IN THE EMPLOYMENT COURT
WELLINGTON

WC 21/07
WRC 7/07

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ELECTROTECH CONTROLS LIMITED Plaintiff
AND	WANITA ANNE RARERE Defendant

Hearing: 6 July 2007
(Heard at Napier)

Appearances: M B Lawson and E C Fackney, Counsel for the Plaintiff
David Oliver, Counsel for the Defendant

Judgment: 5 September 2007

JUDGMENT OF JUDGE C M SHAW

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[1] This challenge is about the terms and conditions upon which Ms Rarere was employed during and following the completion of her apprenticeship employment with Electrotech Controls Limited (Electrotech) and whether Electrotech was entitled to offer her casual employment, an act which resulted in her resigning.

The Authority determination

[2] The Authority heard Ms Rarere's claim for unjustified dismissal. It described her employment with Electrotech since she was employed as an electrical apprentice in 2001 and found that once her 8,000 hours of apprenticeship ended her employment then altered to one of indefinite duration and was subject to the previous terms and conditions of employment. Therefore, the Authority found Ms Rarere was entitled to ongoing employment rather than being treated as a casual

employee and when she refused to be employed as a casual and resigned, her resignation constituted unjustified constructive dismissal.

[3] The Authority awarded Ms Rarere 3 months' lost wages, $7,000 compensation and damages of $939.92 for expenses incurred. It also found that Electrotech was in breach of her employment agreement by not offering her subsidised medical insurance.

[4] The plaintiff challenges only the part of the Employment Relations Authority determination about the nature of the employment relationship. It does not seek a full hearing of the entire matter by way of a de novo hearing.

The challenge

[5] In her statement of defence, the defendant denied some of the plaintiff's versions of the facts as set out in the statement of claim, asserted her own view of the facts, and raised a cross-challenge about the application of s66 of the Employment Relations Act 2000 (fixed term employment) in the context of the facts of this case. However, it was agreed by counsel that this matter could be dealt with in two parts. The first part mainly concerns questions of law about the nature and terms of the employment relationship between the parties once the defendant's fixed term contract came to an end. It is possible, but not yet certain, that the answer to those questions could be determinative of the outcome of the entire challenge and cross-challenge.

[6] The second part concerns whether there had been constructive dismissal and can be dealt with if necessary once the outcome of the first part has been decided.

The facts

[7] An agreed statement of facts provided the factual basis for the hearing although not all were relevant to the questions of law.

[8] The defendant was employed by the plaintiff as an apprentice electrician in January 2001 having earlier entered into an individual employment contract dated 30 November 2000. This, and subsequent employment agreements, were rolled over

annually. Between 2000 and 2004 the defendant had five written employment agreements, the last dated 15 September 2004. Each fixed the term of her employment by reference to her achieving a qualification as an electrician.

[9] The last agreement had a job description for the position of apprentice electrician. It defined the tasks as follows:

> *An Apprentice is an employee working under a training agreement with the employee and the relevant industry-training organisation in the trade as described in "Position" above.*

[10] The defendant was also covered by a core employment agreement for an electrical apprentice. She was paid at an hourly rate for a level three apprenticeship. This agreement provided inter alia:

> (a) The employee is required to register with ETITO (the training organisation) and enter into a training agreement to achieve qualification as an electrician under the National Qualification framework. (clause 3.5)
>
> (b) That either party to the fifth agreement may end it by giving 4 weeks' notice or payment in lieu or forfeiture as the case may be. (clause 18.1)
>
> (c) The employment contract will be terminated automatically at the expiry of 8,000 hours or proof of completion of the National Certificate in Electrical Engineering (level 4), whichever is earlier. (clause 18.1)
>
> (d) In the event that the employee's position is made redundant, the employee shall be entitled to 4 weeks' notice of termination. The employer is under no obligation to pay any other sum, whether by damages, compensation or otherwise as a result of the redundancy. (clause 18.2)

[11] By April 2005 the defendant had completed the 8000 hours and all the required unit standards towards her National Certificate in Electrical Engineering (level 4) qualification. From that time on, while she and the plaintiff were awaiting advice from ETITO that she had completed all requirements satisfactorily and that

the training course had been completed, she continued in the plaintiff's employment carrying out electrical engineering duties under supervision. These were the same duties she performed during the period of the fixed term agreement.

[12] On 30 May 2005 ETITO advised the plaintiff and the defendant that the defendant had completed the requirements for electrical engineering level 4 under the training agreement. However, she had not yet sat the Electrical Workers Registration Board theory exam which must be passed prior to an electrician becoming a registered electrician and working as such. The exam was scheduled for later in the year.

[13] On 21 June 2005 the plaintiff gave the defendant 1 month's notice of termination of her employment under clause 18.1 of her employment agreement and at the same time advised her that she could apply for employment as a trade assistant although with no guarantee of a position. On 7 July 2005 the defendant submitted an employment application form.

[14] On 12 July 2005 the plaintiff met the defendant and told her that it would provide a written offer and employment agreement for temporary employment as a trade assistant until she completed her electrical registration exams in November 2005. This would be at the same rate of pay with her insurance and sick leave continuing on the same basis as before. Her holiday pay was to be paid out on 22 July 2005. After the defendant left the plaintiff's office the plaintiff drew up an offer letter dated 12 July 2005 and an intended casual employment agreement with a starting date of 25 July 2005.

[15] The Authority made a finding that the formal offer of temporary employment was put in the defendant's cubby hole soon after the conversation on 12 July 2005 but she did not uplift it.

[16] The defendant was very upset because she had believed her employment was permanent but had been given notice of termination then offered casual work which she believed could end at any time. She withdrew her application for employment as a trade assistant.

The issues

[17] The questions to be decided in this judgment are:

- What was the nature and terms of the defendant's continuing employment after the end of the fixed term agreement in April 2005?
- In particular, did the terms in the fixed term agreement (the fifth agreement) relating to an apprentice or an apprenticeship or an ETITO training agreement or training allowances form part of the defendant's terms of employment after –
    a) The end of the fixed term agreement in April 2005; and
    b) After 30 May 2005 being the date the parties were advised of the completion by the defendant of the requirements for the national certificate?

1. Nature and terms of the defendant's continuing employment after end of fixed term agreement

[18] The parties agree that the expiry of the stipulated 8,000 hours automatically terminated the employment contract and the defendant's continued employment was indeterminate in duration. The question is whether, apart from its duration, the defendant's continuing employment was on the same terms as her fixed term agreement.

[19] The plaintiff's position is that apart from the indeterminate duration the defendant's terms of employment remained the same. Mr Lawson, for the plaintiff, relied on the principles in *Varney v Tasman Regional Sports Trust*[1].

[20] In *Varney*, Chief Judge Goddard considered the situation where an employment continued beyond its stated expiry without any concluded agreement about the basis on which it was continuing. He referred to, and analysed, s66 of the Employment Relations Act 2000 which enables an employee and employer to agree to a fixed term employment provided that there are genuine reasons based on reasonable grounds for specifying such a fixed term and the employee is advised of

[1] Unreported, Chief Judge Goddard, 23 July 2004, CC 15/04

how and when their employment will end and the reasons for the fixed term. Section 66 also stipulates what are not genuine reasons. Like the present case, in *Varney* the employment continued without discussion once the agreed expiry date had passed.

[21] The Court found that the basis of the plaintiff's employment after the expiry of the fixed term could only be that it was employment on the same terms but indeterminate in duration. If further employment were to have a fixed term, it was necessary for the employer to have genuine reasons based on reasonable grounds for specifying that. In the absence of such an agreement the expiry of the fixed term was waived. The Chief Judge acknowledged that if a fixed term employment is allowed to drift on the nature of the continuing employment is then always going to be problematic.

[22] Mr Oliver, for the defendant, submitted that the rule in *Varney* does not apply to the present case as a matter of law. In fact he queried the rationale in *Varney* in the following way: "*If the old employment legitimately ends why, in the absence of written terms, should the new employment be on the same terms as the old?*" He submitted that such a rule prevents the parties from freely forming a new oral contract of service with basic terms of wages and hours and rights and obligations imposed by common law and statutes. In any event, he submitted that *Varney* could be distinguished and that the reasoning in *Auto-Movements (NZ) Ltd v Eveleigh*[2] applied in the present case.

[23] Mr Oliver argued that at the end of her fixed term employment the defendant commenced work for the plaintiff carrying out general electrical engineering duties in a role equivalent to that of a trade assistant (electrical) and that, as no written employment agreement was made to record the new terms of employment, the terms of her expired fixed term agreement no longer applied.

[24] He suggested further that there are significant distinguishing factors between *Varney* and the present case. In *Varney* the employment was to end after 48 weeks and upon the employer giving the employee notice of termination. In that case the

[2] Unreported, Judge Shaw, 18 May 2007, WC 15/07

Court found that by failing to give the notice the employer had waived the expiry of the employment. He submitted that in the present case there was no strict requirement to give notice and the end date could not have been waived by the employer.

[25] In reliance on the doctrine of waiver, Mr Oliver submitted that the employer did not sufficiently convey to the defendant that it was waiving the fixed term. Further, the plaintiff was not entitled to waive the fixed term which was of benefit to both parties.

Discussion

[26] In spite of Mr Oliver's best efforts, the decision in *Varney* remains good law. Mutuality of intention is the essence of contract and employment agreement. There is nothing to prevent parties from agreeing to a new agreement on different terms or varying existing terms as happened in *Auto-Movements* but they must turn their minds to such an agreement and freely consent to any changes.

[27] In the absence of either party giving any thought to the terms of an agreement which overruns its expiry date, the parties must be assumed to continue to be bound by the existing terms of the agreement. However, having passed its end date it cannot be a fixed term agreement unless the s66 of the Employment Relations Act 2000 requirements for mutual agreement based on genuine reasons are met with both parties consenting to a new fixed term.

[28] The law of waiver tends to be inconsistent and uncertain[3]. Most of the case law concerns the law of sale and purchase which is not entirely apt to employment law. In the present case the applicable law is that which concerns conditions as to time. In *New Zealand Railways Corporation v Fletcher Development and Construction Ltd*[4] the Court of Appeal defined waiver of a time condition as follows:

> *Waiver in this context occurs where the party entitled to insist on strict compliance with provisions as to time leads the other party to understand or assume that such provisions will not be insisted upon. This may occur when the party otherwise entitled to insist on adherence to stipulations as to time*

[3] Burrows, Finn & Todd Law of Contract in New Zealand 3rd edn (2007), para 8.3
[4] (1990) 1 NZ ConvC 190, 464 at 190, 467

does some act inconsistent with his continued insistence on strict compliance.

[29] In this case the plaintiff employer was entitled to insist on the strict provisions as to the time of the employment agreement. It had no obligation to continue the defendant's employment after the 8,000 hours had been completed but because it continued her employment after that, the defendant was entitled to assume that the time for expiry would not be insisted on.

[30] I find that the plaintiff waived the automatic expiry term of the agreement and communicated this to the defendant by continuing to employ her and pay her. She acquiesced to this by continuing to work and receive payment beyond the automatic termination event of completion of the 8,000 hours of work.

[31] In *Auto-Movements* it was found as a matter of fact that when the contract of employment in that case ended at its expiry date the employee continued employment but on a different footing. That situation is quite different from the present. In *Auto-Movements* before the expiry of the fixed term the employer had asked the employee to stay on in a different role. There was no such arrangement in this case.

[32] I conclude that the defendant's continuing employment was governed by the terms of the last formal agreement. The extent to which those terms remained viable after the end of the fixed term agreement is the subject of the next question.

2. Did the terms in the fixed term agreement (the fifth agreement) relating to an apprentice or an apprenticeship or an ETITO training agreement or training allowances form part of the defendant's terms of employment?

[33] Mr Lawson submitted that the only possible interpretation of *Varney* is that the terms remain the same, identical and unchanged, except with regard to the duration of the contract so that even when she had completed the 8,000 hours of work required, the defendant was still an apprentice subject to an apprenticeship agreement with ETITO. She continued the same duties as before and at all times was supervised by a registered electrician. This was because she had not yet finished her registration qualifications.

[34] Mr Lawson argued that until the plaintiff received notice of completion of the qualifications, there was no change in her employment. Even when she did receive the notice, she was still employed as an apprentice under her existing agreement. Theoretically she was required to undertake a training programme even though she had completed her apprenticeship. By then it was impossible for the parties to continue on the same basis and the agreement had effectively become frustrated because the continued employment of an apprentice after the completion of the apprenticeship does not make any sense. In these circumstances the employer offered the defendant another type of employment which she did not uplift.

[35] The defendant's argument was dependent on a finding that her employment after the 8,000 hours had been completed was on a completely different footing. I have found that it was not and therefore the plaintiff's position is the only possible interpretation.

Conclusion

[36] When the defendant had completed her apprenticeship her employer was entitled to terminate the contract immediately but it waived the fixed term requirement to enable her to continue her apprenticeship agreement until her qualification came through. While her circumstances had changed because of her qualification, the agreement had not. The parties were still bound by the September 2004 agreement and the core agreement which clearly treated her as an apprentice.

[37] If the employment relationship were to continue, it was up to the parties to negotiate a new agreement in the light of her changed status. Until that was done, she remained contractually bound as an apprentice subject to the same conditions of employment as an apprentice.

Costs

[38] These are reserved until the Court is advised of the next steps which the parties propose to take.

C M Shaw
JUDGE

Judgment signed at 3.30pm on 5 September 2007