

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 178
5326304

BETWEEN

BRONWYN CAPSTICK
Applicant

AND

SECRETARY FOR JUSTICE
IN RESPECT OF THE
MINISTRY OF JUSTICE
Respondent

Member of Authority: P R Stapp

Representatives: G Fitzgerald, Advocate for the Applicant
A Sherriff, Counsel for the Respondent

Investigation Meeting: 13 September 2011 at Wellington

Determination: 14 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Capstick was employed as a project manager with the Ministry of Justice under a fixed term employment agreement. The purported fixed term agreement applied for two years. The agreement was renewed for one year on 31 May 2010 to commence on 14 July 2010 and expire on 14 July 2011. During the currency of her renewed employment agreement, Ms Capstick was made redundant, she worked out a month's notice, and her employment ended on 10 December 2010.

[2] Ms Capstick has claimed that she is entitled to the pay for the unexpired portion of her fixed term in wages, holiday pay and interest.

[3] The respondent has denied the claim. It contended that the fixed term enabled it to make Ms Capstick's position redundant under the termination of employment

provisions in Ms Capstick's employment agreement. It denied that any money was owed.

[4] Both parties are claiming costs.

Issues

[5] The questions for determination by the Authority are:

- Is Ms Capstick entitled to the unexpired portion of her fixed term employment agreement from 10 December 2010 until 14 July 2011?
- Which party is entitled to costs, and how much?

The facts

[6] It is common ground that Ms Capstick's fixed term employment existed under two agreements, the first purported fixed term role was for a period of 24 months. There is no issue taken with that arrangement. It has been provided simply for background. Ms Capstick's fixed term agreement was renewed for a period of 12 months. The renewed fixed term was covered by a letter of appointment, an employment agreement and a job description. Ms Capstick countersigned the letter recording her acceptance of the arrangement.

[7] It is common ground that the fixed term agreement made provision for:

- The term of the agreement (with a commencement and an expiry date);
- The reason for the fixed term nature of the agreement;
- The way in which the agreement will end;
- The reasons for the agreement ending in the way described.

[8] The above accords with s 66 of the Act. Neither party has raised any issue about these provisions of the fixed term arrangement. They accept that the arrangement was intended as a fixed term under the letter of appointment, the employment agreement and the job description.

[9] Both parties intended for a fixed term to apply in the employment, although Ms Capstick's evidence is that she agreed because she believed the position would become permanent or last at least for five years. She claimed that there was a verbal agreement for a permanent position with Mr Stevenson. She says she is supported by her conversations with Mr Stevenson at the time (some of which were diarised), and with reference to a statement and document regarding making the position permanent. He denied that, and there is no other evidence to support any such agreement existing with certainty, I hold. Their difference on this does not have to be determined because it is not germane to the issue of any entitlement to the money claimed.

[10] The Ministry's employment agreement also included the following provision:

2.5 Term of agreement

The following provisions are set out in your letter of appointment:

- *The term of this agreement*
- *The reason for the fixed term nature of the agreement*
- *The way in which the agreement will end; and*
- *The reasons for the agreement ending in this way*

This agreement may be terminated earlier than the date stipulated in the letter of appointment in accordance with the provisions of this agreement.

[11] There was also a specific term on termination that stated:

6 Termination of employment

6.1 Notice

You or the Ministry may terminate your employment by giving not less than one month's written notice or notice as stipulated in your letter of offer. If you fail to give the required period of notice, payment in lieu may be deducted from your salary or other money that the Ministry would otherwise be required to pay you. The Ministry may pay out your notice in lieu rather than requiring you to work during the notice period. A lesser period of notice may be mutually agreed.

This does not prevent the Ministry from terminating your employment without notice in the event of serious misconduct.

If you are absent from work for five consecutive days without notification to your Manager, or without appropriate authorisation from your Manager, you will be considered to have abandoned your employment, unless you are able to show that you were unable to fulfil your obligation under this clause through no fault of your own. The Ministry will make all reasonable efforts to contact you during this time.

6.2 Medical Retirement

If, as a result of mental or physical illness/injury, you are incapable of carrying out your employment duties and obligations, the Ministry may medically retire you. In such an event you will be given four weeks' notice.

Before any decision is made about medical retirement, you will be requested to undergo a medical examination by a registered medical practitioner nominated by the Ministry, at the Ministry's expense, to obtain an independent medical report for the Ministry. As far as practicable, the Ministry will take your wishes regarding a preferred medical practitioner into account. When you are examined by the Ministry's nominated medical practitioner, you agree that the Ministry shall be provided with all relevant information and opinion from the medical practitioner regarding your condition and its prognosis, the likely date of return to work, whether or not you will be able to resume full previous duties, and any limitations relating to the tasks which you are able to perform.

6.3 Redundancy

Redundancy means the situation where your employment is terminated because the duties, responsibilities and powers of your position are significantly altered or are surplus to Ministry requirements due to a change in the size, structure, responsibilities or requirements of the Ministry.

If your position is made redundant, you will not be entitled to redundancy compensation.

No redundancy will arise by reason of the sale or transfer of the whole or part of the Ministry's operations, where the person acquiring the operation offers you employment in the same capacity on similar conditions or employment, and agrees to treat your service as continuous.

6.4 Employee Protection

...

[12] On 15 October 2010, Mr David Stevenson, the General Manager, Property and Security, issued a proposal to restructure the Property and Security Group within the Ministry, to staff, for consultation. That document stated that the two fixed term property project manager roles (one which was held by Ms Capstick and the other a position in Auckland), were outside the scope of the review. The proposal in the consultation document related to permanent positions and the resourcing in the unit. However, the document also stated that:

I also consider that the existing project management resourcing is in excess of future requirements. This will be addressed through a separate review of the fixed term property project managers.

[13] Ms Capstick was provided with a copy of the proposal document to keep her informed of what was happening.

[14] On the same day, Mr Stevenson met with Ms Capstick separately to discuss the review of the Ministry's fixed term property project managers. He gave her a letter dated 15 October 2010 setting out a proposal to disestablish her fixed term project manager position. The reasons for the proposal were set out in that letter. Generally, they related to changes in the way capital funding was allocated, changes in the service delivery model, and a reduction in the levels of project management work being undertaken by the property services team overall. Ms Capstick disputes that she was given any information as to the changes in capital funding being allocated and the changes in the service delivery model.

[15] Mr Stevenson's letter, and his evidence, made reference to property projects of the property services team that were to be discontinued, delayed, placed indefinitely on hold and/or reduced in scope (paragraph 30 of his evidence).

[16] Ms Capstick says that she felt that she still had a lot of project work to perform over the period of her fixed term agreement. For this reason she claimed the redundancy had no substance. Mr Stevenson says that her fixed term position existed to provide an additional staffing resource in the property services team where the permanent members of the team were unable to manage all of the project work planned under the capital works programme. Any impact on that plan with a reduced amount of work would impact on the capacity to meet the demands of the project work plan through its permanent project manager positions. This was the basis on which he proposed to disestablish Ms Capstick's fixed term position (para.30 of his written evidence). In other words the work associated with the fixed term role held by Ms Capstick was reabsorbed in the permanent group of employees.

[17] The reasoning for a genuine redundancy rested on the production of the change document, one other person being made redundant from the permanent pool and a change to the Auckland fixed term position. In addition Mr Stevenson added that the supporting detail would relate to Treasury papers/minutes, but I hold in essence what he was relying on was his holistic knowledge and his memory and the influences applying at the time needing to affect change (such as the global financial situation and Government requirements).

[18] Mr Stevenson claimed that he invited Ms Capstick to provide input about the proposal, its reasoning and any suggestions she had for alternative courses of action by 29 October 2010. This is supported by his correspondence. He says Ms Capstick never provided any feedback about the proposal to disestablish her fixed term position, that she made no submission or comment and did not suggest any alternative course of action. He did receive a communication from her asking what alternative positions the Ministry could offer her in the event of her position being disestablished. He says he considered whether there were any alternative roles that might be able to be offered to her. He discovered there were no vacant positions in the Property and Security Group. In any event, the new structure that had been proposed for the Property and Security Group envisaged a reduction in the number of employees due to reduced workloads. The evidence of this was that only one other position was made redundant and that was a permanent employee. The Auckland fixed term position was turned into a permanent position in Auckland.

[19] Mr Stevenson says that he made inquiries as to whether there might be another suitable position available for Ms Capstick elsewhere in the Ministry. He was unable to identify any suitable alternative role that could be offered to her at the time. He advised her of that by letter dated 1 November 2010.

[20] On 12 November 2010, Mr Stevenson met with Ms Capstick and advised her of his decision and to discuss it. He also provided her with a letter of the same date which set out his decisions and the reasons for it. His decision was that the position held by Ms Capstick would be disestablished and he gave Ms Capstick one month's notice of termination as required under her employment agreement. Her final day of employment with the Ministry was Friday, 10 December 2010.

The law

[21] Most of the cases I have been able to source on fixed term contracts relate to personal grievance claims. These have involved causes of action to resolve the employment relationship problems by personal grievance remedies. Thus the remedy of lost wages has arisen and been applied to the unexpired portion of the fixed term. That does not apply in Ms Capstick's situation. This is not a personal grievance claim. Those cases therefore can be distinguished.

[22] I have reviewed two cases on point. The first was *Dowd v Universal College of Learning* (unreported) P R Stapp 26 November 2008 WA 157/08 and referred to me by the applicant. In that case a claim for the unexpired portion of a fixed term was declined. The second case is *Mather v Waikato Institute of Technology* (unreported) 24 September 2004 AA 309/04. This was a claim for breach of agreement where a position was disestablished and it was alleged the fixed term period had been unlawfully terminated. There was no breach found and the applicant's claim for payment of the unexpired portion of the fixed term declined.

[23] The leading case on fixed term arrangements is *Williams v. Attorney-General in respect of the Secretary of Justice* [1999] 2 ERNZ 457. Of particular interest in the *Williams* decision is the Court's comment (at pp.469-470), that:

The law about termination of employment for redundancy is by now quite clear. In cases of indeterminate employment contracts which are silent on the subject of termination for redundancy, an employer is entitled to terminate the contract by the notice provided in it or, failing any such provision, by reasonable notice. What period of notice is reasonable is a question of fact to be determined according to the circumstances at the time the notice is given, not the circumstances when the contract was formed. If the contract is not silent on the subject of redundancy but makes express provision for it – including provision for notice, compensation, prior consultation, and other matters – those obligations must be met and if they are not can be enforced ...

A fixed-term contract is, however, quite different. It cannot be brought to an end by the employer by notice at will. Unless it provides otherwise, it can only come to an end upon the expiry of its term. An employer terminating a contract early will remain liable for the remuneration for which it provides until the date of expiry. However, the contract may contain a provision for early termination in particular events or on particular grounds. These cannot include termination at will for no reason at all because such a provision would be repugnant to the nature of the contract as a fixed term contract. The fixed term is not only a maximum term but it should also be seen as a minimum term for most purposes. Generally speaking, such contracts – if their term is lengthy – will provide for the employee to be able to obtain release on giving some agreed period of notice. This recognises that employees, as human beings, cannot be kept in employment against their will. To do so would risk the reproach that the contract contains elements of civility and, as such, is illegal.

It is also competent for a fixed term contract to provide that the employment will come to an end either automatically or upon the employer desiring that it should do so upon the happening of specified events.

[24] The Court then further stated:

I come now to the less obvious case of the position becoming surplus to the employer's requirements. It seems not unreasonable to suggest that parties – notably, employers – have a choice between stipulating on the one hand for contracts of indefinite duration with provision for termination by notice which can be given in the event of redundancy, and on the other hand for fixed term contracts which should then be expected to run their term in accordance with the contract. However, it was not suggested at the hearing that it is not open to parties to enter into a hybrid contract which is for a term of fixed duration but which can terminate or be terminated before the expiry of its term upon the happening of events defined in the contract. One of these may be redundancy, as defined in the contract.

[25] While this case was decided under the Employment Contracts Act it is useful for the principles that would apply in regard to fixed term employment under s 66 of the Employment Relations Act.

[26] Ms Capstick's claim is therefore covered by the law, first in regard to an employment relationship problem in which she has claimed a breach of the employment agreement, and the existence of causes of action to resolve the problem in regard to the payment of wages (s 131 of the Act) and or damages (s 161 of the Act).

Determination

[27] I hold that Ms Capstick had a reasonable belief based on reasonable grounds that her fixed term employment agreement would continue for its duration given she had signed off the declaration in the letter of appointment. She understood that her terms and conditions comprised the letter of offer, the Ministry's employment agreement for fixed term arrangements and the job description. So when she realised that her position was superfluous, she was shocked, and remains to this day upset about what happened. There was no evidence at all that the Ministry's decision had anything to do with any other reason. Indeed Ms Capstick can be reassured that the decision had nothing at all to do with her performance based on the Ministry's evidence as to the reasons why her role finished early. Her concern about what other people think is absolutely understandable, suffice for me to comment that these types of arrangements and changes seem to be increasingly common today and people affected do take the change personally.

[28] Ms Capstick's employment relationship problem has not been made any easier by the way in which the employment relationship problem has been stated (pleaded)

in the statement of problem and the statement in reply from the respondent. What I am clear about is that the employment relationship problem as stated is not a personal grievance, and remedies for a personal grievance can not apply. There was no grievance raised at the time. Therefore the applicant has relied upon claiming wages and or damages she believes are due under her fixed term employment agreement because of a breach. It seems that Ms Capstick is relying on the claim for wages, although the respondent covered the claim for damages in submissions. The Ministry says there has been no loss for damages to apply. I will return to causes of action for any remedies if I need to later.

[29] Ms Capstick's case rests essentially on her claim that the Ministry's fixed term employment agreement is null and void. This is because it contains a redundancy clause permitting the fixed term to be ended earlier than the express expiry date in the letter of appointment. The employment agreement includes the clause I referred to in paragraphs [10] and [11] above to terminate employment earlier. Ms Capstick's reasoning for saying the Ministry's fixed term employment agreement is null and void rests on her belief that the appointment letter prevails over the agreement by virtue of clause 1 of the employment agreement that reads as follows:

Introduction

*The personal terms of your Employment Agreement ("the Agreement") comprise of this Individual Employment Agreement ("IEA") and attached documents (eg position description) and the terms confirmed in your appointment letter. This agreement supersedes all previous negotiations, communications and commitments, whether written or oral. **Where this IEA and your appointment letter differ, your appointment letter shall prevail.** Other Ministry policies, including the Ministry's Code of Conduct also apply to your employment. It is important that you familiarise yourself with these documents, which may be amended by the Ministry from time to time. (Emphasis added)*

[30] I do not agree with the argument that the employment agreement is null and void. This is because:

- Ms Capstick signed the letter of appointment declaration;
- Ms Capstick accepted the employment agreement as part of the arrangement;

- There has been no ambiguity and difference in the terms being applied in both documents;
- The employment agreement contains a clause to end the employment early;
- The agreement clearly makes provision for termination for different reasons as exceptions to the fixed term being absolute. This included a provision for any redundancy. Ms Capstick accepted that termination for cause could include from the employment agreement serious misconduct and medical incapacity, but would not accept that the redundancy part of the clause applied to her, because of her belief that she was entitled to the full term to apply. I hold that the provision for redundancy does apply. This was not a consistent position for Ms Capstick to take, I hold.

[31] Thus Ms Capstick has to show that her employer has breached her employment agreement in respect of not paying her the full entitlement of the fixed term. The Ministry has genuinely relied on the redundancy provision to disestablish the position Ms Capstick held, which it was entitled to do, and has met the threshold required to establish that a genuine redundancy situation existed. Therefore it was entitled to terminate the agreement early, I hold.

[32] The Ministry has also acted fairly, although I accept Ms Capstick does not see it the same way. In any event in the absence of bringing a personal grievance a breach of good faith would not be sufficient to rely on to claim for the wages for the rest of her term, unless she could prove some damage, which I hold she has not been able to do either. For completeness, I hold that there has been no breach of good faith given the procedure followed. Also, the remedy for such a breach would be in a penalty, and that has not been claimed. For completeness there has been no breach of good faith, I hold. The approach to this matter is consistent with that taken in *Mather v Waikato Institute of Technology* (unreported) 24 September 2004 AA 309/04.

[33] I hold that Ms Capstick has not established her claim.

[34] As agreed costs are to follow the event. The applicant has been unsuccessful in her claims. The respondent has incurred costs. Based on the notional daily tariff

applied by the Authority this matter is to be resolved by the applicant paying the Ministry of Justice \$3,000 as a contribution to its costs.

P R Stapp
Member of the Employment Relations Authority