

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Steve Butler (Applicant WEA 135/05 and Respondent WEA 206/05)

AND Terson Industries Limited (Respondent WEA 135/05 and Applicant WEA 206/05)

REPRESENTATIVES Frances Lear for Mr Butler
Don Frampton for Terson Industries Limited

MEMBER OF AUTHORITY P R Stapp

INVESTIGATION MEETING Wellington, 5 July 2005

DATE OF DETERMINATION 22 July 2005

DETERMINATION OF THE AUTHORITY

Background

1. A statement of problem (WEA 135/05) was filed in the Authority by Steve Butler on 18 April 2005. Mr Butler's problem related to a claim for wages he says are due to him that Terson Industries Limited (Terson) has withheld. He is also seeking a penalty for the breach by Terson of his entitlement under the agreement.
2. On 1 July 2005 the Mr Butler decided not to pursue resolving his problem by a personal grievance claim. However, the applicant has continued to pursue the penalty claim and his claim for the wages that were withheld, and he is seeking costs.
3. The parties attended mediation services in the Department of Labour in an endeavour to resolve the matter. The matter remained unresolved.
4. On 25 May 2005 Terson filed a statement of problem (WEA 206/05) claiming damages due to Mr Butler providing only four days notice of termination instead of one month specified in the parties' individual employment agreement.
5. During the Authority's investigation the thrust of Terson's argument focused on Mr Butler failing to act in good faith by not engaging in the process of a negotiation under the

provisions of the employment agreement and failing to inform the respondent of his intentions.

The Employment Relationship Problem

6. Steve Butler and Terson entered into an employment relationship under the terms of a fixed term employment agreement on 21 January 2003. The expiry date of the individual employment agreement was 31 January 2005. That was the agreement. What I will call a loyalty allowance to work the full term of the agreement was payable to Mr Butler monthly and both parties say the loyalty allowance applied until 31 January 2005, (although the agreement mistakenly refers to 28 February 2005), when the amount paid would cease.
7. On 19 December 2004 Mr Butler wrote to the company's director, Don Frampton, in regard to the "*upcoming anniversary of our two year employment agreement, being the 21st January 2005(sic)*". At this time Mr Butler considered the arrangement was still a fixed term.
8. In that letter Mr Butler requested to know what Terson's intention was regarding the employment agreement after the above date, because it was close to Christmas, there was a holiday close down period until Monday 17 January 2005 and that it would leave only four days for the company to respond in regard to its intentions.
9. Mr Butler and Mr Frampton met on 21 December 2004. Mr Frampton indicated that the reasons for the fixed term were no longer applicable. They both have a different impression about the purpose and outcome of their meeting. In essence Mr Butler believed that Mr Frampton required him to answer various questions in regard to his performance before deciding if the company could offer him a new employment agreement. Mr Butler says that at this point the focus of attention was on addressing performance matters and feedback and not negotiating a new agreement.
10. Mr Frampton says that the scope of this meeting was to commence the basis for negotiating a new employment agreement since the reason for the fixed term in the parties' existing employment agreement was no longer applicable. He considered that in accordance with the agreement he could negotiate with Mr Butler and backdate it if it went past the original expiry date of the fixed term. However, he kept up his sleeve what he would do about the payment of the loyalty allowance that under the existing agreement would cease on the 31 January 2005.

11. On 25 January 2005 Mr Butler informed Mr Frampton that he would not be renewing his employment agreement when it expired on Monday 31 January 2005. He informed Mr Frampton that 31 January 2005 would be his last day of employment. Mr Frampton replied accepting what he called Mr Butler's resignation, and requested him to consider the notice period required under the employment agreement to work a period of one month's notice.
12. Mr Butler worked up to and including Monday 31 January 2005. On 21 February 2005 Mr Butler was provided with his final pay slip from the company for January that included an adjustment on the payment for short notice (\$3,373.01). He was paid a gross sum of \$689.97. Mr Butler says that he is entitled to the adjustment that was withheld, ie \$3,373.01.

Terms of the individual employment agreement

13. For completeness the following terms have been taken from the parties' employment agreement:

4. Term

- 4.1 *This agreement is for a fixed term (for reasons specified in SCHEDULE 1) for the period from the Commencement Date as specified in SCHEDULE 1 until the Expiry Date specified in SCHEDULE 1, unless earlier terminated pursuant to other provisions of this agreement. Nothing in this agreement shall prevent the parties, at or before the Expiry Date, from entering into a subsequent agreement; but nothing in this clause shall be interpreted or understood to give the Employee any expectations that this agreement will be renewed, or that any subsequent agreement will be entered into, and no assurance or arrangement for any renewal or subsequent agreement shall bind either party unless such assurance or arrangement is in writing signed by both parties.*
- 4.2 *If the parties enter into a new agreement providing for a new period of employment, despite any similarity between the new agreement and this agreement, the Employee's employment shall not be construed as being continuous, except for the purposes of the Holidays Act 1981 and any amendments thereto.*
- 4.3 *Any negotiations for a new agreement and services provided by the Employee that may occur after the Expiry Date shall not constitute a waiver of the Expiry Date, except that if Terson Industries Limited agrees, the Employee may continue to provide services whilst the negotiations are in progress in which case he or she shall continue to be subject to the terms of this agreement until such time as the negotiations are concluded and/or the Employee ceases to provide the services.*
- 4.4 *For the avoidance of doubt, either of the parties **may** terminate the agreement in accordance with 20.1 during negotiations under Clause 4.3, or once those negotiations have concluded. (My emphasis).*

Clause 20.1 reads as follows:

“20. Termination

- 20.1 *Notwithstanding any monetary sum specified in this agreement, either party to this agreement may terminate it upon giving the other party not less than four weeks’ notice in writing. Terson Industries Limited may elect to pay wages in lieu of notice for all or part of the notice period and/or ask the Employee upon giving five working days notice to take paid annual leave to the extent the Employee has any such paid leave entitlement as at the date such leave is to be taken.*
- 20.2 *If the Employee fails to provide four weeks’ notice, Terson Industries Limited may deduct from any monies due by Terson Industries Limited to the Employee the sum equivalent to the normal base income, (together with any normal ongoing allowances) the employee would have received the period equivalent to the period of notice not given.*

14. In the schedule to the agreement Clause G (Expiry Date) reads as follows:

*“The expiry date of this agreement is: **31 JANUARY 2005.***

Note: This is a fixed term agreement because the Account Manager Role and/or TIL’s Human Resource Structures may need to change over time as a result of TIL’s ongoing changing needs. In particular, the Wellington Branch might in future alternatively encompass the North Island as sales territory in a different manner and, irrespective, it is not currently known what skill sets may be needed by an Account Manager if specialisation within the current Account Manager role (with correspondingly changed remuneration packages) if decided by TIL to be more appropriate in meeting TIL’s needs upon or following the expiry date.

The Employment Relations Amendment Act No.2 2004

15. Under s.66 of the Employment Relations Act 2000 as amended by the Employment Relations Amendment Act (No.2) 2004 s.66(4) and 66(5) provide new provisions as follows:
- (4) *If an employee and an employer agree that the employment of the employee will end in a way specified in sub-s.(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 sub-s.(4), including failure to comply because the reasons for ending the employment agreement 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 sub-s.(4), the employer may not rely on any term agreed under sub-s.(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 the term as ineffective."

16. Prior to the enactment the way in which the employment will end and the reasons for ending the employment in that way did not have to be in writing.

The issues in this matter are as follows

17. Was Mr Butler required to give notice under the terms of his employment agreement where the reasons for the fixed term were no longer applicable at least from 21 December 2004 (the date of Mr Butler's and Mr Frampton's meeting)?
18. Does the adjustment contained in the wages provided to Mr Butler, upon the termination of his employment with Terson, constitute an unauthorised deduction? Or in other words, was the amount lawfully withheld by the respondent in adjusting the final pay and wages for work commitments or requirements under the terms of the employment agreement.
19. Is any breach by the respondent in regard to the way in which it has treated this adjustment a matter for a penalty?
20. Did Mr Butler intentionally, unlawfully or deliberately fail to provide notice under the employment agreement or was he entitled to complete the term of the agreement reasonably believing that he had a fixed term arrangement with the respondent?

Conclusions

21. The agreement ended on 31 January 2005 by expiry of a fixed term.
22. Section 66 (5) of the Act says that the employment agreement remains valid, except the employer cannot end the employment relying on the fixed term. In other words nothing in the Act affects the parties' relationship.
23. Clause 4.1 of the agreement does not prevent a subsequent agreement but does not require it either. In fact there is no expectation of renewal of the fixed term agreement.
24. Clause 4.2 reinforces the point that a new agreement is a separate agreement. Clause 4.3 confirms the point that working beyond the expiry does not constitute a waiver. Clause 4.4 is simply for avoidance of any doubt. It is permissive as it provides only the agreement *may* be terminated by either party in accordance with 20.1.

25. It is my conclusion that the expiry date of the agreement continued to apply notwithstanding the reasons for the fixed term no longer applying because the agreement remained valid. Mr Butler was entitled to rely on its expiry to end the employment relationship. A subsequent agreement was not negotiated, and although the agreement permitted negotiations to occur to extend the agreement, no arrangements had been reached, let alone an agreement to continue negotiations and back date the outcome that the agreement permitted.
26. Mr Butler was therefore entitled to rely on the expiry date without needing to give notice. In the circumstances no adjustment should have been made to the final pay entitlement because notice was not required as Mr Butler relied upon the expiry date, which the parties had agreed would end the agreement when they signed it. Terson Industries Limited is required to pay the sum of \$3,373.01 to Mr Butler.

Breaches and the claim for penalties for an unlawful deduction

27. I am not satisfied that the deduction, while unlawful, followed a wilful decision of Mr Frampton to flout his responsibilities. The money not paid to Mr Butler was calculated on the basis of Mr Butler not giving notice that Mr Frampton considered should have been given under the terms of the agreement for work commitments or requirements from Mr Butler in the period that notice was expected. Because Mr Frampton genuinely believed that he had wanted to negotiate an extension of the agreement and no notice was given by Mr Butler, when Mr Frampton believed it should have been, Terson adjusted the final pay for the relationship to end a month later. A deduction provision existed under the agreement that both parties had signed but was clearly applicable only if Mr Butler resigned during the fixed term agreement (clause 20.2). This is a matter that has more to do with a dispute over the application of the expiry of the employment agreement and Mr Frampton acting on the terms as he understood they applied. This is not a situation for any penalty because there has not proven to be any deliberate and wilful or intentional breach to deny Mr Butler money he should have been paid. However Mr Butler should be paid interest on the amount of money wrongfully deducted or adjusted that he has not had the benefit to use.

The claim for damages by Terson Industries Limited

28. Mr Frampton has complained that Mr Butler did not act in good faith to negotiate and give him notice under the terms of the agreement. The terms in the agreement were permissive. Mr Butler was entitled to rely on the terms of the agreement that included it ending on 31 January 2005 as a valid agreement. Under the terms of a fixed term agreement notice was

not required when the term was relied upon. The claim for damages is not an actual claim but a theoretical calculation in circumstances where there has been a dispute over applying the ending of an employment agreement. The period in question was also affected by Christmas and a holiday close down until Monday 17 January 2005. This is not a situation for damages.

29. Mr Butler did not have to negotiate with Mr Frampton since the provisions in the agreement were permissive to extend it. Mr Butler was able to rely upon the expiry date in the agreement that under the law has continuing validity even although the reasons for the original fixed term were not applicable. If Mr Frampton was being genuine he could have been expected much earlier to indicate he considered the reasons were no longer applicable for the fixed term and reached common ground on that with Mr Butler, and not kept up his sleeve, what would happen to the loyalty allowance, which Mr Butler could have reasonably expected to lose and impact on his employment. In the circumstances Mr Frampton cannot accuse Mr Butler of not acting in good faith.

Terson Industries Limited is to pay Steve Butler

30. The sum of \$3,373.01 and interest on that sum of 7% per annum from 31 January 2005 until the date the sum owing is paid.

Costs

31. Costs are reserved.