IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 32
ARC 17/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MARITIME UNION OF NEW ZEALAND INC Plaintiff
AND	PORTS OF AUCKLAND LIMITED Defendant

Hearing: 24 and 25 February 2010
(Heard at Auckland)

Appearances: Simon Mitchell and Tim Gray, Counsel for Plaintiff
Richard McIlraith and Kylie Dunn, Counsel for Defendant

Judgment: 29 March 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

A The plaintiff's challenge succeeds. The determination of the Employment Relations Authority is set aside and is replaced by this judgment.

B The fixed term individual agreements between the defendant and affected stevedores are inconsistent with the relevant collective agreement pursuant to s 61(1)(b) of the Employment Relations Act 2000. Their fixed terms are unlawful.

C The fixed term agreements are not unlawful under s 66 of the Employment Relations Act 2000.

D The implementation by the defendant of the fixed term agreements was in breach of the statutory good faith provisions of the Employment Relations Act 2000.

E Leave is reserved to the plaintiff to apply for compliance orders.

F The parties are to attempt to settle, if necessary by mediation, the employment status of those stevedores already on fixed term agreements.

G The plaintiff is entitled to costs.

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[1] The issues in this challenge to a determination of the Employment Relations Authority concern the lawfulness of an employer's plans to engage some of its former and current casual employees as full timers, but on fixed term individual employment agreements.

[2] The Maritime Union of New Zealand Inc (MUNZ) has a current collective agreement with Ports of Auckland Limited (POAL) covering the work that would be done by the new and intended fixed term employees. The union claims that this arrangement is and will be in breach of ss 61 and 66 of the Employment Relations Act 2000 (the Act) and in breach of the collective agreement. In particular, the union says that the company's reasons for having employees on fixed term agreements are not genuine business reasons as required by the statute. As to the union's allegation of inconsistency with the collective agreement, it says that the agreement provides for employment of stevedores on three bases (casual, "Axis Ancillary", or "permanent") but excludes the employment of stevedores on a fixed term basis. The union says that the collective agreement is inconsistent with fixed term employment because what is described as its "click over clause", whereby Axis Ancillary employees may become permanent employees, would become inoperable for affected employees. Finally, the union says that the collective agreement's universal provisions for redundancy for employees who are superfluous to the company's requirements would not be available to fixed term employees. In these circumstances the union says that engagement of employees on a fixed term basis would be inconsistent with the provisions of the collective agreement and therefore in breach of s 61 of the Act.

[3] The final cause of action alleges breach by the employer of the Act's good faith dealing requirements in relation to the introduction of fixed term employees and, in particular, the company's failure or refusal to consult about changes to the

employment of union members that will affect the operation of the collective agreement.

[4] The remedies sought by the union include compliance orders restraining POAL from engaging stevedores on fixed term employment agreements.

[5] There is an unresolved dispute between the parties that is associated with the issues in this proceeding but which it is not about. The union claims that the company is not entitled to have what are known as AA/P24 employees driving cranes or straddle carriers. The company says that although it has not provided that work to those employees historically, it is not precluded from doing so if it wishes and if the affected employees are trained appropriately. As I noted at the hearing, if this dispute may be an impediment to progress, it is incumbent on the parties to invoke the dispute resolution mechanism if they cannot resolve it informally as seems to be the case.

The Employment Relations Authority's determination

[6] This was issued on 15 February 2010[1] after an investigation undertaken by the Authority a few days previously. The matter was brought to the Authority by the union after the company's announcement of its intentions on about 14 January 2010. The Authority concluded that POAL's actions were not and will not be unlawful. The case has moved rapidly because POAL is intent upon engaging more fixed term full time stevedores.

Standing

[7] The defendant challenges the plaintiff's standing or entitlement in law to bring those parts of the case challenging the validity of fixed term agreements under s 66 and the consistency of those individual agreements with the collective pursuant to s 61.

[1] AA 68/10.

[8] Standing is a question in each case of the degree of involvement in, or proximity to, the matter in issue of a person seeking to affect by litigation an outcome in which that person has arguably no direct interest. The causes of action in which the union's standing is challenged in this case are not referable to an express statutory provision allowing directly the union to bring the claim. That does not, however, determine standing.

[9] The short answer to Mr McIlraith's submission of an absence of standing is that provided by Mr Mitchell and is to be found in s 137 of the Act which addresses compliance orders of the sort that the plaintiff claims as remedies in all causes of action. Although s 137 addresses the powers of the Employment Relations Authority, those are exercisable by this Court on a challenge (appeal) following the judgment of this Court in *Norske Skog Tasman Limited v Manufacturing & Construction Workers Union Inc.*[2]

[10] Section 137(1) applies "where any person has not observed or complied with …" Part 6 of the Act (in which ss 61 and 66 both fall). Section 137(4) addresses expressly the standing of persons entitled to apply for compliance orders as follows with bold type added to highlight the circumstances of this case:

> (4) The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):
>
> (a) **any person (being** an employee, employer, **union**, or employer organisation) **who alleges that that person has been affected by non-observance or non-compliance** of the kind described in subsection (1):
>
> (b) a health and safety inspector appointed under section 29 of the Health and Safety in Employment Act 1992 who alleges that there has been non-observance or non-compliance of the kind described in subsection (1)(a)(xi).

[11] A compliance order may also be sought on the grounds of non-observance or non-compliance with any employment agreement pursuant to s 137(1)(a)(i). "**[E]mployment agreement**" is broadly defined in s 5 of the Act including "a collective agreement together with any additional terms and conditions of employment;".

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[2] [2009] 7 NZELR 70.

[12] Here, the union alleges that it has been affected by the company's non-observance or non-compliance with both the statute and the union's collective agreement.

[13] I am satisfied that the union's claim in respect of breaches of ss 61 or 66 is neither frivolous nor vexatious. The union is not a mere busybody interfering where it has no real interest. It has claimed to be adversely affected and I consider that its claims have sufficient substance to give it standing.

[14] Case law under previous statutory compliance order regimes illustrates[3] .that Parliament has set a low threshold of standing in compliance proceedings by requiring only an allegation of non-observance or non-compliance. Nevertheless, the Authority or the Court is entitled to expect that this will be more than a purely subjective assertion as I am satisfied it is in this case.

[15] It follows that the plaintiff has standing or entitlement in law to bring a proceeding including these causes of action.

Relevant facts

[16] POAL operates what is now effectively a single container port known as its Axis operation. The company employs stevedores to load onto and unload containers from container ships that call at the port. These stevedores operate container cranes, drive straddle carriers and vehicles known as 'shuttles', 'lash' (secure and unlock containers on vessels), and perform a myriad of associated cargo-related tasks necessary to a timely and efficient turnaround of container ships.

[17] In recent months, the need for stevedore labour at POAL's Auckland container port has been greater than was forecast. As well, larger container ships are now calling at the port less frequently than smaller vessels used to. POAL considers that its previous combination of "permanent" and "casual" stevedores does not allow it to meet the labour demands of these new patterns and to deal with the resultant

[3] *Mills v Primary Producers Co-op Society Ltd* [1989] 2 NZILR 460; *Prendergast v Associated Stevedores Ltd* [1992] 1 ERNZ 737; *Northern Local Government Officers' Union Inc v Auckland City* [1992] 1 ERNZ 1109; *Northern Distribution Union Inc v 3 Guys Ltd* [1992] 3 ERNZ 903.

problems. POAL proposes to offer full time employment to a number of its current casual staff but for a fixed term until 30 June 2010 by which time it anticipates having what it describes as new business model arrangements in place.

[18] A substantial number of the company's stevedoring workforce are members of MUNZ. As already noted, their employment is regulated by the very detailed collective agreement known as the Ports of Auckland Limited and the Maritime Union of New Zealand – Local 13 (the union branch) Collective Agreement. That agreement is current for two years from 1 July 2009 to 30 September 2011. It was settled after prolonged and sometimes difficult collective bargaining. An issue in the bargaining was what is known to the parties as 'consolidation', effectively the amalgamation into one operation of the previously two separate container wharf operations known as Bledisloe and Fergusson. However, no issue of fixed term employment of stevedores was the subject of that collective bargaining.

[19] The collective agreement includes and covers a number of classes of employee. Its Schedule 1 covers "permanent" stevedores, including supervisory leading hands. The second general category of employees covered by the collective agreement in its Schedule 3 are known as "Axis Ancillary", employees who undertake the full range of duties for which they have the necessary skills and training and who are guaranteed at least three eight hour shifts per week. Such employees are also known colloquially as 'AAs' or 'P24s'.

[20] The terms and conditions of employment of the AA/P24 staff include a clause known as "click over" used to identify the need for further permanent full time stevedoring positions when AA/P24 employees work more than a specified number of shifts over a 12 month period. AA/P24 employees may expect thereby to move eventually to "permanent" full time work as stevedores for POAL.

[21] The "click over" provisions of the collective agreement provide that if shifts in excess of a specified level are worked by AA/P24 employees, a number of them will be converted to full time "permanent" employees. The purpose of this provision is to ensure that where the company has sufficient work for more full time permanent employees, it does not continue to have that performed by part time employees.

[22] The final category of employees whose employment is covered in Schedule 8 to the collective agreement, are casuals for whom each period of engagement in work is a separate employment albeit for a minimum period of eight hours in one day, the offer and acceptance of which each party is free to make and reject. Clause 4 of the Stevedoring Schedule limits the ratio of casual employees to a maximum of 25 per cent of the total cargo operations workforce in the event of absenteeism.

[23] Although not so expressed or enforceable in law, it is generally accepted that there is a career path in stevedoring employment beginning with casual employees, moving to AA/P24 engagement, and culminating in permanent status with increasing security of employment and benefits in that progression.

[24] Clause 3.3.9 of the collective agreement limits the percentage of AA/P24 employees in the total workforce to 27.5. The proportion is currently well below that maximum, at 16.95 per cent. In January 2010, as a result of the click over process, eight AA/P24 employees became "permanent" stevedores but were not replaced by others becoming Axis Ancillary employees.

[25] An additional means of meeting peak demand for labour is what is known as either "cross-hiring" or contracting in labour. This can consist of the use of employees from other container ports around the country and/or the use of employees of other local stevedoring companies. In these exercises POAL is not the employer of the additional labour. Rather, it contracts with the employer of the additional labour although the wage rates payable to employees cross-hired or contracted in will be no less than the relevant pay rates for the same work done by POAL stevedores.

[26] Auckland is a predominantly import orientated container port. That is, the amount of incoming container traffic exceeds significantly the number of containers of export cargo. These differences in turn generate seasonal variations in the requirements for labour. Imports peak in the months leading up to the end of the calendar year so that more labour will be needed to unload vessels during these months.

[27] Recently, there have also been some ad hoc engagements of former POAL stevedore employees on short term fixed employment agreements to cover periods of peak labour requirement including some who were made redundant only a few months beforehand in 2009.

[28] There is a metaphorical elephant in the room and which I assess to be the plaintiff's real concern. It is the possibility, signalled in January 2010 by POAL, that its current review of container operations may lead to a contracting out of a significant part of its labour force including stevedores engaged in lashing who form a substantial proportion of that workforce. POAL has invited expressions of interest from enterprises that may wish to tender for such contracts if they are to be let. The union fears that this will both occur and, when it does, will lead to the redundancies of a substantial number of its members employed on the Auckland waterfront who, even if they can obtain alternative employment with a contractor, will lose significant terms and conditions of their employment. The union perceives the engagement by the company of fixed term employees as being a precursor to contracting out. It says this is to both limit its workforce if there have to be redundancies and to create a pool of skilled and experienced stevedores who will be attractive to labour contractors after their employment ends on the Auckland waterfront at the end of June 2010.

[29] On 14 January 2010 POAL called its permanent stevedoring workforce to a meeting at which, by use of a PowerPoint slide presentation, it advised of its intention to conduct what it described as "INFORMATION-GATHERING ABOUT CONTRACTED SERVICES". Included amongst the strategies disclosed to employees were that it would appoint eight AA/P24s as full time employees and would employ a number of additional AA/P24s on a fixed term basis until June 2010. POAL also advised that it would review the operation of the so-called "click over" clause in the collective agreement in June/July 2010. Other advice given included investigation of "Contracting out all Lashing [and] … Shuttle services" and a "Supplementary contracted workforce for Straddle and Crane driving". POAL's advice was that current casual employees would be able to seek employment with contractors either on more stable employment conditions or at least as casuals that POAL said it would endeavour to ensure would be employed by contractors. Its

advice was also that "Full and Part-time Stevedores would no longer have access to lashing work". The company acknowledged that although it did not envisage redundancies amongst its full time and part time stevedore workforce, less overtime might be available to these employees (including an exclusion of current availability of lashing work) so that their incomes might be affected adversely.

[30] There was a further meeting of the company's casual stevedores off site on the following day, 15 January, to provide the same advice.

[31] Since that time, and by the date of hearing in this Court, POAL had engaged six of its previously casual employees as fixed term full timers and was undertaking relevant training of them. Its aim was to offer similar agreements to a number of other casual stevedores in groups of about that size which are ideal for training together. Although POAL had agreed with the union to not progress those plans until the Employment Relations Authority had issued its determination, no such stay of action was agreed to by the company in relation to proceedings in this Court. It is likely, therefore, that further employees will have been engaged on fixed term agreements as were the six original stevedores.

Decision – Unlawful inconsistency with collective agreement?

[32] I deal first with the question whether the statutory provisions affecting the coincidence of collective agreements and individual employment agreements, prohibits the engagement of fixed term employees as the union claims.

[33] The six employees on fixed term agreements were previously employees of POAL and union members. They were then casual employees whose terms and conditions of employment as such were set primarily by the collective agreement. They have not ceased to be POAL employees and they are not new employees beginning work with the company. Rather, the nature of their employment has changed and, for others, is intended by the employer to be changed. At all relevant times POAL and those employees have been bound by the current collective agreement.

[34] Section 61 of the Act provides materially as follows:

> **61 Employee bound by applicable collective agreement may agree to additional terms and conditions of employment**
>
> (1) The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are—
>
> (a) mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and
>
> (b) not inconsistent with the terms and conditions in the collective agreement.

[35] Section 61(1) provides that the terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are both mutually agreed and, importantly for this case, are "not inconsistent with the terms and conditions in the collective agreement." As the Authority found, the collective agreement neither addresses expressly fixed term employment of employees, nor prohibits expressly such arrangements. It is a question of determining objectively whether they are inconsistent with the collective agreement.

[36] Mr Mitchell's approach to the issue of inconsistency was to ask the Court to determine whether the fixed term employees would receive fewer benefits under the collective agreement than employees of indefinite duration. I agree that the comparison to be undertaken for the purpose of assessing inconsistency is between the terms and conditions of AA/P24 employees of indefinite duration (as provided for in the collective agreement) and the new category of AA/P24 employees on the fixed term individual agreements under the collective. These employees have been "promoted" or their employment varied so that they are, for all intents and purposes, AA/P24 stevedores although with fixed terms. Absent the circumstances that brought about their new status, they would ordinarily have expected to have moved to the AA/PR24 status under the collective agreement when further stevedoring labour was required. Some casual stevedores did so earlier in the year.

[37] On this issue of inconsistency counsel referred to the judgment of this Court in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Energex.*[4] The question in that case was whether an employer's requirement of employees to sign a bonding agreement before undergoing training was inconsistent with the applicable collective agreement. Although the collective agreement expressly committed the employer to provide training and required employees to undertake any training that was reasonably within their ability, it also contained what is commonly known as an 'entire agreement' clause between the parties although variations could be made. The collective agreement also included express provisions dealing with matters that remained outstanding from the collective negotiations and one dealing with how to address "new matters".

[38] The Employment Court in *Energex* followed the judgment of the Court of Appeal in *NZ Meat Processors IUOW v Alliance Freezing Co (Southland) Ltd*.[5] The Court in *Energex* identified the principles in the *Alliance Freezing Co* case which it held may be summarised as follows:[6]

> - The question of inconsistencies between the collective employment agreement and additional terms must be resolved objectively.
>
> - The relevant provisions are to be compared to determine whether they can live together as terms of the employment agreement.
>
> - The definition of inconsistent is that in the Oxford English Dictionary.
>
>> "Not agreeing in substance, spirit, or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous." (footnote omitted)
>
> - If the additional term is more favourable to the employee than the CEA(sic), there is usually no inconsistency.
>
> - Where there is a true inconsistency and where the two provisions cannot stand together, the CEA (sic) must prevail whether the result is perceived as favourable or unfavourable to the employee.

[39] The union's challenge turns on the fixed term agreement's compliance with s 61(1)(b). The union says that the fixed term nature of the individual agreements is

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[4] [2006] ERNZ 749.
[5] (1990) ERNZ Sel Cas 834.
[6] At 755-756.

inconsistent with the terms and conditions in the collective agreement and, in this sense, undermines or has the potential to undermine the collective agreement if those fixed term agreements continue and there are to be more such individual agreements.

[40] The first inconsistency between the provisions of the collective agreement and the fixed term agreements is as follows. It is said by the union that while the collective agreement provides that only particular classes of employee are able to perform particular duties and, in particular, only "permanent" employees are entitled to drive straddle carriers, the fixed term employees will do so. The union predicts that this will deprive permanent employees of a significant source of their work and ongoing security.

[41] This contention depends, however, on the separately disputed and unestablished validity of the union's assumption that only "permanent" employees are entitled to straddle driving work. As already noted, this is a dispute still to be had or at least determined and it was not an issue in this proceeding. It follows that the union has not established such an inconsistency.

[42] Next, the plaintiff says that fixed term employment is an integral feature of contracting out which will, in turn, reduce the amount of overtime work available to remaining employees and, in particular, by removing lashing work.

[43] Although that may or may not be so depending on the nature and extent of such contracting out if the company decides to outsource work, that is not a decision that has yet been made. It is, in any event, not the subject of this proceeding which is about fixed term employment. This argument cannot avail the plaintiff in a dispute about the lawfulness of fixed term employment agreements. I do not think that it establishes an inconsistency in terms of s 61(1)(b) as interpreted by the courts.

[44] The union says there are two further inconsistencies. First, it says that employees on fixed terms will be precluded from accessing the benefits of the click over provisions and thereby from becoming permanent employees. Second, the union says that employees covered by the collective who are surplus to the

employer's requirements must be paid redundancy compensation whereas fixed term employees, although coming under the collective agreement, would not.

[45] The plaintiff's case is also that the collective agreement provides for termination of employment by a variety of means including dismissal for cause following warnings or summarily for serious misconduct. There is no reference to the expiration of a fixed term of employment bringing that to an end. There is also express provision for termination of employment by reason of redundancy including for employees covered by the Axis Ancillary Schedule. Clause 5.1.1(ii) provides that "… where possible … staff reductions are achieved by voluntary severance." In addition to entitlement to redundancy compensation, in the event of a contracting out of an employee's work, Mr Mitchell submitted that the collective agreement evidences an expectation that relevant employees will transfer to a company contracted to undertake the work previously done by the employees.

[46] So, counsel submitted, by being employed under the provisions of the collective agreement, an employee has a level of security that arises from joining a large workforce of a financially secure employer with significant ongoing, if not increasing, demand for labour. Fixed term agreements for performing the same work are said to be inconsistent with this.

[47] Mr Mitchell emphasised that the collective agreement anticipates that AA/P24 employees will become "permanents" by operation of the "click over" clause. Counsel submitted that fixed term engagement cuts across all these benefits that might be expected in the usual course by an employee engaged on the provisions of the collective agreement in general, and the Axis Ancillary Schedule in particular. Mr Mitchell submitted that in effect POAL intends to have no ongoing obligations to those employees after the end of June 2010 but at the same time seeks to obtain the benefits of the Axis Ancillary Schedule in its employment of them.

[48] I have concluded that the fixed term nature of the individual employment agreements that are nevertheless subject to the applicable collective agreement, are inconsistent with it and therefore unlawful. That is for the following reasons. The fixed term and its implications deprive those employees of a number of benefits

under the collective agreement to which they would otherwise be entitled. Their individual terms and conditions both conflict with relevant provisions in the collective agreement and are less favourable than those that, but for the fixed term, they would enjoy under the collective agreement. There is, to use the words of the Court of Appeal in the *Alliance Freezing Co* case, a true inconsistency in the sense that the relevant provisions cannot stand together. The collective agreement must prevail and this negates integrally the fixed term nature of the agreements.

[49] The plaintiff is right that the fixed terms preclude the AA/P24 stevedores from obtaining the benefits of the click over provision in the collective agreement. Because their employment is scheduled to end on a specific date, it is inconsistent with that status that they might be promoted and their employment otherwise enhanced by the operation of the click over provision. The fixed term nature of their employment precludes their ability to participate in the "promotion" process effected by click over that might otherwise see them become full time employees of indefinite duration. That is a significantly advantageous position for full time permanent stevedores employed by POAL. They have reached the top of the tree, having progressed, for the most part, from casuals through roles as AA/P24 stevedores. Significant benefits of employment attach to "permanent" full time stevedores but the fixed term agreements preclude access to these and so are inconsistent with the collective agreement.

[50] I accept, also, the plaintiff's case of inconsistency as it affects what would otherwise be an entitlement to the benefits of the redundancy provisions in the agreement. It is implicit in the fixed term employments that the end of employment from the expiration of these terms will not allow the employees to benefit from these redundancy provisions. These include, in particular, the preference for voluntary redundancies before compulsory dismissals and, in the event of the latter, payments of redundancy compensation based on service. It is inconsistent with the collective agreement's provisions for redundancy generally that individual terms and conditions of employment preclude application of these parts of the collective agreement.

[51] In these circumstances, the fixed terms of the individual agreements do not comply with s 61(1)(b) of the Act in that they are inconsistent with the collective agreement and are therefore unlawful.

[52] The Court is usually reluctant to make a compliance order where it can reasonably expect a party to comply voluntarily with the Court's interpretation of a genuinely controversial provision. In these circumstances I do not intend to make a compliance order against the defendant although the Court does expect that the defendant will not now enter into further similar unlawful fixed term agreements.

[53] I nevertheless reserve leave to the plaintiff to apply, if necessary on short notice, for a compliance order if one is needed. As regards those employees who are already parties to such fixed term arrangements, there should now be an opportunity for negotiation between POAL, the union, and those employees themselves, about what is to happen to them. If necessary, the assistance of a mediator can be encouraged or directed by the Court. One possible outcome may be for these fixed term employees to become AA/P24 stevedores but as employees of indefinite duration under the collective agreement. There may, however, be other solutions that better suit the parties and they should have the opportunity, in the first instance, to identify and settle upon these. Leave is reserved for any party or for any of the individual employees affected to apply for further directions if that is necessary.

Breach of s 66?

[54] Although, in light of my conclusion of unlawfulness under s 61, this second cause of action may be academic, I propose nevertheless to determine it for the benefit of the parties.

[55] Section 66 of the Act provides materially (with critical passages in bold type) as follows:

> **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.

[56] The significance of fixed term agreements is that the expiry of the term and the ending thereby of the employment will not amount to an unjustified dismissal of the employee. The section acknowledges a role in employment law for fixed term employment but places some constraints upon that. In particular it dictates that unless an employer satisfies those tests, the employer's assumed immunity from suit for unjustified dismissal when the term concludes, will be lost.

[57] Here, the challenge to the validity of the six fixed term agreements already entered into between the company and individual employees who are members of the union, goes to whether subs (2)(a) is satisfied by the employer. It must establish that

it had genuine reasons based on reasonable grounds for specifying that the employment of the six employees to 30 June 2010 is to end on that date.

[58] Subsection (3) expands upon what are not genuine reasons based on reasonable grounds specifying that the employment of the employee is to end on that date. Subsection (3)(a) excludes from genuine reasons, based on reasonable grounds, an employer's motive "to exclude or limit the rights of the employee under this Act."

[59] As decided cases confirm, the expiry of the term under a fixed term employment agreement does not amount to an unjustified dismissal of the employee. The expiry of the agreed term is the justification for the dismissal. It follows, therefore, that what is otherwise the entitlement to challenge a dismissal as unjustified under the statutory personal grievance procedure is not open to a disgruntled employee in these circumstances. So, disqualification from access to the personal grievance procedure is not, under subs (3)(a) an exclusion or limitation of an employee's rights. That does not, however, prevent, an employee challenging by personal grievance an alleged unjustified disadvantage in the course of fixed term employment or, by unjustified dismissal claim, a dismissal other than by the expiry of the fixed term as contemplated by the parties.

[60] There is no doubt that the first requirement for fixed term employment under s 66(1) is satisfied, that is that there is agreement that the employment will end at the close of a specified date or period. At issue is the requirement under subs (2)(a) that the employer has genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way. What are "genuine reasons based on reasonable grounds" is illuminated by s 66(3) which sets out a number of reasons which the Act specifies to be not genuine reasons. These include excluding or limiting the rights of the employee (subject to such a fixed term arrangement) under the Act, to establish the suitability of the employee for permanent employment or excluding or limiting the rights of "an employee" under the Holidays Act 2003. None of those has been established by the union as being the company's reasons for wishing to engage employees on fixed terms.

[61] I am satisfied, from the evidence adduced by the defendant, that the fixed term agreements of the six employees now engaged on them are founded on genuine reasons based on reasonable grounds under subs (2)(a). That is for the following reasons.

[62] As a result of dynamic economic events and international container vessel scheduling, POAL is undergoing a period of some uncertainty and potential change. These phenomena affect directly and significantly its needs for labour to service the trade of containers through the port. In addition to uncertainty about overall volumes dictated by global trade patterns, recent changes determined by shipping companies have also altered the nature of the port's labour requirements. The trend internationally is for larger container vessels to carry greater numbers of containers so that whilst port calls of such vessels are likely to be less frequent, the intensity of loading and unloading containers and associated activities when such vessels are in port will be greater. In addition to scheduled container vessel calls (which can themselves be disrupted by such causes as adverse weather and delays in other ports), shipping companies are now beginning to provide ad hoc voyages between scheduled services but which are on short notice and require greater flexibility of labour provision.

[63] In these circumstances just outlined, POAL has undertaken a major review of its container port operations including the important element of its human resources. This review is intended to be completed, and any new arrangements made as a result of it, by 30 June 2010. So while the port's recovery from the economic downturn in 2009 has been generally better and quicker than anticipated so that more labour than earlier predicted is required during the first six months of 2010, that may not necessarily continue even if international trade continues to return to pre-recession levels.

[64] I accept that in these circumstances, the existence of which was not seriously challenged by the plaintiff, it was and is reasonable for POAL to engage lawfully some stevedore labour on fixed term agreements and that its reasons for doing so are genuine. It does not fail this test because POAL might have addressed the issues

differently as the union has suggested. That is the employer's option so long as it is genuine under s 66 as I am satisfied it is.

[65] Mr Mitchell for the union relied on the reasoning of this Court in an earlier case to support his contention that fixed term employment is not a reasonable strategy where there is ongoing and long-term need for such employees. The case is *Canterbury Westland Free Kindergarten Association (t/a Kidsfirst Kindergartens v New Zealand Educational Institute* (*"NZEI"*).[7] There are, however, a number of important distinguishing features between the cases. In *NZEI*, the relevant collective agreement required all appointments to be "permanent", a feature of the collective agreement in this case that is not only absent but indeed antithetical in the sense that in this case a range of employments other than full time/"permanent" is provided for expressly.

[66] In the *NZEI* case the Court was careful to caution against misuse of s 66 as follows:

> [53] The problem with fixed-term agreements is that inappropriate reasons … can, by the exercise of ingenuity, be dressed up without undue difficulty as other reasons.
>
> [54] … It is clear that s 66 was intended to amend the law as it stood before October 2000. The effect of s 66 is to prefer the direction taken by the Labour Court under the Labour Relations Act 1987 to that adopted by the Court of Appeal under the "contract is king" philosophy of the Employment Contracts Act 19911. I have spoken of direction because in point of detail there are differences between the section and the Labour Court's formulation but none of them is material to this case. The broad thrust of s 66 is that fixed-term employments that are not exploitative of employees are perfectly legitimate but there is a limit to the extent that recourse may be had to that form of employment.
>
> [55] Normally, someone who succeeds in securing a position expects to enjoy security of tenure to this extent: such a person can expect to remain in her or his employment pending good behaviour and continued satisfactory performance of duties for as long as the position continues. Once appointed, the incumbent does not have to fear displacement through the rise of an even more capable aspirant for her position. … Employees can be dismissed lawfully only if a just reason exists warranting that course. Employment under a fixed-term is an exception to this state of affairs. Unions are usually concerned that such employment can undermine the social system.

[7] [2004] 1 ERNZ 547.

> That concern is a valid one and is supported by ILO conventions. In the UK legislation exists declaring that the end of a fixed-term employment is deemed to be a dismissal. What s 66 contemplates is that fixed-term employment should be confined to special discrete projects of limited duration as opposed to situations of ongoing employment.

[67] In this case the evidence tends to confirm that there will be ongoing work for stevedores on the Auckland waterfront including for those now or about to be on fixed term agreements. However, the difference between this and the *NZEI* case is that in the latter there was no suggestion of another or others being the employer or other provider of the labour for that ongoing work. Here, however, if stevedoring work is to be contracted out, POAL will not be the employer of the employees to perform the ongoing work but, rather, in a contractual relationship with another employer to do so.

[68] The Court in *NZEI* concluded that s 66 contemplates that fixed term employment will be confined to special discrete projects of limited duration but not to situations of ongoing employment. Unlike in *NZEI*, in this case it cannot be said that there will be ongoing employment with POAL for the stevedores affected after 30 June 2010. Although it is possible that there will be, it is also possible at this stage that POAL will so restructure its container operations that contractors will provide the labour for this work. That latter possibility is the antithesis of ongoing employment with POAL for those stevedores. Although not the same as a discrete project of limited duration, then it is at least similar to it in the sense of meeting a temporary need until further decisions can be taken and implemented.

[69] Nor is this a case, as *NZEI* was, of an employer resorting to fixed term employment to deal with training or continuing education issues. There is no suggestion in this case that there is such a motive on the part of POAL.

[70] I do not accept the argument advanced by Mr Mitchell that "the right to be employed under an enforceable agreement is clearly one of the rights available to employees under the Act." In all but termination by reason of effluxion of the term of the agreement, its provisions accord the fixed term employees all the rights and protections of employees under the Act and under the collective agreement. Section

66 creates a statutory exception and contemplates that employments formed within its definition will be so exempt. I am satisfied that this is one of these. Except for the reasons governing my earlier s 61 conclusion, it is not, as the plaintiff submits, a form of engagement designed to limit the rights of the employees under the legislation.

[71] It follows that the plaintiff's challenge to the validity of the agreements under s 66, both current and prospective as is intended by the port company, must fail.

Breach of good faith requirements?

[72] This cause of action relates to the plaintiff's claim that the engagement by POAL of fixed term employees is in breach of its statutory good faith obligations to the union. The plaintiff says that during collective bargaining over a long period culminating in the settlement of the collective agreement in mid 2009, the defendant sought, and the plaintiff accepted, changes to terms and conditions of employment of employees. These were to increase the flexibility of labour to address the unpredictability of, and peaks in, container vessel servicing requirements. The plaintiff says that despite those phenomena having been addressed in bargaining and concessions made by the defendant, no reference was made by POAL to fixed term agreements which it now seeks to obtain in a way that it could not have during bargaining. This, the plaintiff says, has the effect of undermining the benefit of the collective agreement to the union and its membership. Finally in this regard, the union says that the employer breached the good faith obligations by not consulting with it and its members before engaging the fixed term employees.

[73] The relevant provisions of the Act dealing with good faith begin with s 3 setting out its objective. This includes:

> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
>
> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
>
> (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and

(iii) by promoting collective bargaining; and
(iv) by protecting the integrity of individual choice; and
(v) by promoting mediation as the primary problem-solving mechanism; and
(vi) by reducing the need for judicial intervention; and

(b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

[74] Next, the plaintiff relies on s 4 which provides materially:

> **4 Parties to employment relationship to deal with each other in good faith**
>
> (1) The parties to an employment relationship specified in subsection (2)—
>
> (a) must deal with each other in good faith; and
>
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
>
> (i) to mislead or deceive each other; or
>
> (ii) that is likely to mislead or deceive each other.
>
> (1A) The duty of good faith in subsection (1)—
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
>
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
>
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
>
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
>
> (ii) an opportunity to comment on the information to their employer before the decision is made.

[75] Section 4(4) sets out the matters to which good faith applies including, at (b): "any matter arising under or in relation to a collective agreement while the agreement is in force:"

[76] The plaintiff relies particularly on s 4(4)(d) extending that obligation to "a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:"

[77] It is notable, as Mr Mitchell submitted, that s 4(5) provides expressly that the instances set out in subs (4) are only examples and do not limit the application of s 4.

[78] Turning to the cases on good faith, Mr Mitchell relied first on the judgment in *Carter Holt Harvey Ltd v National Distribution Union*[8] where, at paragraph [55], the Court of Appeal stated:

> … Good faith connotes honesty, openness and absence of ulterior purpose or motivation. In any particular circumstances the assessment whether a person has acted towards another in good faith will involve consideration of the knowledge with which the conduct is undertaken as disclosed in any direct evidence, and the circumstantial evidence of what occurred. …

[79] That was followed by a further judgment of the Court of Appeal in the following year, *Auckland City Council v NZPSA Inc.*[9] Unlike the *Carter Holt* case, which concerned union rights of entry onto a workplace, *Auckland City Council* concerned obligations of good faith (as then defined in the legislation) in circumstances of a proposed restructuring of the employer's organisation affecting employees. At paragraphs [23] and following, the Court of Appeal held:

> [23] … While in an abstract sense it may be said, as the Court said, that the PSA was entitled to the same good faith behaviour as the Council exhibited towards individual employees, in a practical sense the conduct required in discharge of that obligation will not necessarily be the same, …
>
> [24] There can be no dispute that the parties to an employment relationship must deal with each other openly and fairly. They must communicate and, where appropriate, consult in the sense of imparting and receiving information and argument with an open mind when that still realistically can influence outcomes. To adopt an approach calling for mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplaces must be kept in mind. Similarly the issue in question may affect the nature and timing of the provision of information and consultation. Redundancy of particular positions presents different issues than does the formulation of business plans.
>
> [25] … It is not possible to lay down rules or protocols defining what may or may not constitute dealing in good faith. The statute is seeking to promote good employment relationships. It seeks to have the parties embrace that objective and to deal openly and fairly to that end. That will not exclude vigorous bargaining and even

[8] [2002] 1 ERNZ 239.
[9] [2003] 2 ERNZ 386.

> industrial action. But even those cauldrons must be tempered by behaviour that avoids the corrosiveness of bad faith. It is necessary only to contemplate those situations to realise that any general requirement of "energetic and positive displaying of good faith behaviour" goes too far.

[80] Those latter words, considered a bridge too far by the Court of Appeal, had been used by the Employment Court at first instance in the *Auckland City* case to describe the employer's obligations of good faith in that instance. It is not insignificant both that Parliament subsequently enacted more particular good faith obligations and, in doing so, used language remarkably similar to that which had been rejected by the Court of Appeal in the *Auckland City* case.

[81] Section 4(1A) set out above was inserted, as from 1 December 2004, by s 5(1) of the Employment Relations Amendment Act (No 2) passed by Parliament earlier in that year. The statements of the Court of Appeal, especially in the *Auckland City* case, dealing as it does with consultation about a restructuring, must now be read in the light of the new provision passed by Parliament in response to the effect of the Court of Appeal's judgment.

[82] The plaintiff's case is that the employer should not be entitled in good faith to achieve directly with individual employees covered by the collective agreement what it had omitted or failed to achieve in bargaining with the union for that collective agreement. Further, the union contends that POAL should not be permitted in good faith to take a significant step towards contracting out by placing employees on fixed term agreements without consultation about these.

[83] Some of the plaintiff's witnesses claim that if fixed term agreements had been the subject of the settlement in collective bargaining, a collective agreement incorporating these would not have been ratified by union members. However, I think that can only be speculation. Bargaining is always a matter of compromise. It might equally be said that if POAL had persuaded the union's negotiators to allow for fixed term agreements as are now appearing, a settlement could still have been achieved by the employer compromising on another issue or issues in the bargaining to reflet the importance to the employer of the ability to have fixed term agreements. In such circumstances I do not think it can be said that there would have been no

ratification and therefore no collective agreement. Rather, it seems more likely that fixed term agreements would have had another cost to the employer in bargaining but that if agreement had been reached about this, ratification might nevertheless have taken place.

[84] It is not insignificant that the advice to the union and employees of both proposals to engage employees on fixed term agreements and to seek expressions of interest for contracting out stevedoring functions including lashing, were provided by POAL at the same time and their interdependence was identified by the employer.

[85] Mr Mitchell emphasised, also, the incongruity of the defendant's preparedness to consult with the union and its members about its business reorganisation including the possibility of contracting out work, on the one hand, with its apparent failure or refusal to consult about fixed term agreements. It is correct that POAL did not consult with the union about the fixed term appointments. It simply announced its decision to do so and made the appointments almost immediately with backdated effect. It was, as Mr Mitchell submitted, a matter that arose in relation to the collective agreement and so an issue on which good faith conduct was required under s 4(4)(b). The evidence also establishes that the employer may have expected the union to have opposed fixed term employment for its members as it has.

[86] POAL was not active and constructive in establishing and maintaining a productive employment relationship with the union by failing or refusing to consult with it and, by so doing, precluded the union from being responsive and communicative as the statute also requires. The employer was not entitled in law to avoid the inconvenience of union opposition in the consultation exercise, by failing or refusing to consult and simply announcing a fait accompli.

[87] This is a workplace in which there is a long history of consultation and, for the most part, good co-operation about outsourcing when needed because of the vagaries of the business. There is a long tradition of discussion about these issues with the union. Even after sometimes vigorous debate, agreement is reached, often

with co-operation on the part of the union in ensuring the provision of sufficient qualified labour to turn vessels around even in difficult circumstances.

[88] It is also significant that, as eventuated, the employees to whom fixed term employment was offered were likely to be and were union members. As Mr Mitchell submitted, the union is well resourced, is able to respond promptly to requests for consultation, and has done so in the past. It would be unrealistic to say that the issue of engagement of fixed term labour is other than as part of a broader discussion and consultation between the parties for their mutual benefit and the successful operation of the business. In that sense I accept that the engagement of fixed term employees does impact on the operation of the collective agreement.

[89] In these circumstances, although it is not now realistic or possible to consult about the cases of employees who have already been appointed to fixed term positions and have commenced these, the company must henceforth honour its obligations under s 4 and consult with the union about any further such engagements of employees before doing so. In view of my finding of unlawfulness of the fixed terms under s 61, there must now be consultation with the union about how the affected employees are to be treated.

[90] I am sufficiently confident of the defendant's preparedness to meet that obligation that I will not make a compliance order in the first instance. Nevertheless I will reserve leave to the plaintiff to apply to the Court, if necessary on short notice, if it considers that a compliance order is required. The defendant's industrial relations manager has undertaken to the Court to review, in conjunction with the union, how union officials may be involved in such consultations and the meetings that the company holds with employees. The company's preparedness to do so after becoming aware in the hearing as to how its exclusion of union officials from meetings might be viewed, gives me optimism about how POAL will treat its consultation obligations now that these have been identified in this case.

Costs

[91] The plaintiff has been successful overall, albeit on two out of three causes of action, and is entitled to an order for contribution by the defendant to its costs. I would prefer the parties to attempt to resolve this issue by themselves in the first instance. If that is not possible, the plaintiff may apply by memorandum filed and served within two calendar months from the date of this judgment with the defendant having a further period of one month within which to respond by memorandum.

Postscript

[92] Although an issue flagged by the Authority in its determination, such was the haste with which this proceeding was brought on that it was not until in the course of the hearing that the positions of potentially affected employees, albeit union members, were realised and appreciated. The positions of the six (and perhaps now more) employees currently on fixed term agreements, ought to have been addressed by giving them an opportunity to be heard and represented in the proceeding because it may or will affect them. Although they are all union members, there may be a conflict of interest for the union in both bringing these proceedings to challenge agreements freely and willingly entered into by its members and to also protect their interests as it should.

[93] Despite, ultimately, being dealt with satisfactorily in this case, parties in other similar cases should not overlook the natural justice necessity to ensure that persons potentially but really and significantly affected, have rights of representation and hearing in such proceedings.

GL Colgan
Chief Judge

Judgment signed at 3.15 pm on Monday 29 March 2010