

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 33/07
ARC 111/05**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ALISON SCHNELLER Plaintiff
AND	RANWORTH HEALTHCARE LIMITED Defendant

Hearing: 6 and 7 July; 30 and 31 October 2006
(Heard at Auckland)

Appearances: Paul Wicks, Counsel for Plaintiff
Tony Drake and Mark Donovan, Counsel for Defendant

Judgment: 5 June 2007

JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The issues for decision in this challenge and cross challenge to a determination of the Employment Relations Authority include:

- whether the termination of Alison Schneller's¹ employment with Ranworth Healthcare Limited (Ranworth) was a dismissal (justiciable) or the conclusion of a lawful fixed term employment agreement (non-justiciable);
- if a dismissal, whether Alison Schneller was dismissed unjustifiably by Ranworth;
- if so, the remedies to which Alison Schneller may be entitled;

¹ Because the plaintiff's sister, Karen Schneller, is a significant player in the events of this case, I refer to the plaintiff as Alison Schneller and her sister as Karen Schneller throughout this judgment to avoid possible confusion.

- the costs that ought properly to have been awarded to Ranworth after its successful defence of proceedings in the Employment Relations Authority.

[2] The monetary remedies at issue in the case are relatively modest. Alison Schneller claims reimbursement of lost income of \$11,533 plus interest and distress compensation “*of at least \$15,000*” plus costs. The Authority’s costs award in favour of Ranworth (including disbursements) was less than \$3,000. The costs to the parties of a hearing over four days must surely have exceeded the amounts that could realistically have been in issue.

[3] This case is unusual, both for a civil proceeding and in this jurisdiction, because the defendant put up a witness and was then permitted to cross-examine her on the basis that she had been declared hostile. That witness was Karen Schneller. A similar situation was reached in the Employment Relations Authority with regard to Karen Schneller’s evidence although not by the same process of hostility declaration. Among other things, Karen Schneller gave evidence about the discussions with her sister that preceded the beginning of Alison Schneller’s relevant employment. There were no other witnesses to these discussions than the Schneller sisters. Karen Schneller sought to portray an account of these discussions that might be seen to have been favourable to her sister: certainly an account of them that did not suit the defendant’s case.

[4] The Employment Relations Authority found, as I have, that there were significant contradictions between the evidence given to the hearings by Karen Schneller, and her written statement made to Ranworth after its receipt of Alison Schneller’s personal grievance. The Authority concluded that it was the former (sworn evidence) that was unreliable and that the latter (a statement made for the purposes of later litigation) was accurate.

[5] Although I accept, as did the Authority, that Karen Schneller was an unreliable witness, I have not been persuaded that, like the Employment Relations Authority, I should accept one set of statements as true but reject a subsequent account of the same events given on oath before the Authority and then this Court, as untrue, in effect perjured evidence.

[6] Although the defendant established that this witness was unreliable, its case does not support the propositions, first, that I should prefer one account to another and, second, that the written evidence statement given to the employer's solicitors is truthful and that the evidence given on oath is deceitful.

[7] Rather, I conclude that Karen Schneller's credibility is compromised by these contradictory accounts and that she is an unreliable witness whose account of relevant events, whenever given, cannot be relied on. She was, of course, put up as a witness by the defendant which then was given leave to cross-examine her on the basis that she was hostile. But that cross-examination did not establish, at least sufficiently, that I should accept one account given by her but reject the other. The effect of my conclusion of unreliability is that there is no credible evidence for the defendant about what passed between the defendant and Alison Schneller on material issues. There is, however, Alison Schneller's evidence about these events, in the absence of reliable contradiction of which I have to accept and do accept as what probably happened. Alison Schneller's evidence was not altered by counsel's cross-examination of her. She adhered to the account of relevant events that she has always given.

[8] Ranworth is a provider of health services and a subsidiary of a holding company, Abano Healthcare Group Limited (Abano). Before beginning work for Ranworth as its employee in January 2004, Alison Schneller worked for another of Abano's subsidiary companies, Burtons Healthcare Limited (Burtons), as a legal quality assistant. From Burtons, Alison Schneller moved to another associated entity, Eldercare Management Limited (Eldercare), in about July 2003 where her employment ended on 29 December 2003.

[9] Alison Schneller's employment by Burtons was part-time but of indefinite duration. Eldercare became Alison Schneller's employer in July 2003 following its purchase of the assets of Burtons. Her terms and conditions of employment remained unchanged but her employer became Eldercare as from 10 July 2003.

[10] In the following month Eldercare changed its name to Abano, a holding company comprising three subsidiaries, Ranworth, Burtons and another known as "Health Partner". Alison Schneller thereafter worked for Burtons.

[11] On 19 January 2004 Alison Schneller began work for Ranworth. It says this was under a new individual fixed term employment agreement under the then applicable s66 of the Employment Relations Act 2000. Alison Schneller says that although the agreement purports to be for a fixed term, it was not so in law and that her employment with Ranworth from January 2004 was employment of indefinite duration. The defendant's case turns on its assertion that Alison Schneller's employment ended with the expiry of a lawful fixed term of employment, that this cannot amount to a dismissal or at least an unjustified dismissal and, as the Authority found for these reasons, the plaintiff can have no claim against Ranworth.

[12] The first draft employment agreement was left for Alison Schneller by Ranworth's general manager, Graham Menary, for discussion and alterations. This form of preliminary draft made clear Ranworth's intention that the employment would be for a fixed term.

[13] Alison Schneller's discussions about the form of agreement were, however, with Karen Schneller who had, by that time, taken over from Mr Menary. Again I am satisfied from the evidence that Karen Schneller told Alison Schneller that although the company wanted the employment to be for a fixed term for the performance of specific projects, Karen Schneller was optimistic that there would be an ongoing role for her sister and told her that the fixed term employment could, in these circumstances, either be continued or employment of indefinite duration arranged at the conclusion of the fixed term. I am satisfied, also, that when Alison Schneller asked Karen Schneller why the company had stipulated for fixed term employment, Karen Schneller also said that there were some concerns about nepotism in working relationships although Alison Schneller had, for some time and successfully, worked for enterprises managed by her sister.

[14] I find that although less than ideal from her point of view, Alison Schneller accepted the company's stipulation for fixed term engagement in the hope or the expectation that her employment would be ongoing with Ranworth or with its associated entities after the expiry of the term. Alison Schneller negotiated a number of variations to the company's initial proposal, each advantageous to her, including the provision of study leave to enable her to complete academic qualifications and the payment of a bonus during the term of the agreement if she achieved certain key

objectives that were one of the company's main purposes in wanting a fixed term agreement.

[15] The final form of agreement executed by both parties was clearly one for a fixed term. Terms and conditions particular to Alison Schneller's circumstances were set out in Schedule 1. Schedule 2 was intended to contain a job description but this was never completed, either before execution of the agreement or even during its currency as was tacitly agreed to be the default position.

[16] Alison Schneller worked under the agreement for its specified term. On or around 18 January 2005, the date of its expiry, Alison Schneller was advised by Karen Schneller (following instructions to this effect from more senior management personnel) that her employment would end under the terms of the agreement although, in the event, there was some outstanding work that Alison Schneller agreed to stay on to complete for a further period of about a month. Shortly after this additional work eventually ended, Alison Schneller elected to accompany her husband on his university sabbatical leave so that even if, as she contended, she had been dismissed unjustifiably, the period for which Ranworth may have been liable to Alison Schneller for remuneration compensation would only have been a matter of weeks in any event.

[17] The then applicable law dealing with fixed term employment agreements was set out in s66 of the Employment Relations Act 2000 and provided as follows:

- Parties could agree that the employee's employment would end at the close of a specified date or period or upon the occurrence of a specified event or at the conclusion of a specified project.
- Before such agreement the employer must have had genuine reasons based on reasonable grounds for specifying that the employment of the employee was to end in that way.
- Further, the employer was obliged to advise the employee of when or how his or her employment would end and the reasons for it ending in this way.

- Genuine reasons did not include to exclude or limit the employee's rights under the Act or to establish the suitability of the employee's permanent employment.

[18] These provisions were interpreted and applied in a case heard by this Court (*Clarke v Norske Skog Tasman Ltd* [2003] 2 ERNZ 213) and subsequently on appeal by the Court of Appeal (*Norske Skog Tasman Ltd v Clarke* [2004] 1 ERNZ 127).

[19] If employment was pursuant to a lawful fixed term agreement, the expiry of this agreement according to its terms would not support a claim to an unjustified dismissal. If, however, what purported to be a fixed term employment agreement did not meet the statutory requisites, the employee's employment was to be regarded as of indefinite duration and its termination a dismissal amenable to consideration as a personal grievance alleging that it was unjustified.

[20] I conclude that Alison Schneller agreed tacitly to give up her former employment with Burtons on 29 December 2003 on the understanding that she had reached with Karen Schneller that she would be employed by Ranworth as from 19 January 2004 as a legal compliance officer. As instructed by her superiors in Ranworth, Karen Schneller told Alison Schneller that Ranworth insisted on this engagement being for a fixed term of one year and of the commercial reasons for this stipulation. I am satisfied, however, that Karen Schneller was hopeful that term could be reviewed at its expiry and extended, and so informed Alison Schneller.

[21] From 19 January to 8 March 2004 Alison Schneller's employment agreement was oral only. The written form of agreement was not executed until 8 March although it confirmed its retrospectivity to 19 January. The terms of the employment agreement clearly provided for a fixed term of 12 months and without any legitimate expectation of renewal or conversion to employment of indefinite duration.

[22] I am satisfied, as was the Employment Relations Authority, that the ending of Alison Schneller's employment with Ranworth was the expiry of a lawful fixed term employment agreement, albeit one extended orally to complete some unfinished tasks. The following factors confirm this conclusion.

[23] Alison Schneller was a qualified and experienced lawyer whose expertise in the field of health law had also embraced elements of employment law including reviewing, advising on and revising her employer's collective and individual employment agreements. The draft of the written fixed term agreement was given to Alison Schneller for her consideration and, following negotiation, changes were made to its original form at her request. Alison Schneller understood both the nature and the content of the agreement. A draft of the agreement sent under cover of a letter of 3 March 2004 confirmed that this employment had begun on 19 January 2004 pursuant to an oral employment agreement between the parties. On 8 March 2004 Alison Schneller counter-signed Ranworth's letter of offer confirming that she had read and understood the terms and conditions of the offer and had received a copy of it, that she had been given an opportunity to seek independent advice before accepting, and that she had completed and returned all of the relevant documentation.

[24] The written agreement began by confirming that *"The position is that of a fixed term Employee engaged to meet the temporary business needs of the Employer"*. The agreement also described the employment as being *"on a temporary basis"* and that it would remain *"until the completion date set out in the First Schedule"*. It continued:

Nothing in this agreement shall expressly or by implication be read as providing entitlement to or expectation of any further employment beyond this engagement.

[25] Again to emphasise the point the agreement provided:

As this agreement is a temporary employment agreement, there shall be no payment for redundancy and the employee undertakes not to make any claim for redundancy compensation against the employer during the term of or on the expiry of the agreement.

[26] Clause 26 (*"COMPLETENESS"*) provided:

(a) *The terms and conditions set out in this agreement and the associated letter of offer represent the entire agreement of the parties and replace any previous agreements, contracts and understandings.*

[27] The First Schedule to the agreement, focusing upon the particular individual aspects of the contract, also emphasises that *"Employment under this agreement is*

on a temporary basis commencing on Monday the 19 [sic] day of January 2004 and finishing on Tuesday 18 January, 2005”.

[28] Although a position description or account of the particular duties to be performed under the agreement was never concluded in the form of a second schedule or otherwise as the parties clearly contemplated, the evidence establishes that the tasks to be performed were of a limited duration nature and there was no contemplation of an ongoing need for an employee of the company to undertake them after they had been done satisfactorily within the period of 12 months of the engagement. Although, as she said in evidence, Alison Schneller may well herself have foreseen an ongoing role within the group of companies for someone having her qualifications and experience, the agreement did not so provide.

[29] In early 2004, when the employment agreement was entered into, Ranworth had good commercial reasons for stipulating that Alison Schneller’s employment would be for a fixed term. Because of a changing legislative environment affecting its business and because it considered that it could operate more efficiently by purchasing legal advice and compliance services as and when needed, Ranworth considered that it only had need of a full-time legal and compliance officer to conclude a number of specific projects that it estimated would take no more than about one year to complete. There is no evidence that these reasons were other than genuine in the sense that they were not a pretext to avoid the application of the unjustified dismissal provisions in the legislation or to evaluate Alison Schneller’s suitability for the job. She had worked satisfactorily for associated companies for some time in a very similar role and there was no suggestion of dissatisfaction with her work. Although “*nepotism*” was said by Karen Schneller to her sister Alison to have been the reason for the company stipulating for a fixed term agreement, I have concluded that this was a relatively minor concern of new owners or management within the company as a result of previous experience in other employment situations.

[30] Addressing the tests for lawful fixed term employment under s66 of the Employment Relations Act 2000 applicable at the time, I am satisfied that:

- the parties agreed that Alison Schneller's employment would end at the close of a specified date; and
- before that agreement was made Ranworth had genuine reasons based on reasonable grounds for specifying that Alison Schneller's employment was to end in that way; and
- Ranworth advised Alison Schneller when her employment would end and the reasons for it ending in this way; and
- Ranworth's reasons did not include to exclude or limit Alison Schneller's rights under the Act or to establish her suitability for permanent employment.

[31] The extension of the fixed term beyond 18 January 2005 was for the purpose of concluding particular assignments left incomplete at the end of the term and this extension was itself a further short period of fixed term employment that did not offend the requirements of s66.

[32] So the ending of Alison Schneller's employment was not a dismissal. Rather, it was the agreed and lawful conclusion of a period of fixed term employment for which she is unable to claim that she was unjustifiably dismissed.

[33] It follows that the challenge to the Employment Relations Authority's determination fails. It is unnecessary in these circumstances to determine the questions of justification and remedies.

[34] Ranworth has cross challenged the Authority's award of costs against the plaintiff (\$2,500 plus disbursements of \$402.50). It simply asks the Court to award a higher amount for costs in the Authority but submits this should be dealt with separately following the outcome of Alison Schneller's challenge. The outcome of the plaintiff's case is not relevant to whether the Authority correctly determined costs. However, I have not heard from Ranworth in support of its cross challenge or from the plaintiff in opposition and so will do so in written submissions accompanying any that they make in support of, and in opposition to, the claim for costs on this challenge.

[35] In that regard, the defendant may have 28 days to file and serve written submission in support of its claim for costs against Alison Schneller, with the plaintiff having the same period to respond by written memorandum.

GL Colgan
Chief Judge

Judgment signed at 11.30 am on Tuesday 5 June 2007