

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 494/10  
5285771

BETWEEN                      STEPHEN ABSOLUM  
   Applicant  
  
AND                                THE FLETCHER  
   CONSTRUCTION COMPANY  
   LIMITED T/A BRIAN PERRY  
   CIVIL  
   Respondent

Member of Authority:        Dzintra King  
  
Representatives:              David Feist, Advocate for Applicant  
   Paul Tremewan, Counsel for Respondent  
  
Investigation Meeting:        28 September 2010 at Auckland  
  
Submissions received:        6 October 2010 from Applicant  
   12 October 2010 from Respondent  
  
Determination:                26 November 2010

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**DETERMINATION OF THE AUTHORITY**

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**EMPLOYMENT RELATIONSHIP PROBLEM**

[1]     The applicant, Mr Stephen Absolum, says he has been unjustifiably dismissed. Mr Absolum was purportedly employed on a fixed term contract and says he was terminated prior to the expiry of the fixed term. In the alternative, he says that if the employment agreement was not a genuine fixed term agreement he was unjustifiably dismissed on the grounds of redundancy.

[2]     The agreement provided Mr Absolum was to work as a hammer hand based in Auckland and that he might be required to work at other locations as required by the

company. If the company was to relocate him permanently it would consult with him in good faith.

[3] The term of the agreement provided:

*We both agree to be bound by this agreement from when your employment is confirmed (see Confirmation of Employment clause later in this letter) until either of us ends the agreement under the Termination clause outlined later in this letter.*

[4] The duration of the agreement was as follows:

*Your employment is on a fixed term basis due to the limited duration of the **Upper Nihotipu Dam Upgrade**. Your employment will commence on the date specified and subject to the Termination clause, it will continue until **11 December 2009** or when the project has been completed, whichever comes first.*

*In the event that unexpected circumstances arise that cause the agreement to be cancelled or the work to be suspended at a date earlier than the anticipated completion date then we reserve the right to cancel this agreement at that earlier date.*

*There can be no expectation of continued or further employment after the stated termination date or completion of the project because your employment contract is scheduled to coincide with the completion of the **Upper Nihotipu Dam Upgrade**. You acknowledge that the remuneration package contained in this agreement constitutes consideration for entering into a fixed term agreement.*

[5] The termination clause provides that either party could terminate on a week's notice written and that the company could pay in lieu.

[6] Mr Matthew Findlay, the Civil Operations Manager, said Mr Absolum started work on 9 March on the Takanini Manholes Project as the company was awaiting

approval to work on the dam. Mr Absolum spent the next six weeks on that project and the Auckland Airport Stand 19 Project before starting work on the dam on 14 April 2009.

[7] By mid May the dam project was progressing with the toe and crest of the dam well underway. With the completion of the control room concrete walls it was necessary to assess staffing levels.

[8] Mr Findlay said the skill mix was discussed and agreed between the project manager, the site supervisor and himself. Mr Absolum was not required as part of the team as there were sufficient resources using permanent labour and two senior contract carpenters.

[9] Mr Findlay accepted that one of the reasons for moving Mr Absolum was that his pay rate was higher than that of other workers.

[10] On 11 May the company was awarded the Waitakere Bridge Pier Repairs project which was due to start on 8 June. It was decided to terminate Mr Absolum's employment by allocating him to the new project rather than terminate his contract at the dam.

[11] In early June 2009 he was transferred to working doing repairs on the Waitakere Bridge.

[12] Mr Findlay said when he met Mr Absolum they did not discuss the contract. Mr Findlay simply outlined the need for Mr Absolum to change projects. He did not recall any objections.

[13] On 28 July 2009 Mr Absolum was asked to meet with Mr Findlay and was told that he was being terminated due to the recession and that as the bridge work would be finished on Friday that would be his last day. Mr Findlay told Mr Absolum there was no further work for him and would therefore give him a week's notice. He told Mr Absolum he would pay this week in lieu to allow him time to look for other employment.

[14] The work on the dam was completed on 21 December 2009.

[15] Both parties agreed that there was still work to be done when Mr Absolum was transferred to the bridge project.

[16] The fixed term agreement is clearly tied to the dam project.

[17] The employment start date was 9 March 2009. However, Mr Absolum did not begin work on the Nihotipu Dam until 14 April as the company was awaiting approval to commence work on the dam. In this six week period Mr Absolum was not employed on a fixed term contract as that contract related to the Nihotipu Dam.

[18] Section 66 (2) (a) provides that when an employer and employee agree that employment will end in a particular way, the employer must have genuine reasons based on reasonable grounds for specifying this.

[19] Subsection 4 (b) provides that the reasons for ending the employment in the way specified must be stated in the employment agreement. The agreement provides that employment would continue “*until 11 December 2009 or when the project has been completed, whichever comes first*”. It also says it is “*scheduled to coincide with the completion of the Upper Nihotipu Dam Upgrade*”.

[20] In *Julie Shortland v Alexander Construction Company Limited* [2010] NZEMPC 41 Couch J, referring to a similar provision in the employment agreement in question in that case, said that for the grounds to be reasonable the fact that the company had no other work in prospect had also to be included. As the agreement did not state that there was no other work available Couch J held that the agreement did not comply with s 66 and had to be regarded as being open ended.

[21] In the instant case, it is evident from the history of the employment that other work was available. Furthermore, the evidence established that the Nihotipu Dam project had not been completed at the time that Mr Absolum was removed from work on the dam and placed on work on the bridge.

[22] Mr Absolum's contract was not a genuine fixed term agreement. Even if it had been, its terms were not complied with by the employer.

[23] The termination clause provides for the giving of a week's notice subject to the right of the employer to pay in lieu. The employer cannot rely on this clause per se as the termination still needs to be justified.

[24] I do not accept the submission that Mr Absolum agreed to variations in the specified projects. If the periods of employment prior to and post work on the dam were also to be fixed term agreements it is evident that the provisions of s 66 were not complied with in either case.

[25] The applicant has argued that if it is not a fixed term employment agreement that the dismissal was unjustified and would appear to have been made on the grounds of redundancy.

[26] There was no consultation and a week's notice was given.

[27] The respondent submits that the procedure was fair and the applicant knew there were no other positions available. That begs the point that work on the Nihotupu dam was still continuing. There was evidence that one of the reasons for removing Mr Absolum from work on the dam was that his pay rate was higher than that of other staff who were kept on to work on the dam. I am not satisfied that there was no further work for Mr Absolum to do after 4 August when his employment terminated. Work on the dam was still continuing.

[28] Mr Absolum is entitled to be paid three months' lost wages. Mr Absolum claims \$1,000 per week gross in lost earnings. He is to be paid three months lost earnings. This totals \$13,000. Mr Absolum found some alternative employment but did not receive any earnings until 11 November. The amount of these earnings - \$145.84 net - is to be deducted from the gross amount owed by the respondent.

[29] Mr Absolum has also sought compensation for humiliation and distress. The respondent is to pay Mr Absolum the sum of \$4,000 pursuant to s 123 (1) (c) (i).

**Costs**

[30] If the parties are unable to resolve the matter of costs the applicant should file a memorandum within 28 days of this determination. The respondent should file a memorandum within 28 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority