing unusual in Mr Versteynen's explanation of why he raised the termination date with Mr Wright later on 21 March.

[14] During his absence on leave Mr Wright said he looked at his employment agreement and noticed the document contained a fixed term provision. He said in evidence that when he saw it he assumed the provision was there so that Mr Versteynen could get rid of him after a year if he did not like him. He believed Mr Versteynen was seeking to enforce the provision because he had done something wrong.

[15] Not surprisingly given his view of the events of 21 March, Mr Wright became very upset about the prospect of his employment ending, and about why. After a delay that was not explained at the time, by letter dated 6 May 2011 he asked Mr Versteynen to attend mediation: '*to discuss the indicated termination of my employment'*. Nothing in the letter gave any indication of the nature of Mr Wright's concern about the termination, and the 21 March incident was not mentioned. Mr Wright subsequently advised that he had obtained advice and did not believe the fixed term arrangement in the employment agreement was lawful.

[16] The point on which the advice appears to have focussed was the adequacy of the wording in clause 3.2.3 of the employment agreement in the context of the employer's statutory obligations. I will return to that matter, but as a matter of fact I find it likely that Mr Wright knew at the outset he was employed for the 2010-2011 season only and at best he had forgotten by March 2011 that was the case. In circumstances including Mr Versteynen's relationship with the owner of the farm, he came to assume either that his employment would be treated as continuous or that he

would be re-employed for the 2011-2012 season. When he was given information to different effect on 21 March, he thought he was being treated unfairly.

[17] When he received the 6 May letter Mr Versteynen asked Mr Wright what it was about. Mr Wright replied he did not believe the termination of his employment was lawful. Mr Versteynen was shocked. He told Mr Wright he would not attend mediation, he did not believe there was any issue to discuss, and that the employment agreement was for one year and would terminate at the end of the month.

[18] By letter dated 7 May 2011 Mr Wright asked Mr Versteynen to confirm in writing the date on which the agreement would end.

[19] Mr Versteynen responded in a letter dated 7 May 2011, which read:

> *This letter is to confirm that you are employed as a farm assistant on a fixed term contract commencing 1 June 1010 and terminating on 31 May 2011. I note that you agreed to the terms set out in the contract as per your signature dated 23rd February 2010.*
>
> *You have requested a reason why your contract will not be renewed. As a sharemilker I am unsure of my long term plans and going into next season, commencing 1 June 2011, I am not looking at hiring full time employment.*
>
> *I believed myself to be fair to you by giving as much notice as possible telling you that you would not be required for future employment with me on 21 March 2011, of which I do admit was only verbally. At the end of the day this was just reiterating the period of employment stated in your contract.*

[20] As Mr Wright had planned to take the balance of his annual leave entitlement in May Mr Versteynen regarded Mr Wright's last day of work as 12 May, with the remaining three weeks to be paid as annual leave. There was a debate about the annual leave arrangement which is not relevant here other than to say it is one of several disputes which has contributed to the relationship becoming acrimonious.

[21] Mr Wright did not seek to report for work after 31 May 2011 and his employment terminated on that date. No full-time replacement was employed for the 2011-2012 season.

[22] By letter dated 20 June 2011 Mr Wright advised Mr Versteynen he was not satisfied with the 7 May response, and repeated that he considered the employment

agreement was not a lawful fixed term agreement because it did not contain a genuine business reason for the fixed term. He did not accept the reason given in the 7 May letter was a genuine business reason. In effect during that exchange both parties were addressing the genuineness of the reason for seeking to terminate the employment relationship, which is a separate issue.

[23] Mr Wright ended the 20 June letter by saying he did not regard the termination date in the employment agreement as effective, and that he had been dismissed unjustifiably.

Was there a valid fixed term agreement

[24] Section 66 of the Employment Relations Act 2000 provides for fixed term employment agreements. It reads in part:

> 1. *An employee and an employer may agree that the employment of the employee will end –*
> *(a)at the close of a specified 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. *...*
> .
> 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 agreement must state in writing –*
> *(a)the way in which the employment will end; and*
> *(b) the reasons for the employment ending in that way.*
>
> 5. *..*
> 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 the term as ineffective.*

[25] The question of whether there was a genuine reason for entering into a fixed term agreement in terms of s 66 must be assessed as at the time the agreement was entered into. At the commencement of their relationship the parties agreed that Mr Wright's employment would be for the 2010-2011 season. I find that Mr Versteynen had genuine reasons based on reasonable grounds for specifying that would be the case, namely the need for a full time assistant which was created by VFL's extra requirements following the tree-felling. The need would pass when the extra work was completed. I do not accept that Mr Versteynen employed Mr Wright with a view to using the fixed-term nature of the employment agreement to dispense with Mr Wright's services if he was not satisfied with them.

[26] For these reasons I find s 66 (1) and (2) were complied with.

[27] In that the written agreement specified its commencement and termination dates it complied with s 66 (4)(a).

[28] Further to s 66 (4)(b), the attempt in clause 3.2.3 of the agreement to state the reasons for the employment ending in the specified way was not well expressed. Bearing in mind that the author of the provision, Mr Versteynen, is a layperson, that the agreement was known to be for the 2010-2011 season, I find it likely the parties discussed and understood the reason for this in or about February 2010, and that the arrangement was agreed accordingly, I have considered whether the wording of clause 3.2.3 sufficed for the purposes of ss (4)(b).

[29] In *Shortland v Alexander Construction Company Limited*[1] the Employment Court said:

> *The statute requires the reasons to be in writing to ensure absolute clarity and certainty. That cannot be provided by implication.*[2]

[30] In *Shortland* the Court found the relevant clause did not contain the necessary clarity and certainty. The clause referred to the termination of the agreement on the completion of a particular project, without providing any method of identifying the

[1] [2010] NZEmpC 41
[2] At [20]

point of completion and without stating what the court found to be the actual reason – namely that there was no other work in prospect.

[31] The test in *Shortland* does not permit wording such as that in clause 3.2.3 of the agreement. The reference to the 'job' requiring 'this length of time' to complete is too vague to satisfy it.

Was Mr Wright dismissed unjustifiably

[32] Had it not been for the failure to comply with s 66(4)(b), and the effect of s 66(6), I would have found this was a genuine fixed term agreement which terminated at the expiry of its term for genuine reasons which were also the reasons for entering into the agreement. The termination of employment was not imposed as a result of the incident of 21 March.

[33] Section 66(6)(a) means that VFL could not rely on clause 3.2 of the employment agreement to end the employment relationship as it did. The termination of employment was therefore a dismissal. Inevitably, since the dismissal was imposed on the basis of a non-compliant approach to the fixed term provision in the employment agreement, the circumstances did not meet the requirements of a justified dismissal. It was not justified.

Remedies

[34] Mr Wright seeks the reimbursement of remuneration lost as a result of his personal grievance. However since I find that the need for full time assistance had disappeared as Mr Versteynen anticipated, I find also that Mr Wright's position would no longer have been available and his employment would have been terminated justifiably if the correct procedure had been followed.

[35] Mr Wright would have lost the remuneration he did in any event, and for that reason I make no order for the reimbursement of lost remuneration.

[36] There was also a claim for compensation for injury to Mr Wright's feelings. Much of the injury to feelings arose from Mr Wright's view that his employment was

being terminated because of the incident on 21 March, when that was not the case. However there was some additional injury arising from the manner of reliance on the fixed term nature of the agreement, which can be the subject of compensation albeit limited.

[37] For these reasons VFL is ordered to compensate Mr Wright for injury to his feelings in the sum of $3,500.

Claim for wages owed

[38] A claim for unpaid wages should be included in the statement of problem or by notified amendment to the statement of problem. Here a claim for unpaid wages was added in Mr Wright's statement of evidence, which is not appropriate. In addition the method of calculation was not identified, which is unhelpful.

[39] However I address the claim because it was relatively straightforward and there was an opportunity to discuss it at the investigation meeting. Referring to nett figures Mr Wright said he was paid $390 for the week of 16 May 2010 and $468 for the week of 24 May 2010, when he should have received $585 in both weeks. He sought $313.74 accordingly.

[40] Mr Versteynen said the payments were made for extra work done before the commencement date of the agreement, namely before 1 June 2010. The work was paid for at an agreed hourly rate. With a small exception to Mr Wright's benefit the payment correctly reflected the hours worked and the agreed rate.

[41] Mr Wright did not dispute the calculation, so I accept it. There will be no order for payment of unpaid wages.

Summary of orders

[42] VFL is ordered to pay to Mr Wright the sum of $3,500 as compensation for the injury to his feelings caused by his personal grievance.

Costs

[43] Costs are reserved.

[44] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan
Member of the Employment Relations Authority