

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 59
5292017

BETWEEN PATRICIA CORIN
Applicant

AND TRANSFIELD SERVICES
(NEW ZEALAND) LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in person
Gillian Service and Emily Moore for Respondent

Investigation Meeting: 12 November 2010

Further information
received: 6 December 2010 from Applicant

Submissions Received: 30 November 2010 from Applicant
19 November 2010 from Respondent

Determination: 15 February 2011

DETERMINATION OF THE AUTHORITY

- A Ms Corin has been unsuccessful in her claims for unjustified disadvantage and unjustified dismissal.**
- B Costs are reserved.**

[1] Ms Patricia Corin was employed by Transfield Services (New Zealand) Limited (Transfield) on a fixed term employment agreement which was extended a number of times. Ms Corin was employed to provide additional services to support the administration team for the duration of the construction season. This was conveyed to Ms Corin in the employment agreement. The duration of the initial employment agreement was from 2 December 2008 to 31 March 2009.

[2] In October 2009 Ms Corin was issued with a verbal warning. In November 2009 Ms Corin says she was dismissed and replaced with another full time employee. Ms Corin claims she was disadvantaged in her employment and then unjustifiably dismissed.

[3] Transfield delivers services to key infrastructure, including roads, electricity and telecommunications in New Zealand. Ms Corin was employed to provide services to the Infrastructure division of the company which has responsibility for road construction projects. Normally the construction season runs from November/December in one year to March/April the following year.

[4] Transfield employs a core team of permanent staff within the Infrastructure division. This includes administrators, engineers, plant operators, supervisors, project management and general labour. It also employs temporary staff during the busier months to match the workload.

[5] Transfield won a tender for the State Highway (SH) Piarere Construction project (the Piarere project) in March 2008. The project involved a four kilometre realignment of SH1, just north of Tirau. At the time the contract was won, it was anticipated it would be completed by the end of September 2009, which it was.

[6] Ms Karen Boyes, the Waikato Regional Manager for Transfield identified a short term need to provide additional administrative support in its Hamilton office to the construction division while the Piarere contract was being completed. Another factor which impacted on the decision to engage someone temporarily was the status of another contract, referred to as the PMSC contract. This contract was due for retender in April 2009. If the contract was not renewed a number of employees would be facing the prospect of redundancy.

[7] It was anticipated that the operational demands of the construction work would ease towards the end of March leaving the permanent staff with the capacity to pick up any additional work resulting from the Piarere project. It was for this reason that Transfield expected the additional administrative support would only be required until 31 March 2009.

[8] However, the Piarere project was larger than at first anticipated and also, as a result of the work done at Piarere, the Construction Division tendered for, and won, another project, referred to as the Zealong Tea Farm Access Project (the Zealong

project). The Zealong project involved creating all the main access roads into the Zealong Tea Farm site in the Waikato. The project was weather dependent and so an exact finish date was difficult to establish. At best it was expected that the project would be completed by 13 November 2009.

[9] Ms Corin had worked well and her efforts were appreciated by Transfield and it offered her four extensions to the expiry date of her contract, which were all accepted by Ms Corin.

[10] Transfield denies Ms Corin's claims that she was unjustifiably disadvantaged in her employment or that she was unjustifiably dismissed. Transfield says Ms Corin left of her own accord before the last extension to her fixed term agreement reached its expiry date.

[11] The issues for determination are:

- was Ms Corin's employment affected to her disadvantage by an unjustifiable action by Transfield;
- did Ms Corin leave her employment of her own accord or was she dismissed unjustifiably from her employment; and
- if Ms Corin was unjustifiably disadvantaged or unjustifiably dismissed what (if any remedies) is she entitled to?

Disadvantage grievance

[12] Ms Corin says one or more terms and conditions of her employment were subject to disadvantaged by the unjustifiable actions of Transfield when she was issued with a verbal warning on 6 October 2009 and further, as a result of the treatment she received from Ms Boyes, which she attributes to her support of another administrative support person, Ms Brenda Stacey. Ms Corin says that it was because of Ms Boyes treatment of her that she decided not to apply for a new permanent position, advertised during her last week of employment.

[13] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Transfield's actions disadvantaged Ms Corin in her employment,

and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[14] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Transfield can establish justification for a disadvantageous action, there is no grievance.²

[15] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

Warning

[16] At the time of Ms Corin's initial employment she was based at Transfield's Te Rapa offices. Aspects of Transfield's businesses were also run from an office located in Ruakura. In 2009 Transfield decided to consolidate and to move all its operations in to one location. The move to Ruakura took place in September 2009. There had been discussions with staff about preferred seating positions. In the end the managers decided on a seating plan which would make the best use of the available space. The seating plan brought all the administration staff into one area.

[17] Another change occurred at that time. Until the move to Ruakura, Ms Corin had reported directly to the Construction Manager, Mr Jason Brewerton. After the move to Ruakura all administrators became part of the same team and reported directly to Ms Kay Matthews, the newly appointed Team Leader.

[18] On the day of the move, the desks belonging to Ms Corin and Ms Stacey were not put in their allocated spaces. A day or so later Ms Mathews asked both ladies to move their desks into the correct area. Eventually Ms Boyle became involved and sent both ladies an email at 11.56am on 30 September 2009 instructing them to move their desks in line with the layout plan. Ms Corin and Ms Stacey were given until 5pm the following day to have the desks moved.

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

[19] Ms Corin failed to move her desk as per the instruction and the configuration of the desks was identified as a health and safety hazard as it partially blocked access.

[20] On 2 October 2009 Ms Corin (and separately Ms Stacey) was invited to attend a disciplinary meeting regarding an allegation that she had “refused to arrange the position of her desk in the office administration area, in accordance with the designated seating and office plan”. Ms Corin was invited to have a representative at the meeting and was advised of the possible consequences of the meeting.

[21] The disciplinary meeting occurred on 6 October 2009. After considering her explanation Ms Corin was issued with a verbal warning.

[22] It is common ground that a warning is an action which is disadvantageous to an employee. The question for the Authority then, is whether the action taken by Transfield when it issued Ms Corin with a verbal warning can be said to be unjustified.

[23] Standing back and considering the matter objectively, I find the actions of Transfield and the way it acted in issuing Ms Corin with a verbal warning is how an employer acting fairly and reasonably in all the circumstances of this matter would have acted.

[24] Ms Corin was issued with a fair and reasonable instruction to put her desk in the allocated spot according to the diagram. A reasonable time frame was given to allow the desk to be moved. The resulting failure by Ms Corin led to a hazard in the workplace as the placement of her desk did not allow ease of access.

Ms Corin’s support of Ms Stacey and Ms Boyes treatment of Ms Corin

[25] Ms Corin says that her support of Ms Stacey through allegations Ms Stacey had made against managers of Transfield meant that her friendship with Ms Stacey would put any possible permanent position in jeopardy. Ms Corin told me in her written evidence that her supervisor, Mr Brewerton, had told her that because she was supporting Ms Stacey, who was considered a trouble maker, she would also be deemed the same.

[26] Mr Brewerton told the Authority that what he actually told Ms Corin was it was his perception that senior management did not believe Ms Stacey’s allegations and viewed Ms Stacey as a troublemaker. Mr Brewerton says he told Ms Corin that due to

her association with Ms Stacey and her support of her allegations, she might risk being “tarred with the same brush”.

[27] Ms Corin says she attended a meeting in early November 2009 to discuss her fixed term agreement. She says she was advised that Transfield was going to establish a permanent position which would include some payroll and that she would be welcome to apply for it. Ms Corin took this approach to mean that she was not going to be offered the permanent role she had been promised for twelve months and concluded that the Transfield managers were trying to get rid of her, just as they were trying to get rid of Ms Stacey. It was this perception by Ms Corin which eventually led her to not apply for the newly established permanent role.

[28] I find Ms Corin was actively encouraged, in particular by Mr Brewerton but also by Ms Chris Savage, Transfield’s customer services officer and payroll officer to apply for the new job once it had been approved.

[29] Further, I am satisfied Ms Corin was never promised that she would become a permanent employee but rather, she hoped that a permanent position would result from her temporary position.

[30] Ms Savage emailed a copy of the job description for the new role as soon as it had been approved by senior management. Ms Corin was the first person to receive a copy of the position description for the new role, which she was advised would be advertised externally the following week. Ms Savage gave uncontested evidence that she reiterated more than once to Ms Corin that she was welcome to apply for the new position.

[31] Ms Boyle told the Authority that Ms Corin had made it clear to her that if the new position, as it did, reported to Ms Matthews then she would not be interested in that. Ms Corin wanted to continue to report to Mr Brewerton.

[32] Mr Brewerton told the Authority that Ms Corin had told him, also, that, among other things, if the position reported to Ms Matthews, she would not be applying for it. Mr Brewerton told me he suggested that Ms Corin apply for the role and raise any issues during the job interview, rather than just not apply.

[33] Mr Brewerton was clear in his evidence that he considered Ms Corin a good worker and that any other candidate would have to be exceptional to get the role ahead

of her. He and Ms Boyes were both of the opinion that Ms Corin was a definite contender for the job.

[34] By way of an example of Ms Boyes treatment of Ms Corin which she says was a catalyst in her decision not to apply for the new job occurred in November, after moving into the new premises at Ruakura. Ms Matthews requested that the Reception desk be manned at all times. Ms Stacey and Ms Corin were responsible for ensuring the desk was covered when the normal Receptionist was absent.

[35] On 19 November 2009 the Receptionist was required to attend a training session which was due to be completed by 12.00 noon. Unbeknown to Ms Matthews, Ms Stacey and Ms Corin had arranged to have lunch together that day. The training session lasted longer than anticipated and by 1.00pm the Receptionist was still not back to the front desk.

[36] Rather than cancel their lunch date, and stagger their lunch breaks to ensure the Reception desk was manned the pair left the phone with another employee who stayed at her desk with the phone.

[37] Both Ms Stacey and Ms Corin were invited to a disciplinary meeting to discuss this incident, as leaving the Reception desk unmanned was in contravention of Ms Matthews previous instruction that it was to be manned at all times.

[38] The meeting was to be held on 24 November 2009, however, as Ms Corin had left her employment on 23 November 2009 the process was never completed. Ms Corin says this process was set up in an attempt to get rid of her. I do not accept that as being an accurate reflection on the reason for the disciplinary process.

[39] Also, in answer to Ms Corin's complaint about Ms Boyes conduct toward her, this example can not be attributed to Ms Boyes. The issue arose as a result of an instruction by Ms Matthews, and the letter inviting Ms Corin to a disciplinary meeting was written by Ms Matthews.

[40] At the investigation meeting Ms Corin accepted she and Ms Stacey could have had their lunch breaks at different times, but chose not to. I accept the evidence of Ms Boyes on this matter that the phone was left with an operational staff member who could have been called to an emergency at any time. This would have left both the desk and the phone unmanned.

[41] Ms Corin has not established that Ms Boyrs treated her in other than a professional manner. Also, I find Ms Corin's concerns about her relationship and her support of Ms Stacey as being a barrier to her possible appointment to the new position, were unfounded and misconceived. From the evidence produced to the Authority I am satisfied Ms Corin's work was respected at all levels of the organisation and she was potentially a front runner for the newly created position.

[42] I find Ms Corin's employment was not subject to an unjustified disadvantage and I can be of no further assistance to her in this regard.

Was Ms Corin Dismissed?

The fixed term employment agreements

[43] The applicable law dealing with fixed term employment agreements is set out in s66 of the Employment Relations Act (the Act) and provides as follows:

- Parties may agree that the employee's employment would end at the close of a specified date or period or upon the occurrence of a specific event or at the conclusion of a specified project.
- Before such agreement the employer must have genuine reasons based on reasonable grounds for specifying that the employment of the employee was to end in that way.
- The employer is obliged to advise the employee of when or how her employment would end and the reasons for it ending in this way.
- Further, the written employment agreement must state the way in which the employment will end and the reasons for it ending in that way.
- Using fixed term agreements to exclude or limit the employee's rights under the Act or to establish the suitability of the employee's permanent employment do not constitute genuine reasons.

[44] Where employment is pursuant to a lawful fixed term agreement, the expiry of this agreement, according to its terms would not support a claim to an unjustified dismissal. If, however, what purported to be a fixed term employment agreement, did not meet the statutory requisites the employees employment is to be regarded as of

indefinite duration and its termination may be subject to consideration as a personal grievance for unjustified dismissal.⁴

[45] Ms Corin initially applied to Transfield, in October 2009 in answer to an advertised permanent position and attended an interview. Ms Corin was advised that she was unsuccessful in her application.

[46] About four weeks later Ms Corin received a telephone call from Ms Christine Savage, Transfield's Payroll/HR Administrator. Ms Savage asked Ms Corin if she had secured employment. When she told Ms Savage she had not yet found a job, Ms Savage asked Ms Corin if she would be interested in a 3 month Fixed Term contract to provide administrative support for the duration of the construction season until the end of March 2009. Ms Corin was keen to take up this opportunity and was sent a copy of a written employment agreement and a letter of offer for a fixed term period of employment.

[47] Ms Corin was originally employed from 2 December 2008. The terms of Ms Corin's employment were recorded in the written individual employment agreement dated 1 December 2008. Clause 2 of that agreement states:

2 TERM OF AGREEMENT

- 2.1 This Agreement for Fixed Term employment will commence 02 December 2008 and end 31 March 2009.
- 2.2 If the requirement for additional staffing resources ceases to exist prior to the end date of, 31 March 2009, specified in subclause 2.1 above, employment will terminate in accordance with clause 16 Termination of Fixed Term Employment, and you will only be paid up to, and inclusive of, the date of the last day of employment.
- 2.3 If the requirement for additional staffing resources continues beyond 31 March 2009, as specified in subclause 2.1 above, both parties agree that the Agreement may be mutually extended with the date of the extension being discussed by both parties.
- 2.4 Nothing said between you and the Company during the term of this Agreement shall be construed in any way as extending its term, nor shall there be any express or implied obligation on the parties to renew this Agreement at the expiry of its Fixed Term.

[48] Clause 16.6 states:

Except as provided in clause 2, as at 31 March 2009 this Individual Employment Agreement for Fixed Term Employment shall terminate.

⁴ *Clarke v Norske Skog Tasman Ltd* [2003] 2 ERNZ 213; *Norske Skog Tasman Ltd v Clarke* [2004] 1 ERNZ 127; and *Schneller v Ranworth Healthcare Ltd*, Auckland Employment Court, 5 June 2007, Colgan CJ, AC 33/07.

[49] Schedule A of the agreement states:

The company's reason for the temporary nature of this agreement is to support the Administration team for the duration of the construction season until 31 March 2009.

[50] As events transpired Ms Corin's original fixed term was extended, in accordance with clause 2.3, four times:

- 1 April 2009 – 30 June 2009
- 1 July 2009 – 30 September 2009
- 1 October 2009 – 13 November 2009
- 13 November 2009 – 27 November 2009

[51] By March 2009 it was apparent that rather than the workload reducing it became clear that two administrators would be needed to support the construction and maintenance divisions for the near future. Ms Brenda Stacey was a permanent administrator initially working across both the maintenance and construction divisions. During her employment Ms Corin's work was focussed on the needs of the construction division which left Ms Stacey free to focus on the administrative needs of the maintenance division.

[52] On or about 17 March 2009, Ms Savage spoke to Ms Corin and offered an extension to her fixed term agreement for a second period of three months. Ms Corin accepted this offer. The details of the agreed extension were set out in a letter dated 17 March 2009 which records the reason for the agreement was "to provide continued administration support to the Piarere construction project" until 30 June 2009.

[53] Ms Savage told the Authority that one of the considerations for extending the term of the agreement was that invoicing was to be moved to head office rather than through the divisional administrators. It was anticipated that this would see a reduction in the workload of the two administrators and by the end of June it was anticipated that the administrative work required for the Piarere project would also be reducing.

[54] However, during the currency of Ms Corin's second fixed term, Ms Boyes raised concerns about Mr Brewerton's workload with him. After Ms Boyes and Mr Brewerton had discussed Ms Boyes concerns, it was agreed Ms Corin would be kept

on undertaking the same work, in an effort to provide Mr Brewerton with additional support until the end of the Piarere project. After a discussion with her, Ms Corin agreed that her contract would be extended to 30 September 2009. This was confirmed in writing on 25 June 2009.

[55] In the meantime, Transfield had successfully tendered for the Zealong project which was to be completed by 13 November 2009. Taking into account the administrative requirements of the construction division in October 2009, it was decided that Ms Corin's engagement should be further extended to provide administrative support until the end of the Zealong project. This was the third extension to the fixed term and Ms Corin accepted that her employment would now end on 13 November 2009.

[56] In early November 2009, the Zealong project's end date was revised to 27 November 2009. With that in mind, on 3 November 2009 at a meeting with Ms Savage, a further extension of two weeks to Ms Corin's fixed term was discussed and agreed. The new agreed final date of Ms Corin's employment was now 27 November 2009.

[57] The evidence establishes that at all times during her employment Ms Corin agreed that her employment would end on a specified date or upon the occurrence of a specific event or close of a specified project.

[58] There is no evidence to suggest the reasons for the fixed term agreements were anything other than genuine reasons based on reasonable grounds. In other words there was no evidence that the reasons for the fixed term agreements were a pretext to avoid the application of Ms Corin's legal rights or to evaluate Ms Corin's suitability for the job. Further, Ms Corin was advised every step of the way when and how her employment would end and the reasons for it ending in that way.

[59] Finally, I am satisfied that the written agreement stated the way in which the agreement would end and the reasons for it. The agreement itself also anticipated that the reason for the fixed term may be completed earlier or later than originally planned and provided a mechanism for the early termination or extension of the agreement at clauses 2.2 and 2.3.

[60] Therefore, had Ms Corin remained in her employment until 27 November 2009, her employment would have ended, not by way of dismissal, but rather by the agreed

and lawful conclusion of a period of fixed term employment. This finding is supported by Ms Corin's oral evidence at the investigation meeting when she told me that she was leaving on the Friday anyway as she did not have a permanent contract, although she was hoping to be made permanent.

[61] In coming to my conclusions in this matter I have also been mindful of the decision Judge Couch in *Shortland v Alexander Construction Co Ltd*⁵ where he held that to be compliant with s 66 of the Act the agreement required wording to the extent that "...the company had no other work in prospect."⁶ I am satisfied that the wording of the employment agreement was clear about the reasons for it ending in the way prescribed. Clause 2 articulates clearly that the agreement is to fill a requirement for additional staffing resources and at clause 2.2 states that if this requirement ceases to exist employment will terminate.

[62] Further, at the investigation meeting Ms Corin acknowledged that if she had not accepted the variations to the agreement in terms of the extensions, she understood her employment would end at the conclusion of each extension.

Ms Corin's departure from Transfield

[63] By the time Ms Corin met with Ms Savage on 3 November 2009 it had become common knowledge that if the PSMC contract tender was successful Transfield was likely to require a permanent administrative position. The new position would include aspects of the work Ms Corin was performing, plus payroll cover and the maintenance of the training database.

[64] During the 3 November meeting Ms Savage advised Ms Corin that an application for approval for the new administration position had been made to Head Office but whether the position would go ahead was still dependant on a successful outcome of the PMSC tender.

[65] Ms Savage advised Ms Corin that the business was also subject to restructuring and there may be an obligation to offer the new position to other permanent employees who were being made redundant. Ms Savage told Ms Corin that if the position was approved, it would be advertised and she would be welcome to apply for it.

⁵ [2010] NZEmpC 41.

⁶ Ibid at [18].

[66] On or about 13 November 2009 Transfield was advised that it was the preferred tenderer for the PMSC contract. The next step in the process was for Transfield to successfully negotiate and finalise the details of the contract. Essentially, it meant that planning could begin to ensure the right staffing numbers were in place to meet the requirements of the contract.

[67] Following notification of the preferred tender status, approval was granted for one new permanent full-time Administrator position to be established in the Waikato Infrastructure team. A new job description was drawn up and on 20 November 2009 the job description was sent to Ms Corin via email. Consistent with the previous advise Ms Corin had received, she was advised the role would be advertised externally and she was invited to make an application.

[68] As previously set out, Mr Brewerton says Ms Corin had several conversations with him about the new job and advised him that she would not be applying for the role if she had to work with Ms Matthews and if she could not solely work for the Construction team.

[69] On 24 November 2009, the day after Ms Corin had received the invitation to the disciplinary meeting regarding the leaving of the reception desk unmanned, Ms Corin approached Mr Brewerton and told him that she was too upset to continue working. She told Mr Brewerton she did not feel comfortable staying in light of the new permanent position being created and asked if she could leave immediately rather than working out the term of her fixed term agreement. Mr Brewerton agreed to Ms Corin's request and arranged for her to continue to be paid the extent of her contract being 27 November 2009.

[70] This conclusion is consistent with Ms Corin's evidence at the investigation meeting when she told the Authority that it was her decision to leave as she didn't think she could work until the Friday.

[71] I find Ms Corin left her employment on her own volition on 24 November 2009, and was not dismissed. I can be of no further assistance to her.

Costs

[72] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Transfield may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Ms Corin will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[73] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell
Member of Employment Relations Authority