

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 196/10
5287463

BETWEEN	THE POSTAL WORKERS UNION OF AOTEAROA First Applicant
	DOUG BEHAN-KITTO Second Applicant
AND	NEW ZEALAND POST LIMITED Respondent

Member of Authority: K J Anderson

Representatives: P Blair, Advocate for Applicants
N Jones, Advocate for Respondent

Investigation Meeting: 4 February 2010 at Rotorua

Determination: 29 April 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Firstly, there is a dispute about the interpretation, application and operation of a provision of the relevant collective employment agreement (“CEA”) relating to temporary and on call employees and the application and relevance of section 66 of the Employment Relations Act 2000 (“the Act”). In essence, the second applicant, Mr Behan-Kitto claims that the provisions of s.66 of the Act are not displaced by the relevant provisions of Part M of the CEA pertaining to when an on call employee is contracted under a fixed term agreement. Mr Behan-Kitto also claims that the fixed term employment agreement for a period of employment from 20th July 2009 to 19th October 2009 did not meet the requirements of s.66 of the Act and therefore it was unlawful. Finally, Mr Behan-Kitto claims that his employment under the fixed term

employment agreement was ended on 19th October 2009, with his relegation to on call status, and that this constituted an unjustified disadvantage to employment. In regard to resolution of the problem/s, both the Postal Workers Union of Aotearoa (“the Union”) and Mr Behan-Kitto seek answers to a number of questions that have been posed to the Authority for its determination.

Background Facts and Evidence

[2] Since November 2007, Mr Behan-Kitto has been employed as Postal Delivery Worker (“Postie”) with New Zealand Post Limited (“NZ Post”). This employment has been on an on call basis, apart from two fixed term periods of employment which are the subject matter of this dispute.

[3] The CEA between the Union and NZ Post, at Part M has a provision for **ON CALL EMPLOYEES**. The salient content for the matters requiring determination is:

8. *An on call employee is an employee who is designated by the company as such and has an ongoing relationship with the company but who is employed on a purely as and when required basis with no guarantee of any number of hours in a given period, provided that for any particular assignment the hours to be worked will be specified before the assignment begins. It is a condition of being designated “on call” that the employee make themselves reasonably available and repeated non-availability when offered work may result in the loss of on call status or termination of the relationship.*

9. *Where the expected duration of the engagement is in excess of two weeks and the engagement fits the criteria of a temporary/fixed term position, the employee will be afforded the same benefits as a temporary employee. Annual holidays and sick leave will accrue during that time at the rate applicable to the position to which they have been appointed and the employee may take leave during the period according to the usual application /approval process. The employee will revert to on call status at the end of the fixed term.*

[4] The relevant provisions for **TEMPORARY EMPLOYEES** are:

2. *A temporary employee is an employee who is employed on a continuous basis for a fixed term of employment. The term of employment will be specified before the employee begins in the employment offer letter. This letter forms part of the employment agreement.*

3. *The period of employment will generally be less than 12 months.*

[5] Effective from 19th January 2009, Mr Behan-Kitto moved from on call employment, (on an as required basis), to two periods of fixed term employment. The

first period was from 19th January to 18th July 2009 and the second period was from 20th July to 19th October 2009. The evidence of Ms Jenn Nikora, Delivery Leader for NZ Post – Rotorua Branch, is that Mr Behan-Kitto was offered the fixed term employment due to a “recast” which in basic terms, involves NZ Post conducting a review of the efficiency of its delivery rounds from time to time. Mr Behan-Kitto was offered the fixed term employment until the recast was finalised and the outcome decided.

[6] The change from on call to a fixed term employment for Mr Behan-Kitto is recorded in a letter from Ms Nikora dated 15th January 2009. The relevant content is:

This is to confirm our discussion regarding the change of hours for your position of on call to temporary. As you are aware the reason for the change of hours is to fill the position of outside delivery. Effective from 19 January 2009 to July 18 2009, the standard hours of work for your position of outside delivery are 22.3, which will be worked in accordance with the following roster.

After this fixed term period you will revert to your original on-call contract.

To accept this variation to the terms and conditions of your employment, please sign one copy of this letter and return it to me. Your other terms and conditions remain unchanged.

It subsequently transpired that a further period of fixed term employment was required and this was recorded in a further letter dated 20th July 2009 conveying that the fixed term of employment would be from 20th July to 19th October 2009. This letter is more detailed than the earlier letter in regard to the first period of fixed term employment but the intention and outcome is the same in that at the completion of the fixed term, the employment status of Mr Behan-Kitto returned to being on call. The evidence of Ms Florence Mills, Delivery Systems Leader – Waikato/Central Region, is that the installation date for the recasted delivery rounds was Monday 19th October and the new rounds began to be delivered on 20th October 2009.

[7] In the meantime, because it was intended that the temporary fixed term role being performed by Mr Behan-Kitto would become a permanent role, NZ Post advertised the position. Mr Behan-Kitto was interviewed but was unsuccessful and subsequently returned to his on call position.

[8] However, beforehand, on 10th October 2009, Mr Blair, Postal Workers Union, contacted Ms Trish Adler, Mail Centre Leader – Rotorua Mail Centre. In his email to

Ms Adler, Mr Blair informed that the Union considered that it regarded the employment status of Mr Behan-Kitto as “*permanent*” and that the position adopted by NZ Post that Mr Behan-Kitto was a temporary employee on a fixed term contract, was “*legally flawed*.” Mr Blair was of the view that the “*continuing employment status and agreement*” pertaining to Mr Behan-Kitto, was a breach of s.66 of the Act. Mr Blair advised NZ Post that:

After more than 2 years as an employee, advertising the position that Doug currently holds and requiring him to apply for that job alongside other applicant's [sic] would be unlawful and we request NZ Post not to follow that intended course. We advise NZ Post that the only lawful, fair and reasonable course to follow in the current circumstances would be to confirm Doug in his current position as a permanent employee.

[9] In summary, the argument for the applicants is that pursuant to the provisions of s.66 of the Act, NZ Post was not permitted to rely on the expiry of the second fixed term period of employment (19th October 2009), to end the employment of Mr Behan-Kitto and return his employment status to being on call, with no guarantee in regard to his hours of employment.

[10] The applicants have posed several questions for the Authority to determine. Paraphrased, they are:

- (a) Is the fixed term agreement (“B”) that expired on 19th July 2009 a written fixed term employment agreement to which s.66 of the Act has application and relevance?
- (b) Can Part M of the CEA displace the application of s.66 of the Act to fixed term employment agreements in the context of Part M, clause 9 of the CEA?
- (c) Does the fixed term employment agreement (“B”) comply with the requirements of s.66 of the Act?
- (d) Was the termination of the fixed term employment agreement (“B”) and the return of Mr Behan-Kitto to on call status, lawful?
- (e) Did the termination of the fixed term contract on 19th October 2009, and the return of Mr Behan-Kitto to on call status, constitute an unjustified disadvantage to the employment of Mr Behan-Kitto?

Analysis and Conclusions

[11] Section 66 of the Act applies to fixed term employment and among other things, provides that an employee and an employer may agree that the employment of the employee will end:

- (a) *at the close of a specified date or period;*¹

Then:

- (2) *Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must –*
- (a) *have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
- (b) *advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*

- (3)

And:

- (4) *If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (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 subsection (4), including failure to comply because the reasons for ending the employment 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 subsection (4), the employer may not rely on any term agreed under subsection (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 that term as ineffective.*

[12] In answering the questions posed by the applicants, I am bound not only to examine the terms of s.66 of Act, but also the terms of the fixed term contract that expired 19th October 2009 and the previous contract or variation to the terms of employment that it superseded, along with Part M of the CEA. This is because the circumstances applicable to Mr Behan-Kitto are not strictly those one would normally encounter in relation to the application of s.66 of the Act, in that Mr Behan-Kitto was not a “new” employee engaged for a specific time frame or project. Rather, the circumstances applying to Mr Behan-Kitto have been specifically agreed and provided for under the terms of the CEA at Part M. Firstly, at clause 1:

¹ Subsection (1)(a).

New Zealand Post may employ temporary and on call employees. Temporary and on call employees may be used for leave relief, special projects or to meet the local delivery and business requirements of the company.

Then at clause 2:

A temporary employee is an employee who is employed on a continuous basis for a fixed term of employment. The term of employment will be specified before the employee begins in the employment offer letter. This letter forms part of the employment agreement.

And then in relation to on call employees, at clause 9:

Where the expected duration of the engagement is in excess of two weeks and the engagement fits the criteria of a temporary/fixed term position, the employee will be afforded the same benefits as a temporary employee. Annual holidays and sick leave will accrue during that time at the rate applicable to the position to which they have been appointed and the employee may take leave during the period according to the usual application /approval process. The employee will revert to on call status at the end of the fixed term. (Emphasis added.)

[13] Returning to the questions posed by the applicants:

- (a) **Is the fixed term agreement (“B”) that expired on 19th July 2009 a written fixed term employment agreement to which s.66 of the Act has application and relevance?**

The answer to this question must be: Yes

- (b) **Can Part M of the CEA displace the application of s.66 of the Act to fixed term employment agreements in the context of Part M, clause 9 of the CEA?**

Obviously, it is trite law that generally, the statute cannot be contracted out of. But one must be careful not to provide a simplistic answer to a question that arises from circumstances that have a more complex background. Also, one must be conscious of the “mischief” that s.66 was, apparently, introduced to prevent. That is, the use (or misuse) of temporary employees to avoid some obligations and/or benefits that may apply to permanent employees. As I have concluded earlier, Mr Behan-Kitto was not a new employee. He was an on call employee and had been since November 2007. His terms and conditions of employment were provided by the CEA which was negotiated between the Postal Workers Union (the First Applicant) and NZ Post. Clearly the parties anticipated and/or provided for the exact circumstances applying to Mr Behan-Kitto, as evidenced by Part M of the CEA. In particular - clause 9 - whereby an employee, such as Mr Behan-Kitto, could move between on call work and temporary fixed term work where appropriate circumstances arise. My overall

conclusion is that while Part M of the CEA cannot displace the provisions of s.66 of the Act, in the circumstances applying to Mr Behan-Kitto, both s.66 and the relevant clauses of Part M of the CEA must be read together in order to provide a sensible and practicable workplace application.

(c) Does the fixed term employment agreement (“B”) comply with the requirements of s.66 of the Act?

An inspection of the employment agreement reveals that it was agreed that the fixed term engagement of Mr Behan-Kitto would end on 19th October 2009, hence subsection (1) is complied with. I also conclude that subsection (2)(a) was met in that NZ Post had a genuine reason “*based on reasonable grounds*” for specifying that the employment of Mr Behan-Kitto would end on the date in question. On the other hand, the document does not technically comply with subsections (2)(b) and (4)(b) as Mr Behan-Kitto was not informed within the contract of “*the reasons for his employment ending in that way.*” However, if one looks at the earlier “variation” to the terms of his employment that Mr Behan-Kitto agreed to on 16th January 2009, I have no doubts that he was quite aware of why he was offered the fixed term temporary employment and why and when both fixed term engagements would end. This is also revealed by the fact that Mr Behan-Kitto applied for and was interviewed for the permanent role that arose as part of the recasting process. Nonetheless, it would be prudent for NZ Post to ensure that they include more specific details in any future fixed term employment agreements to ensure that disputes of this nature do not arise in future.

(d) Was the termination of the fixed term employment agreement (“B”) and the return of Mr Behan-Kitto to on call status lawful?

Yes - the terms of the CEA provided for such circumstances and it has been the practice of NZ Post to provide fixed term employment engagements to on call employees in order to provide them with more regular hours of work and the associated income.

(e) Did the termination of the fixed term contract on 19th October 2009, and the return of Mr Behan-Kitto to on call status, constitute an unjustified disadvantage to the employment of Mr Behan-Kitto?

No – for the reasons set out above.

[14] In conclusion, I observe that while it is regrettable that Mr Behan-Kitto was unsuccessful in regard to his application for the permanent role that became available with NZ Post, I accept the submission of the company that there was a genuine requirement for the fixed term engagements and that NZ Post has a transparent recruitment process that required it to interview prospective candidates for the permanent position and that unfortunately for Mr Behan-Kitto, another candidate was found to be more favourable .

Costs

[15] As NZ Post was represented by a national manager (Ms Jones), the issue of costs does not appear to be applicable.

K J Anderson
Member of the Employment Relations Authority