

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 57
5319266

BETWEEN TIMOTHY ROCHFORD
Applicant

AND VICE CHANCELLOR OF
UNIVERSITY OF OTAGO

Respondent

Member of Authority: G J Wood

Representatives: Peter Cranney for the Applicant
Barry Dorking for the Respondent

Investigation Meeting: By consideration of papers

Submissions Received: By 30 March 2011

Determination: 12 April 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a determination about whether or not the dismissal of Mr Rochford by the respondent (Otago University) was unjustified, because it was in breach of s.66 of the Act, entitled fixed term employment. Mr Rochford argued that the parties had agreed that his employment would end on the occurrence of a specific event, and s.66 provides that such a type of agreement was unlawful if its purpose was to establish the suitability of the employee for permanent employment.

[2] It is Otago University's position that Mr Rochford was instead employed under s.67, i.e. an agreement that provided for a probationary arrangement, and such agreements impliedly provide for employers to assess the suitability of employees for permanent employment, and thus s.66 did not apply.

Factual discussion

[3] In this case Mr Rochford was employed as a lecturer subject to a confirmation policy that usually lasted for five years. He was never confirmed at the end of that policy and then his employment was terminated.

[4] The agreed facts are as follows. On 18 March 2004 the applicant was offered a confirmation path position which he accepted on 29 March 2004. The applicant's employment agreement consisted of:

- The appointment letter;
- A booklet attached to the appointment letter entitled "Information for Applicants for Academic Posts";
- A collective employment agreement;
- The respondent's policies incorporated by the CEA;
- Various provisions incorporated by statute or implied by law.

[5] The respondent's purpose in offering appointments subject to a confirmation path is to establish the suitability of the employee for permanent employment.

[6] On 18 August 2009 the respondent sent the applicant a letter extending the applicant's confirmation path by approximately one year.

The law

[7] Section 66 – Fixed term employment provides:

1. *An employee and employer may agree that the employment of that employee will end - ...*
 - (b) *On the occurrence of a specified event ...*
2. *Before an employee and employer agree that the employment of the employee will end in a way specified in sub-section (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 ...*

3. *The following reasons are not genuine reasons for the purposes of sub-section 2(a): ...*
 - (b) *To establish the suitability of the employee for permanent employment...*

[8] Section 67 – Probationary arrangements provides:

1. *Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation after the commencement of the employment, -*
 - (a) *the fact of the probation period must be specified in writing in the employment agreement; and*
 - (b) *neither the fact that the probation period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that period during or at the end of the probation period. ...*
3. *However, if the employer does not comply with sub-section 1(a), the employer may not rely on any term agreed under sub-section 1 that the employee serve a period of probation if the employee elects, at any time, to treat that term as ineffective.*

[9] In *New Zealand Meat Workers & Related Trades Union Inc. v. AFFCO New Zealand Ltd* [2010] NZEmpC 62 it was held at para.12 that the nature and purpose of a probationary period is as follows:

It is a period that enables the employer to assess an employee's competence and suitability for a position at a time when such an assessment is able to be made and after an appropriate period for training, guidance and, if necessary, modification or improvement by the employee. It takes account of the reality that in some situations a new employee's ability to perform a job and general suitability in that employment cannot be assessed sufficiently before its commencement. The existence of an agreed probationary arrangement also acknowledges on the part of both parties that employment may be terminated at the end of the probationary period if, assessed fairly and reasonably by the employer, the employee is incapable of performing the work or is otherwise unsuited to the employment. A probationary period is one of some uncertainty as opposed to a greater level of certainty in employment after its expiry and as opposed to employment in which there is no probationary period. Termination of the employment at the end of the probationary period is a possibility upon which the parties agree and acknowledge from the outset.

[10] In *Norske Skog Tasman Ltd v. Clarke* [2004] 1 ERNZ 127 the Court of Appeal deal with s.66. The majority held that any provision for the termination of a fixed term agreement was ineffective when s.66(2) had not been complied with. Heath J in the minority dealt with the issue of s.67 as well, pursuant to reasoning that was not in conflict with the majority, and which is quoted only for the interface between the two sections. At para.[172] he held:

By s.66 of the Act Parliament permitted employer and employee to negotiated fixed-term contracts. In doing so Parliament largely adopted the approach contained in the ILO Convention. By excluding probationary periods from fixed term employment contracts (see ss.66(3)(b) and 67 of the Act) and providing discrete remedies for unfair bargaining (see ss.68 and 69 of the Act) a deliberate policy decision was made to depart from terms of the ILO Convention, yet, still to protect the rights of employees.

Determination

[11] It is apparent from the above cases that if the parties enter into a valid probationary arrangement under s.67 then that is protected from challenge under s.66. Otherwise the parties could agree on a period of probation in their employment agreement, but at the end of the period be subject to challenge, because the agreed probationary arrangements provided for the occurrence of a specified event under s.66(1)(b), and the purpose of it was to establish the suitability of the employee for permanent employment. Of course the purpose of a probationary period, as is made clear in the *AFFCO* case, is for an employer to be lawfully allowed to make such an assessment. Similarly, s.67A (relating to trial periods) is not specified as an exception to s.66, but again any trial provision could be construed as setting a specified date, period or event (in the first 90 days of employment) for the very purpose of establishing the suitability of the employee for permanent employment. Hence the conclusion that a valid probationary arrangement under s.67 is exempt from challenge under s.66.

[12] I therefore commence my analysis with an assessment of whether the parties' agreement complies with s.67. In Mr Rochford's case his appointment was offered under terms and conditions provided for by reference to Otago University's policies incorporated into the parties' collective employment agreement.

[13] Otago University's confirmation policy provides amongst other things:

Overview of Confirmation of Appointment

- ***Purpose***

...First, it aims to ensure ... that anyone who is appointed to a confirmable position is suitable for employment in terms of the University's ongoing performance expectations.

Second, it aims to guide staff as to how they can lay the foundations, consolidate, and build a successful academic career ...

- ***Confirmation Period***

It is the Vice Chancellor's expectation that, subject to satisfactory performance ... the initial appointment for any person ... shall normally lead to confirmation after a period of five years.

Early confirmation for these staff may be granted after initial appointment period of three or four years ... Confirmation may occur following a recommendation from the Head of Department if the staff member has been promoted from one rank to another in the promotion exercise. ...

Confirmation of appointment may be deferred for a period of 12 months beyond the expiry of the initial five year confirmation period ...

In cases of non-confirmation, a temporary fixed-term appointment of one year will be available from the end of the five year confirmation period, or the end of the six year confirmation period if an extension has been granted. The temporary appointment will not be susceptible to further extension. ...

- ***Right to Appeal***

Staff members who have not been confirmed have the right to appeal.

[14] I accept that this is a process whereby a period of five years has been agreed to by the parties to enable the employer to assess the employee's competence and suitability at a time when such an assessment is able to be made and after an appropriate period for training, guidance, and, if necessary, modification or improvement by the employee (*AFFCO* applied).

[15] Five years is certainly at the extreme end of a probationary period, but given the nature of the work and the necessary training and supervision required in a tertiary education profession, and the implied acceptance of the practice in the collective agreement, such a period is appropriate. It also allows an employee to grow into a position which can become, on confirmation, a lifetime career. The arrangement also

provides for the sorts of safeguards to employees that s.67 and the cases which preceded it, such as *Nelson Air Ltd v. New Zealand Airline Pilots Association* [1994] 2 ERNZ 665, envisaged.

[16] Having determined that the confirmation arrangements are provided for under s.67 of the Act, it therefore follows that s.66 is not relevant and I so determine.

G J Wood
Member of the Employment Relations Authority