

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Kevin List (Applicant)  
**AND** Office of the Clerk of the House of Representatives  
(Respondent)  
**REPRESENTATIVES** P McBride for the Applicant  
P Gunn for the Respondent  
**MEMBER OF AUTHORITY** G J Wood  
**INVESTIGATION** 2 and 3 September 2003  
**MEETING**  
**FURTHER SUBMISSIONS** 18 September 2003  
**RECEIVED BY**  
**DATE OF** 22 September 2003  
**DETERMINATION**

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship problem**

1. Mr List claims that he was unjustifiably disadvantaged in his employment and/or unjustifiably dismissed no less than three times before the due completion date of his fixed term agreement with the respondent (the Office of the Clerk). For its part, the Office of the Clerk considers that its treatment of Mr List was justified in all the circumstances.

**The Facts**

2. In the period 1999 to 2002 the Office of the Clerk appointed a number of temporary employees to cover for two special ad hoc Select Committees that operated over that period. In September 2002 Mr Kevin List, the applicant, successfully applied for a position as a temporary Parliamentary Officer (Select Committees). He was appointed to the Local Government and Environment Committee Secretariat. In relation to the

nature of the work he was to undertake, the employment agreement states:

*“The appointment is temporary because the employee is relieving for a permanent employee who will be on leave until the end of November, and then assisting with a period of anticipated high workload in the Select Committee Office.”*

3. The agreement also dealt with the issue of discipline. It stated:

*“When dealing with disciplinary matters management will:*

- (a) remind the employee of the right to request assistance and/or representation at any stage*
- (b) advise the employee of the specific matter(s) causing concern and provide a reasonable opportunity for the employee to state any reasons or explanations*
- (c) advise the employee of the corrective action required to amend the employee’s conduct and give the employee a reasonable opportunity to do so*
- (d) undertake an appropriate investigation before taking any substantive disciplinary action*
- (e) depending upon the seriousness of the misconduct, usually give an oral warning before a written warning*
- (f) record the process and results of any disciplinary action in writing and give the record to the employee to read and sign before placing it on the employee’s personal file*
- (g) suspend the employee pending an investigation under paragraph (d) if the alleged offence is sufficiently serious*
- (h) advise the employee of their right to pursue a grievance in terms of s 102, ERA 2000.”*

4. The agreement also deals with the ending of the employment. It states:

*“Employment terminates on 28 March 2003, or earlier after either the employer or the employee gives at least one month’s notice. The Clerk and the employee may agree to shorten or waive the period of notice.”*

5. In November Mr List was spoken to about his report writing and was assigned a Clerk of Committee as a coach. This discussion was held with Mr Andrew Beattie, a Clerk Assistant (Select Committees) in the Office of the Clerk, who is responsible for the management of the staff in the Select Committees Office. This was the only time his work was ever questioned until the events leading up to him leaving the Office of the Clerk early.

6. In November 2002 approval was given for the Office of the Clerk to increase its permanent full-time staff by 13. Of these 13 positions, three were for Select Committee officers who did the type of work undertaken by Mr List. Mr List applied for two of these positions and was interviewed in January 2003. Unfortunately he was unsuccessful in his application.
7. One of the appointees was to commence as early as 17 February and Mr Beattie met with Mr List's supervisor to discuss what work there was to be done over the balance of the term of Mr List's employment agreement. The supervisor told Mr Beattie that Mr List's work could be completed by 28 February.
8. On 12 February Mr Beattie met with Mr List and told him that he had not been successful in his attempts to get permanent employment. He was offered three options – to leave immediately and be given four weeks salary in lieu of notice; to be given four weeks notice to finish on 14 March; or to work out the period of his agreement, i.e. until 28 March. He was also told that he would need to shift to a new workspace to allow for the commencement of a new 'permanent' staff member on his Committee. Mr List indicated that he wished to complete his work through to the end of its term, i.e. 28 March.
9. Following this representations were made to Mr Beattie to try and persuade him that Mr List's fixed term employment agreement be extended. Mr Beattie decided that he would not do so. He accordingly held a meeting with Mr List and his representative on 14 February. After a discussion about why he had been unsuccessful in his application for 'permanent' employment, Mr List was told that his employment would be terminated with four weeks written notice, which he could work out.
10. On 26 February Mr Beattie was informed about an 'incident' in the Select Committee Office the previous evening whereby it was alleged that a visitor to Parliament had been left unsupervised by Mr List for about 5 minutes and had used a telephone and touched Committee papers.
11. Mr Beattie was, understandably, very concerned about this and accordingly he held a meeting with Mr List the next afternoon. Mr List was questioned about his supervision of the visitor. Mr List told Mr Beattie that she was left in the presence of

three Committee Clerks while he searched in an adjoining office for material his supervisor had sought from him as a matter of urgency. Mr Beattie put the allegations to Mr List about what the visitor had done, which shocked Mr List who, not being there at the time, had no knowledge of the alleged actions.

12. I make no factual findings as to what actually happened during the visit, because it is not necessary as, at its own election, the Office of the Clerk did not produce as a witness the complainant to these allegations. By contrast, the Authority did receive a statement of evidence from the visitor, who stated that all she did was to answer a call on her personal mobile phone. She denied reading any Parliamentary material in the Select Committee Office.
13. Mr Beattie, however, did draw his own conclusions. As a result he told Mr List at that meeting that he had caused a major security breach and that he should pack up his desk and leave the office by 5.00pm the next day. He also told Mr List that he would still, however, be paid until 14 March.
14. Mr List returned to his desk and told a number of staff, directly and by phone, that he had been dismissed. He was understandably upset, but his actions, including ripping up papers at his desk, occasioned another complaint by the same person who had complained about him two days earlier.
15. The next day Mr Beattie was told by the complainant that he had been unpleasant to the new appointees and had made public comments about the Select Committee Office and Mr Beattie that were less than complimentary.
16. Mr Beattie wished to have another meeting with Mr List early on the morning of 28 February. Consistent with him having already having been told to leave, Mr List was not at work and therefore a meeting was unable to be held until the afternoon. In the meantime, Mr Beattie had arranged for Mr List's final pay to be made up and he also sent Mr List a letter, which stated:

*“Following our discussion yesterday, I am writing to confirm that your last day in the office will now be today, Friday 28 February. You will still be paid for the period up to and including Friday 14 March.”*

17. This letter is consistent with the overwhelming weight of evidence before the Authority, which I accept (including evidence from current employees of the Office of the Clerk), despite Mr Beattie's contrary belief - namely that as from 27 February Mr List's employment was to end on 28 February, even though he would be paid up until 14 March.
18. Despite these prior actions, a meeting was held that afternoon in which Mr List was told by Mr Beattie that he had been harassing other staff. This was denied by Mr List, who admitted only to loudly ripping up paper. Mr List was told to pack his desk and leave immediately.
19. The meeting did not end on good terms. Mr List's representative suggested that the process adopted by Mr Beattie was in breach of the principles of natural justice. Mr Beattie's response to this was that he was quite happy to "escalate the situation".
20. The matter of the ending of Mr List's employment and the visitor incident received some publicity in the press. Mr List, aware that a report would go out whether he co-operated with the press or not, gave an interview to the reporter and released the letter his lawyer wrote to the Office of the Clerk raising a personal grievance. That letter had given the Office of the Clerk seven days to respond. The seven days had not expired before the press article referred to above was published. This may well have affected the way that the Office of the Clerk responded to the raising of the grievance. In any event, despite mediation and subsequent discussions between the parties, the matter has been unable to be resolved and it therefore falls to the Authority to make a determination.

## **Determination**

21. In the normal course of events, Mr List's employment would have continued until 28 March 2003. The Office of the Clerk relies on the unavailability of work for Mr List to invoke the term of the agreement which allowed it to give him one month's notice. However, the reason for the unavailability of work for Mr List was the fact that subsequent to the parties entering into the agreement, the Office of the Clerk obtained approval for additional 'permanent' employees. Once a 'permanent' employee started work in the Select Committee that Mr List worked in, it necessarily followed that there

would not be enough work for Mr List to do because, in effect, the Select Committee would be overstaffed. However, the Office of the Clerk had in effect created the shortage of work for Mr List by its decision to replace him in advance of the term of his agreement expiring. It made that conscious decision. It could just as easily have deferred the appointment of the 'permanent' employee until 1 April. In doing so, it simply replaced one type of worker (temporary fixed term) with another ('permanent'). However, the level of workload that was anticipated in the Select Committee over the period of the agreement (the reason for the fixed term) remained. It therefore follows that the Office of the Clerk had no justification for terminating Mr List's employment early. It is claimed that Mr List had no right to work during this period and that as long as he was paid for the period, the Office of the Clerk's actions could be justified. However, Mr List actually had an agreement with Mr Beattie (albeit one imposed by Mr Beattie), that he would work through until 14 March. Mr List was entitled to rely on that agreement.

22. Furthermore, it is clear that the Office of the Clerk's actions in making Mr List leave on 28 February, two weeks earlier than decided, were also unjustifiable. I accept that Mr Beattie had concerns over what had happened with respect to the visitor to Parliament on 25 February. However, to the degree that he was concerned about Mr List's involvement in that matter, he had powers under the disciplinary provisions in the employment agreement to suspend Mr List if he felt the alleged offence was sufficiently serious. He chose not to do so, but instead chose to end Mr List's employment early. In the absence of any fair process and in the absence of any direct evidence of any misconduct by Mr List, these actions can not be justified. The actions of the next day merely compounded the problem.
23. It follows that Mr List's employment was terminated unjustifiably and that he was unjustifiably disadvantaged in the course of his employment. He is entitled to the two weeks pay he has lost, namely \$1,531. He is also entitled to compensation under s.123(c)(i) of the Act. In this regard I accept that Mr List was upset about the way he was treated by the Office of the Clerk. However, I also need to take into account that Mr List came across as a fairly robust individual able to deal well (in his own way) with the set backs that life sometimes places in people's way, that he has the benefit of

this determination to “clear his name”, that he has subsequently obtained alternative employment in the Parliamentary complex (albeit not full time), that his employment was only terminated two weeks early and that he had not been employed in the Office of the Clerk for a long period. Taking all these factors into account a sum of \$6,000 is appropriate. There is no reason to make any deduction from this sum for contributory actions by Mr List. On the evidence provided, the only potential issue could be Mr List’s behaviour at his desk after he was told he had to leave the next day. However, in this context any displeasure expressed by Mr List over his treatment is understandable and in any event, the complainant was not called to evidence her concerns.

24. I do not accept that the ending of Mr List’s employment agreement two weeks early has had a significant impact on work opportunities elsewhere in the Parliamentary complex (as highlighted above) and decline to make any additional compensation under s.123(c)(ii) accordingly.
25. Mr List was unjustifiably dismissed/disadvantaged in his employment. I therefore order the Office of the Clerk of the House of Representatives to pay to Mr Kevin List the sum of \$1,531 in remuneration and \$6,000 in compensation under s.123(c)(i) of the Act.

### **Costs**

26. Costs are reserved.

**G J Wood**  
**Member of Employment Relations Authority**