

term period expiring in December 2007 and December 2008 respectively. In December 2007 Nector advised Ms Allardice that they were withdrawing the offer of employment contained in the second agreement and proceeded to terminate her employment. Ms Allardice claims the termination of her employment amounted to a dismissal which was unjustified.

[4] Nector says the second agreement provided to Ms Allardice in December 2007 contained an offer of employment which it was entitled to withdraw as there was no meeting of the minds between the parties as to the terms of Ms Allardice's employment from January 2008 onwards.

[5] In addition to her claim for unjustified dismissal Ms Allardice claims Nector is in breach of its statutory obligations of good faith and seeks a penalty.

[6] Nector while disputing the allegations of bad faith, has counter-claimed that Ms Allardice is herself, in breach of the statutory obligations of good faith.

[7] The issues for determination:

- Was the employment relationship a fixed term relationship?
- Was Nector entitled withdraw the offer of employment in December 2007?
- If the answer is no, what, if any, remedies should be awarded to Ms Allardice?
- Has Nector breached its obligations of good faith and if so, what penalty should be awarded?
- Is Ms Allardice in breach of her good faith obligations?

Was the employment relationship a fixed term relationship?

[8] Ms Allardice was under the misapprehension that her employment had been terminated due to the expiry of the purported fixed term in the first agreement received in March 2007. Nector denies it relied on the fixed term to bring about the end of the relationship. For the sake of completeness, I have taken this opportunity to give consideration to whether a fixed term agreement existed between the parties.

[9] For the period 2000 to December 2006 inclusive Ms Allardice was subject to a contracting agreement with Netcor. In November 2006 Ms Allardice was advised that Netcor would no longer be using the services of independent contractors and wished to engage her as an employee.

[10] Ms Allardice was not happy with the change in status. Without entering into written employment agreements, Netcor began treating Ms Allardice as an employee and deducted PAYE from its payments to her albeit Ms Allardice had not completed a Tax Code Declaration form. Ms Allardice's work remained the same.

[11] While initially disputing her changed status, Ms Allardice eventually accepted that she was in an employment relationship with Netcor. Netcor provided Ms Allardice a written employment agreement in March 2007. Ms Netcor's accountant wrote to Netcor on 26 March and then again on 7 August 2007 outlining concerns with the proposed agreement including the fixed term.

[12] In March 2007 Ms Raewyn Hill, a director of the respondent, alleged Ms Allardice had been overpaid. Netcor put any further discussions about the employment agreement to one side while it investigated the claims of overpayment. This took until August 2007, at which time Netcor advised Ms Allardice the allegation was without substance.

[13] On 23 August 2007 Ms Allardice, along with her accountant Mr Britten, met with Raewyn and Jim Hill. It was agreed no further correspondence would be entered into about the agreement until Netcor's accountant had been in touch with Ms Allardice to discuss her employment status. This did not occur until October 2007.

[14] During October and November 2007 both Ms Allardice and Mr Britten unsuccessfully attempted to seek resolution to the outstanding issues with respect to the employment agreement.

[15] On 16 November Ms Allardice, together with other Mental Health Tutors were advised they would receive new employment agreements by the end of November 2007. This new agreement was received by email by Ms Allardice on 6 December.

She was provided with one week to consider and sign the agreement or the offer would lapse.

[16] Mr Peter Fleischl, Ms Allardice's partner, contacted Netcor's manager, Mr Greg Chan between 6 and 11 December to encourage him to expediently conclude an agreement with the applicant to enable her to move forward. Ms Allardice met with Mr Chan on 11 December 2007. Mr Chan was unable to answer all Ms Allardice's questions at that meeting and undertook to make further enquiries and reconvene the meeting.

[17] The meeting was reconvened on 18 December. At that meeting Mr Chan advised Ms Allardice that he had not reviewed all the correspondence regarding the issues raised by her with regard to the agreement and was therefore not in a position to enter into negotiations with her. It was agreed that Ms Allardice would document the issues still requiring clarification and negotiation and provide that information to Mr Chan, by 20 December 2007.

[18] Ms Allardice through Mr Britten wrote to Mr Chan as promised, on 19 December 2007. On 20 December at 12.36pm Netcor wrote to Mr Britten requesting the signed employment agreement be returned by 4.00pm or the offer would be withdrawn.

[19] When the signed agreement was not forthcoming, Netcor wrote to Mr Britten on 21 December purporting to withdraw the offer of employment. This notice resulted in Ms Allardice's employment being terminated.

[20] I am satisfied Ms Allardice worked throughout 2007 as an employee. The oral terms and conditions of employment were not in dispute with the exception that Netcor maintained Ms Allardice was at all times subject to a fixed term.

[21] The Employment Relations Act at s. 66 allows employees and employers to agree that employment will end at the close of a specified period. However, before such an agreement is enforceable there must be genuine reasons based on reasonable grounds and the employee must be advised of when or how the employment will end and the reasons for the employment ending in that way.

[22] Further, s.66 requires such agreements to be in writing. An employer can not rely on any term agreed under s.66 if the employer has failure to meet its requirement for the fixed term agreement to be in writing.

[23] In applying s.66 to this case, the Authority must firstly, be satisfied that Ms Allardice and Netcor had reached an agreement that Ms Allardice's employment would end at the close of a specified date or period.

[24] I am satisfied Ms Allardice has not agreed that her employment should be subject to a fixed term arrangement. Netcor began treating Ms Allardice as an employee in February 2007. There was no discussion or indication prior to that, that her employment would be subject to a fixed term nor was she provided with the reasons for a fixed term arrangement. The employment agreement was not provided until March 2007. On 26 March 2007 Ms Allardice, through Mr Britten, made it clear to Netcor that she did not accept that a fixed term agreement was appropriate.

Was Ms Allardice dismissed?

[25] On 20 December at 12.36pm Netcor wrote to Mr Britten requesting the signed employment agreement be returned by 4.00pm or the offer would be withdrawn. When the signed agreement was not forthcoming, Netcor wrote to Mr Britten on 21 December purporting to withdraw the offer of employment.

[26] Ms Allardice says this action by Netcor resulted in her being dismissed from her employment by an unjustified action. Netcor disputes Ms Allardice was dismissed and says that as no terms of employment could be agreed and negotiations had ceased, the employment simply came to a conclusion.

[27] I have concluded that Ms Allardice was dismissed by Netcor in December 2007. I have also concluded that that dismissal was unjustified in all the circumstances.

[28] It was common ground that throughout 2007 Ms Allardice continued to object to her status being changed from that of independent contractor to employee. She also

disputed aspects of the proposed written employment agreement and sought to have those issues discussed.

[29] Netcor's first response to Ms Allardice's letter of 26 March did not occur until August 2007. This was an inordinate delay which has not been satisfactorily explained by Netcor.

[30] The next opportunity for the parties to sit down and discuss both the nature of the employment relationship and the proposed employment agreement did not occur until December. At that time Mr Chan became involved. He offered to find answers to Ms Allardice's questions but failed to. He then attend a reconvened meeting completely uninformed and not in a position to enter into any negotiation over the issues.

[31] I am satisfied that throughout 2007 Ms Allardice was attempting to regain her status of independent contractor and that it was not until 19 December that she accepted she was an employee and had been treated as such for the 2007 year.

[32] Ms Daniell, on behalf of Netcor referred the Authority to the decision of the Employment Court in *Timmins v Asure New Zealand Limited* [2006] 1 ERNZ 571 to support her contention that in the absence of any other agreement the employment relationship was a temporary arrangement whilst the parties attempted to negotiate and agree on terms of employment and when they could not Netcor was within its rights to withdraw its offer.

[33] I do not accept Ms Daniell's submissions. The *Timmins* decision can be distinguished on its facts. Asure New Zealand and Mr Timmins had specifically agreed pursuant to an individual employment agreement that his employment was for an initial training period which was for a fixed term. There was no dispute that while the parties attempted to negotiate a written agreement Mr Timmins was employed and paid as a casual employee with no expectation of ongoing work. That agreement was an oral agreement with the last oral offer of employment ending on 4 January. Ms Allardice was never subject to a casual employment arrangement.

[34] Ms Daniell submitted that Ms Allardice's employment was a temporary arrangement while the parties attempted to negotiate and agree on terms of employment. As set out earlier, in order for the employment relationship to be temporary, the employment would have to end on a specific day or at the end of a specific project. This type of arrangement falls under the ambit of s.66 of the Act and I have already found that there was no fixed term agreement pursuant to the Act. No temporary arrangement can be inferred from the facts of this case.

[35] I have concluded therefore that in the absence of any agreement to the contrary, Ms Allardice's employment was of an indeterminate nature. In withdrawing the offer of a new employment agreement Netcor ended Ms Allardice's employment.

[36] Netcor's actions in terminating Ms Allardice's employment fell well short of what a fair and reasonable employer would have done in all the circumstances and in terms of what it was required to do under s.103A of the Act.

Remedies

[37] Turning to the remedies to which Ms Allardice may be entitled to resolve her grievance, I am satisfied there was no contributory fault or blame on her part. Ms Allardice's desire to negotiate the terms and conditions of her employment does not amount to blameworthy conduct for the purposes of assessing contribution under the Act.

[38] Ms Allardice provided substantial evidence to the Authority of job applications she had made since her dismissal. Ms Allardice has not been successful in any of her applications. In my view the appropriate period for assessing reimbursement of lost remuneration is three months. Ms Allardice is entitled to reimbursement for lost wages in the sum of \$16,224.00 gross.

[39] Ms Allardice has also provided compelling evidence, including independent medical evidence as to the affect the loss of the job she had held for 8 years had on her. In the particular circumstances of this case, I consider the appropriate award for compensation under s.123(1)(c)(i) of the Act is the sum of \$10,000 for the distress caused by the abruptness of the dismissal.

Breach of good faith

[40] The parties to an employment relationship are statutorily bound to deal with each other in good faith. This obligation extends to a requirement that the parties be responsive and communicative. Ms Allardice claims Netcor breached its obligations of good faith in that it was not responsive and communicative in its employment relationship with her.

[41] At the investigation meeting Netcor was unable to provide any reasons as to why it took five months for it to respond to the issues Ms Allardice raised in her letter to Netcor regarding both her employment status and her employment agreement. When Mr Chan met with Ms Allardice in December to sort out the issues he was uninformed and unable to enter into any meaningful dialogue with her.

[42] It was not until the letter of 21 December that Netcor addressed some of the issues raised by Ms Allardice in her letter of 26 March. Netcor advised Ms Allardice that the issues of redundancy compensation and the fixed term nature of the employment agreement were not negotiable. Netcor also advised that clauses dealing with continuing education and reimbursement of expenses would not be inserted into the employment agreement.

[43] It seems somewhat ironic that the main issue of dispute between the parties throughout 2007 was Ms Allardice's assertions throughout that she should be an independent contractor. Had she achieved her ambition, she would not have had redress to the personal grievance provisions of the Act.

[44] That said however, Netcor was required to deal with Ms Allardice in good faith. Ms Allardice had been given limited opportunity to discuss or negotiate on the terms set out in the employment agreements. Then at the 11th hour Netcor acted very swiftly indeed to terminate the relationship, rather than spend any more time in what it viewed as fruitless negotiation. These actions were not the actions of an employer being responsive and communicative in an employment relationship.

[45] I am satisfied that in this case a penalty is warranted. Having regard to all of the circumstances I order Netcor to pay a penalty of \$1,000 and the whole of that penalty is to be paid to Ms Allardice.

Counter-claim

[46] In its Statement in Reply Netcor disputes it was in breach of its obligations of good faith and counter-claims that it was Ms Allardice who was in breach of the good faith obligations and should pay a penalty.

[47] Netcor has failed to make out its claim with respect to its counter-claim.

Costs

[48] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Ms Allardice may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority