

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Peter John Curtis Capon (Applicant)
AND Royal Commerce Company Limited trading as Royal English College
(Respondent)
REPRESENTATIVES Philip C Butler, Advocate for Applicant
Scott Wilson, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 30 September 2004
DATE OF DETERMINATION 6 May 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Capon says he was unjustifiably dismissed from his teaching duties by the respondent and claims lost remuneration, compensation and costs.

[2] The respondent denies the dismissal was unfair saying that Mr Capon was on a justified fixed term agreement and was dismissed fairly. It declines the remedies he seeks.

The issues

[3] The Authority needs to determine;

- was Mr Capon employed on a legitimate fixed term agreement; and
- was his premature justified in the particular circumstances of this case; and
- whether the applicant contributed to the events leading up to the dismissal; and
- if Mr Capon was unjustifiably dismissed what remedies are appropriate; and
- the matter of costs.

What caused the problem?

[4] The applicant had been employed since 5 September 2002 on a number of fixed term arrangements. The relevant agreement here is one which began on 4 February 2004 and was set to expire on 9 April 2004. This agreement required the applicant to tutor students and mark their work

for 23 hours per week at an hourly rate of \$26.00. While previously employed as an ESOL tutor, this particular agreement resulted from a request from the respondent that Mr Capon tutor some accountancy classes. Mr Capon, although not an accounting graduate, had some qualifications the respondent regarded as relevant. It was agreed that the applicant's deployment in this role was a trial.

[5] The course was a trial in two senses. Firstly, the respondent wanted to determine whether the new course it was offering would "pull" the paying students and secondly, whether Mr Capon had the skills to deliver the course. It was not a trial in the sense of a probationary teaching position.

[6] On Friday 27 February 2004 Mr Capon found an undated letter in his pigeon hole asking him to attend a meeting to discuss some concerns. The concerns were not set out in the letter. The applicant attended a meeting with Mr Ron Greaves, the Principal and the Director of Business Studies, Mr Graham Sanders on Monday 1 March 2004. The respondent's representatives maintain that at the meeting they discussed the company's concerns about mistakes the applicant had made in the marking of a test. Further, Mr Greaves says that he told the applicant that his work performance was under review and that the company could not guarantee his future employment.

[7] On Monday 8 March 2004 Mr Capon received a letter dated 1 March 2004 advising that a further decision regarding future employment would be made on 8 March 2004 and that he had two weeks to show he was capable of delivering the course to the standard required by the company. Significantly it also contained two weeks notice of termination.

[8] The following day Mr Greaves called the applicant to a meeting and advised him that the company would be dismissing him on Friday 12 March 2004.

[9] The respondent contends that in the period immediately prior to the dismissal of the applicant it provided Mr Capon with all the support and resources he required to ensure that the course could be completed in the manner in which it expected. The applicant did not agree that this had been the case.

[10] On 11 March 2004 the applicant received a letter from Mr Greaves the significant part of which reads;

Dear Peter,

At the meeting on 1 March it was clearly stated and witnessed by Graham that we intended to cancel your contract in two weeks which we are entitled to do under the terms of the contract you signed.

We told you at the time that we had very serious concerns of you being capable of delivering at the course.

Graham pointed out to you that you had not marked the student exams papers correctly.

Graham had to try and explain to several students why you had instructed the students incorrectly.

Several students did not want to come to your class because they did not believe you.

We agreed to review the situation on 8 March, but the fact is that we gave you notice of termination on 1 March. This was witnessed by Graham at the meeting. The letter dated 1 March was placed in your pigeon hole on 1 March after you left to go home that night.

On going feed back from the class during this period was that they were not happy with you and had lost confidence in you as a teacher and wanted another teacher.

Clearly this situation could not be allowed to continue, hence the action taken to cancel your contract early.

As we could not inform you Friday 27 February of our decision, due to your failure to check your pigeon hole, we were not able to have the meeting until Monday 1 March. Consequently, we will pay you until Monday 15 March as per the contract.

Ron Greaves

Principal

[11] On 10 March 2004 the applicant wrote to Mr Greaves and the burden of that letter, after highlighting some communication difficulties over the original note left for the applicant, relates to the early termination of the contract and the failure to pay two weeks notice. A key section of the letter reads

...
I feel aggrieved that in spite of your words that would give me an opportunity to come up to standard within two weeks, in actuality, only six working days were provided. This seems manifestly unfair in that you offered me that position to deliver Business Diploma Accounting modules. I didn't ask for it. Your letter of 3 February clearly states you would review the situation at the end of the contract, yet the contract will be cut short by four weeks to end on 12 March...

...
Furthermore, it is difficult for me to know which benchmarks I have not met when they are so ill defined as to be unrecognizable. How am I being assessed? Thus, it is impossible for me to know what I should do when problems arise...

...
Through all this, problems with conflicting information, changing standards together with slow and confusing communication levels have led to a right royal fiasco. It is my view that the appropriate action for you is to pay out my contract through to and including Friday 9 April.

[12] Clearly, the respondent took a different view as attempts at mediation proved unsuccessful and the matter proceeded to investigation with the Authority.

The investigation meeting

[13] At the investigation meeting several significant issues were aired, among the key acknowledgements was Mr Sanders accepting that Mr Capon had qualifications to teach the subject to the standard required.

[14] This investigation proceeded without written statements of evidence as both parties sought some urgency given travel commitments. Initially, the respondent was represented by Mr Greaves. Mr Wilson later arrived to represent the respondent's interests. Prior to his participation the meeting progressed by way of question and answer and this had largely been completed before Mr Wilson's arrival. Counsel's subsequent submissions for the respondent have to some extent relied on reported evidence but substantially on the paper trail between the parties.

Discussion and analysis

[15] The applicant was employed under a fixed term contract on agreed terms. Procedural fairness requirements relating to a dismissal apply equally to employees on fixed term agreements as to those on so called permanent agreements.

[16] A key question is, what legitimate expectations did the applicant have under the terms of the agreement. Surely he could expect to complete the term of the agreement unless issues arose under clause 9 of that agreement.

[17] In this clause the key is set out in 9.2.

The provision in clause 9.1 shall not prevent the Employer from summarily terminating employment in the case of serious misconduct or absent without reasonable cause or for any justified cause. (Emphasis is mine).

[18] The respondent's case rests upon its finding that Mr Capon failed to deliver the Business Studies course to the standard it required. This is a performance/competence issue and a case law precedents clearly set out in *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 660 need to be applied. I regard with some scepticism the respondent's suggestion that permanent employment was to be offered to Mr Capon had he successfully delivered this course. The fact is he'd been engaged on a succession of fixed term agreements since commencing in September 200. Given that history I think it highly improbable that the respondent would have changed its practice.

[19] The respondent brought its concerns to the applicant's notice, maintains it *counselled* him regarding improvement and provided the resources necessary. The applicant says the notice to him was initially poorly communicated, the counselling vague and non-specific and his premature dismissal in these circumstances was unfair.

[20] Faced with the situation of student complaints and some students choosing to absent themselves from the Business Studies classes, the respondent needed to act and was entitled to do so. It put the applicant under a supervisory regime with Mr Sanders, the head of the Business Studies School, but with little apparent success. Mr Sanders took over the course delivery himself following the applicant's dismissal.

[21] The question of whether the respondent was entitled in the specific circumstances to employ Mr Capon on a fixed term agreement is at issue. Mr Butler contends it was not, as the key purpose was to determine the applicant's suitability in a changed teaching role. On the other had the respondent submits that it was unsure whether it could attract students to the course and so was trying the module to test the water as well as determining the applicant's capacity to deliver it. The relevant section of the act is section 66.

[22] Another question is whether the applicant was offered the opportunity to have support or representation at the 1 March meeting. Mr Greaves' evidence was that it was offered, the applicant agrees it was to the extent that Mr Sanders was offered and Mr Capon accepted this offer. Two issues arise here. The applicant's employment was at risk. It was naïve of Mr Capon to accept Mr Sanders as his support person given the potential threat to his employment. It was a situation calling for some expertise and total independent advice. Secondly, while the offer by Mr Greaves was well intentioned, it is abundantly clear that Mr Sanders had a serious conflict of interest. That should have been apparent to Mr Greaves and Mr Sanders if not to the applicant. In short I believe they should have insisted on outside representation or support.

Determination

[23] I find Mr Capon was unjustifiably dismissed by the respondent as it failed to provide adequate supervision to him and ended his agreement prior to the expiry date.

[24] The applicant did not contribute to his dismissal. The respondent accepted the risk of Mr Capon not measuring up by proposing he conduct the Business Studies module when his service to the respondent was solely in ESOL to that point. While I accept that in an attempt to maintain Mr Capon's employment given the drop in student enrolments in English, the respondent sought to deploy him in the Business Studies course, it has to accept that such a move was somewhat hazardous. Had support and supervision been in place from the outset, the problem may never have arisen.

[25] I accept that for this particular agreement the respondent has met the threshold set by s66 of the Employment Relations Act 2000.

[26] I have no doubt that the applicant understood and accepted the terms of the fixed term agreement offered to him and the reasons for it. I base this on the documents presented to the Authority and the lack of any objection by the applicant on this ground prior to the dismissal.

Remedies

[27] Having found that Mr Capon was unjustifiably dismissed I must considered appropriate remedies. As the applicant lost remuneration as a result of his dismissal I order the respondent to reimburse the applicant for remuneration lost between 12 March 2004 up to and including 9 April 2004. I decline the applicant's claim for losses beyond the expected expiry day of the fixed term agreement.

[28] In the course of the investigation I heard significant evidence outlining the difficulties the applicant faced following his dismissal. I accept that Mr Capon has suffered hurt and humiliation and award him the sum of \$4,000.00 on this head of his claim.

Costs

[29] To avoid additional expense to the parties I make an order for costs now. The investigation meeting was relatively short and no written briefs were provided. Mr Butler seeks a contribution of \$2,000.00 towards his client's costs. In the circumstances I believe it fair to award the applicant \$1,400.00 as a contribution to his legal costs.

Paul Montgomery
Member of Employment Relations Authority