IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 41
WRC 33/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JULIE SHORTLAND Plaintiff
AND	ALEXANDER CONSTRUCTION COMPANY LIMITED Defendant

Hearing: 13 April 2010
(Heard at Hastings)

Appearances: Trent Petherick, Counsel for Plaintiff
Stuart Webster, Counsel for Defendant

Judgment: 13 April 2010

ORAL JUDGMENT OF JUDGE A A COUCH

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[1] The plaintiff, Mrs Shortland, was employed by the defendant on terms which purported to be a fixed term agreement. In May 2008 that employment ended at the defendant's insistence. The plaintiff believed that this was an unjustifiable dismissal. The defendant said it was the end of a fixed term period of employment which had been agreed. In the alternative, the defendant now says that it was a genuine redundancy.

[2] The Employment Relations Authority investigated the matter and found in favour of the defendant, dismissing the plaintiff's claim. The plaintiff challenged the whole of that determination and the matter proceeded before me today by way of a hearing de novo.

[3] I heard evidence from three witnesses. First was the plaintiff. On behalf of the defendant I then heard from Mr Hamilton, the managing director of the company, and Mr Briggs, a director who was the manager of the project in which the plaintiff was engaged for the last year of her employment.

[4] I was also provided with a brief of evidence from Dr Jolly, the plaintiff's general practitioner. Mr Webster indicated that he did not wish to cross-examine this witness and he was not present. I invited Mr Petherick to provide this evidence in the form of an affidavit but, understandably, he was unable to arrange that today. As the evidence which Dr Jolly would have given was largely corroborative of what the plaintiff herself said and her evidence in those respects did not significantly alter under cross-examination, I do not think I would be greatly assisted by having Dr Jolly's evidence and I do not have regard to the brief which was before me.

[5] The evidence given by all witnesses was commendably brief but nonetheless included a good deal of evidence about events prior to 2007 which was not directly relevant to the matters at issue. I have regarded that evidence as background and not recorded it in detail in this judgment.

Essential facts

[6] The plaintiff was initially employed by the defendant in March 2003. She worked in the defendant's main office doing clerical and administrative work. In May 2007 the plaintiff was offered a position as site administrator for a project known as Elephant Hill. This project involved the construction of a winery, restaurant and associated site works. It was a substantial project on which up to 48 staff were employed.

[7] The terms of this aspect of the plaintiff's employment were recorded in a written individual employment agreement dated 23 May 2007. Clause 3 of that agreement was:

> 3.0 TERM OF AGREEMENT
> 3.1 Fixed Term Individual Employment Agreement
> This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The parties agree that this is a fixed term employment agreement.

> This agreement will commence on Wednesday 6 June, or a mutually agreed date, and will end on the completion of the Elephant Hill project. The Employer has genuine reasons based on reasonable grounds for specifying that the employment agreement is to end at this time, namely the end of the Elephant Hill project. The parties also confirm that the Employee has been advised by the Employer when discussing this agreement, the reasons for the employment ending in this way.

[8] The plaintiff worked on site. Her duties changed during the period of her employment there. Initially her work was mainly clerical and administrative but later she also took on a health and safety role for the site. The plaintiff reported to Mr Briggs.

[9] In mid April 2008 Mr Briggs told the plaintiff that her job would soon come to an end. The plaintiff queried this with Mr Hamilton as she regarded the project as far from being complete. Mr Hamilton replied that he regarded decamping from the work site as completion of the project and confirmed that the plaintiff's employment was soon to end.

[10] On 1 May 2008 Mr Hamilton wrote a very brief letter to the plaintiff saying that her employment would end the following day. That subsequently occurred and the plaintiff was paid one week's pay in lieu of notice. The site office in which the plaintiff had worked was disestablished on 7 May 2008 but a number of staff, estimated at ten, remained working on the project which was then managed from the defendant's head office. Clerical and administrative work previously done by the plaintiff was taken over by Mr Briggs. The health and safety function previously performed by the plaintiff was taken over by the site foreman.

Issues

[11] Was the employment agreement a valid fixed term employment agreement? This turns on whether it complied with s 66 of the Employment Relations Act 2000 (the Act) which provides:

> **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.

[12] If it was a valid fixed term employment agreement, when did the agreed term end? This turns on the meaning of the expression "completion of the Elephant Hill project."

[13] If it was not a valid fixed term agreement, was the dismissal of the plaintiff justifiable? This is to be decided by applying s 103A of the Act which provides:

103A Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[14] I note here that, by way of an alternative ground of defence, the defendant sought to rely on justification of the plaintiff's dismissal by reason of redundancy. This had not been pleaded in the statement of defence. When I raised that difficulty in the course of the hearing, Mr Webster sought leave to amend the statement of defence to include it. On behalf of the plaintiff, Mr Petherick opposed that course. As it was common ground that redundancy was raised when the matter was before the Authority and Mr Petherick was able to effectively cross-examine on this issue, I find that there was little prejudice to the plaintiff in permitting this ground of defence to be pursued and I allowed the amendment.

Did the employment agreement comply with s 66?

[15] Section 66(2)(a) provides that before an employee and an employer agree that the employment will end in a particular way, the employer must have genuine reasons based on reasonable grounds for specifying this.

[16] Mr Hamilton said in evidence that the reason was that, at the time the employment agreement was entered into, the company had no other significant work in prospect other than the Elephant Hill project. Although it is close to the border line I find that this was a genuine reason based on reasonable grounds for entering into a fixed term agreement.

[17] But that is not the only requirement of s 66. Subsection (2)(b) provides that the employer must advise the employee of the reasons. There was no evidence that this was done in the case of the plaintiff other than through the written employment agreement proffered to her.

[18] Subsection (4)(b) provides that the employment agreement must state in writing the reasons for it ending in the way specified. In this case it is clear that the actual reason, as explained by Mr Hamilton, was not fully stated in the agreement which says only that the reason was "the end of the Elephant Hill project." On its own, that statement does not provide reasonable grounds for having a fixed term agreement. For the grounds to be reasonable requires the other element, namely that the company had no other work in prospect, to be included.

[19] On this issue, Mr Webster submitted:

> 6 Implicit in the words 'end of the Elephant Hill project' is the notion that there is no more work because no other project is mentioned. In that respect it is axiomatic.

[20] Mr Webster expanded on that orally. He submitted that the requirement of s 66 for the reasons to be in writing can be complied with by implication. I do not accept that submission. The statute requires the reasons to be in writing to ensure absolute clarity and certainty. That cannot be provided by implication. For this reason I conclude that clause 3.1 of the employment agreement between the parties did not comply with s 66. The consequence of that conclusion is that the employment agreement must be regarded as having been open ended.

[21] As the plaintiff's employment was unilaterally terminated by the defendant, it follows that it was a dismissal.

Was the dismissal justifiable?

[22] The defendant does not attempt to justify the plaintiff's dismissal on grounds of misconduct. That is proper in light of Mr Briggs's evidence that the plaintiff was a good worker while engaged on the Elephant Hill project. Rather, the defendant suggests that the plaintiff's dismissal was justified on the grounds of redundancy.

[23] On this issue, Mr Webster submitted that "the formal notice given to her on 1 May 2008 amounts to a redundancy because the work that the plaintiff performed was no longer available for her to perform because the site had been decamped." With respect, that submission misses the point. There was no evidence of an agreement that the plaintiff's work would be performed only at the Elephant Hill site. Equally, there was nothing to suggest that by its very nature the work could only be performed at that site. This was readily apparent from the fact that Mr Briggs subsequently performed a part of it from the company's head office.

[24] I also find as a fact that a substantial amount of the type of work done by the plaintiff still remained to be done after 2 May 2008. That emerged clearly from the evidence of both Mr Hamilton and Mr Briggs that the clerical and administrative

work formerly done by the plaintiff was subsequently done by Mr Briggs and that the health and safety function was assumed by a foreman. It cannot be said that the plaintiff's work had disappeared by 2 May 2008.

[25] There are other major difficulties with the proposition that the plaintiff's dismissal was justifiable on grounds of redundancy.

[26] Section 4(1A) of the Act provides as follows:

> (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.

[27] This subsection, and in particular paragraph (c), applies to every employer considering a restructuring or other rearrangement of work which may result in the redundancy of employees. In this case Mr Hamilton effectively conceded that none of the requirements of the subsection was met. He also confirmed that redundancy was not the basis on which the plaintiff's employment was terminated at the time. Rather, it is an explanation on which the defendant has subsequently sought to rely.

[28] For these reasons I find that the plaintiff's dismissal was clearly not justifiable on grounds of redundancy. In terms of s 103A, it is not what a fair and reasonable employer in the defendant's place would have done in all the circumstances.

[29] In his submissions, Mr Webster urged me to conclude that, notwithstanding the matters I have just described, the plaintiff's redundancy was inevitable and that she ought not be compensated for loss of her job. I reject that submission. In light

of the defendant's total failure to comply with its good faith obligations and the undeniable fact that at least a significant part of the plaintiff's work remained to be done, it is not realistic or proper to speculate on what the outcome may have been had the defendant done what a fair and reasonable employer would have done, including compliance with its statutory obligations.

Meaning of clause 3.1 of the employment agreement

[30] Although I have concluded that the employment agreement in this case did not comply with s 66, I nonetheless deal with the issue whether the fixed term specified in clause 3.1 of that agreement had expired. I do so largely because it was the central focus of much of the evidence and was a matter greatly in contention between the parties.

[31] As I have noted earlier, this issue turns on the meaning of the expression "completion of the Elephant Hill project." When interpreting an agreement, the starting point must be the ordinary meaning of the words used in the context of the agreement as a whole.

[32] In some cases it may be necessary to depart from that straightforward approach but the Court should only do so where the plain meaning of the words used is absurd or there is other very good reason to do so. Any suggestion to depart from the plain meaning of the words must be based on sound evidence establishing that the mutual intention and understanding of the parties was something else. In this case Mr Hamilton said that he drafted the clause in question and that what he had in mind was that the plaintiff's employment would end "when the site team comes back to the office." As he was bound to do, however, Mr Hamilton accepted that that was far from what the agreement said.

[33] The case for the defendant in this regard was that a departure from the plain meaning of the words used in the agreement was justified on two closely related grounds. Mr Hamilton and Mr Briggs gave evidence that they believed the plaintiff had a similar understanding to Mr Hamilton namely that the words "completion of the Elephant Hill project" meant "when the site team comes back to the office."

When this was put to the plaintiff in cross-examination, however, she denied it. Otherwise there was no evidence to support that proposition. It was also suggested by Mr Hamilton and Mr Briggs that there is an industry practice that completion of a project occurs when the contractor decamps from the site. The plaintiff also denied any knowledge of this.

[34] In respect of both of these propositions, the evidence given was broad and unspecific. It fell far short of what would be required to displace the normal meaning of the words used.

[35] The ordinary meaning of the word "completion" in this context is finished or concluded. On the evidence of the defendant's witnesses I find as a fact that the Elephant Hill project was not completed as at 2 May 2008. Significant practical work remained to be completed including finishing work on the restaurant and the majority of site works. There was also a substantial amount of paper work which had still to be done in relation to the project. Practical completion was not certified until 7 July 2008 and a code completion certificate was not issued until December 2008. It seems to me impossible to say that the project as a whole was completed before either of those events occurred. I note also that Mr Briggs agreed that he was still working 10 hours a week on the project as at August 2009 and that even now the project was not entirely completed.

[36] Without attempting to say definitively when the project was completed, if that has indeed yet occurred, I have no hesitation in finding that it was not completed within three months after 2 May 2008.

[37] Overall, I find that the plaintiff was unjustifiably dismissed.

Remedies

[38] The plaintiff gave clear detailed evidence in relation to the remedies she sought. Her loss of employment with the defendant left her in a precarious financial position. She said that she felt psychologically unable to seek alternative employment doing clerical or administrative work but that she made immediate

efforts to mitigate her loss of income by obtaining other types of work. She got some work two weeks later and subsequently obtained a second part time job.

[39] The plaintiff claimed reimbursement only of wages lost during the period of three months following her dismissal. That was a total of $7,447. I find that loss was proved in full and order the defendant to reimburse the plaintiff for it.

[40] The plaintiff also sought compensation for humiliation, loss of dignity and injury to her feelings in the amount of $8,000. She gave evidence that she suffered considerable distress as a result of her dismissal and consequent loss of income. Her mental health was affected. In particular, she suffered a loss of confidence which she has only recently been able to regain. Another significant factor of her evidence was the humiliation she felt when forced to go door knocking for work, she having been productively employed for some 35 years.

[41] In my view the amount of $8,000 sought as compensation for that distress is moderate and I award that sum in full.

Conclusions

[42] The plaintiff was unjustifiably dismissed by the defendant.

[43] The defendant is ordered to pay the plaintiff $7,447 gross as reimbursement of lost remuneration and $8,000 as compensation pursuant to s 123(1)(c)(i) of the Act.

[44] The determination of the Authority is set aside and this decision stands in its place.

Comment

[45] I wish to commend both counsel for the concise manner in which this case was formulated and for the efficient manner in which the hearing was conducted.

Costs

[46] Costs are reserved. If they cannot be agreed, Mr Petherick is to file and serve a memorandum by 14 May 2010. Mr Webster is then to have 21 days to file and serve a memorandum in response.

AA Couch
Judge

Judgment delivered orally at 4.41 pm on Tuesday 13 April 2010