

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 693
3064415

BETWEEN

KERRY CROSSLEY
Applicant

AND

**KWIK KIWI CARS LIMITED t/a
MARK CROMIE MOTOR
GROUP**
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Adrian Plunket, advocate for the Applicant
Richard Evans, representative for the Respondent

Investigation Meeting: 5 November 2019 in Whangarei

Submissions [and further 5 November 2019 from the Applicant
Information] Received: 5 November 2019 from the Respondent

Date of Determination: 5 December 2019

DETERMINATION OF THE AUTHORITY

- A. The fixed term agreement was not a genuine fixed term agreement under s66 of the Employment Relations Act 2000 (the Act).**
- B. Accordingly, Ms Kerry Crossley was entitled to treat the fixed term agreement as ineffective.**
- C. Ms Crossley was unjustifiably dismissed. In order to settle Ms Crossley's personal grievance claim, Kwik Kiwi Cars Limited t/a Mark Cromie Motor Group (Mark Cromie Group) must within 21 days of the date of this determination pay her:**
- (i) The sum of \$20,000 compensation for the humiliation, loss of dignity and injury to her feelings and**
 - (ii) The sum of \$3,770 gross in lost remuneration.**
- D. Costs are reserved.**

Employment Relationship Problem

[1] The applicant, Ms Kerry Crossley, was employed by the respondent, Kwik Kiwi Cars Limited trading as Mark Cromie Motor Group (Mark Cromie Group) as a booking consultant and backup service advisor on a four-month fixed term employment agreement (the agreement).

[2] The agreement started on 8 February 2019 and expired on 7 June 2019. Approximately one month prior to the agreement reaching its expiry date, Ms Crossley was informed that the agreement would terminate on the expiry date and that no further agreement would be offered to her.

[3] Ms Crossley says that Mark Cromie Group did not have a genuine reason based on reasonable grounds for employing her for a fixed term. Accordingly, Ms Crossley says the expiry of the agreement was ineffective and Mark Cromie Group's actions in terminating her employment amounted to an unjustified dismissal. Ms Crossley seeks remedies under the Employment Relations Act 2000 (the Act).

[4] Mark Cromie Group denies Ms Crossley's claims. It says that it had genuine reasons based on reasonable grounds to offer Ms Crossley a fixed term employment agreement and that it was entitled to rely on the fixed term agreement to end Ms Crossley's employment. Accordingly, it says Ms Crossley was not unjustifiably dismissed.

The investigation meeting

[5] The investigation meeting took a full day in the Authority. Ms Crossley and her partner, Mr Trent Bockock, each filed witness statements. For Mark Cromie Group, Mr Richard Evans, General Manager and Mr Heath Kendall, Brand Manager, each filed witness statements.

[6] Each of the witnesses giving evidence before the Authority swore on oath or affirmed, that their evidence was true and correct. Each witness had an opportunity to provide any additional comments and information and did so.

[7] As permitted under s174 of the Act, this determination does not set out all the evidence and submissions received. The determination states findings of fact and law and makes conclusions on issues necessary to dispose of the matters before the Authority.

Issues

[8] The issues for determination by the Authority are as follows:

- (a) Was the fixed term employment agreement between Mark Cromie Group and Ms Crossley a genuine fixed term employment agreement under s 66 of the Act?
- (b) If the fixed term employment agreement did not comply with s 66 of the Act, was Ms Crossley unjustifiably dismissed?
- (c) If Ms Crossley was unjustifiably dismissed, what remedies are available to her?

First Issue

Was the fixed term employment agreement between Mark Cromie Group and Ms Crossley a genuine fixed term employment agreement under s 66 of the Act?

[9] Section 66 of the Act makes provision for fixed term employment agreements.

66 Fixed term employment

- (1) 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; or
 - (b) on the occurrence of a specified event; or
 - (c) at the conclusion of a specified project.
- (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.
- (2) The following reasons are not genuine reasons for the purposes of subsection (2)(a):
 - (a) to exclude or limit the rights of the employee under this Act;
 - (b) to establish the suitability of the employee for permanent employment;
 - (c) to exclude or limit the rights of an employee under the Holidays Act 2003.
- (3) 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.

- (4) 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.

[10] Recently, the Employment Court in *Paul Morgan v Transit Coachlines Wairarapa Limited* considered fixed term agreements and s66 of the Act.¹ Chief Judge Inglis states:

[5] As s 66(2) makes clear, an employer and employee may only agree to enter into a fixed-term employment agreement when two threshold requirements are met⁴ once entered into, the two requirements must be satisfied if an employer subsequently wishes to rely on a fixed-term agreement to bring employment to an end. The two requirements are that 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.

[6] An employee employed under a fixed-term agreement which does not satisfy the requirements of s66(2) may elect to treat the expiry of the agreement as ineffective.

Ms Crossley’s employment by IC Motor Group

[11] For approximately 20 years, on and off, Ms Crossley worked for the IC Motor Group Limited (IC Group) in the position of booking consultant.

¹ *Paul Morgan v Transit Coachlines Wairarapa Limited* [2019] NZEmpC 66(4Employment Relations Act 2000, s 66(2)(a) – (b). Note too that s 66(1) requires agreement between the parties as to one of three end points.)

Kwik Kiwi Cars Limited trading as Mark Cromie Group

[12] Mark Cromie is a director of and major shareholder in Kwik Kiwi. Richard Evans is a director and shareholder in Kwik Kiwi. Mr Evans became a director following Ms Crossley's departure from Kwik Kiwi.

[13] Kwik Kiwi trades as a number of businesses, including Mark Cromie Holden, Mark Cromie Nissan, Hyundai Northland and Volkswagen Northland. Kwik Kiwi employs staff across all of those businesses. In late 2018, Mr Cromie and Mr Evans reviewed the businesses of Kwik Kiwi.

[14] Kwik Kiwi trading as Mark Cromie Motor Group (Mark Cromie Group) operated the sole Holden Franchise in Hannah Street, Whangarei, and various other sites in Whangarei. Mark Cromie Group employed 36 staff. Mark Cromie Group had outgrown the site located at Hannah Road, Whangarei. Various options were considered but proved not financially viable.²

Purchase of IC Group by Kwik Kiwi trading as Mark Cromie Motor Group (Mark Cromie Group)

[15] Mark Cromie and Richard Evans decided to approach Mr Kelly and Mrs Tracey Illerbrun the directors of IC Group, to see whether or not they were willing to sell the IC Motor Group business. This would enable Mark Cromie Group to consolidate and grow its business.

[16] A deal was struck in which Mark Cromie Group purchased the IC Group operation, including the business, land and rights to three existing franchises.

[17] IC Group had 44 staff at the time of the sale of its business to Mark Cromie Group.

Announcement of sale of IC Motor Group to Mark Cromie Group

[18] Ms Crossley became aware of the sale of IC Group to Mark Cromie Group in December 2018. A meeting of staff at IC Group was called to announce the sale of the business to Mark Cromie Group.

[19] In a letter to staff dated 17 December 2018 following the meeting, Mr Illerburn stated:

² Witness Statement of Richard Evans

These last couple of weeks have been a very emotional time for myself and Tracey. We have been presented with an offer to purchase our business interests including the land and buildings of IC Motor Group. This was a very difficult decision to make as we had not been considering exiting the car industry for many years and it is with mixed emotion that we advise effective 8 February 2019, Mark Cromie will take over the business operation of IC Motor Group. ... So what does this mean for you:

1. We have discussed with Mark the process of the business transition and we both want this to be as smooth as possible for all staff members including the customers and the brands. It is Mark's intention to merge his business interests with that of IC Motor Groups that is on this site today. This new proposed business model and ownership will be significantly stronger and larger in the Northland market.
2. Mark and his team would like to discuss with each and every one of you new employment arrangements in the coming weeks.
3. We understand that this will cause some uncertainty for you until the acquisition and transition has been detailed and finalised further. Myself and Tracey will be working closely with you all over the next six weeks to help with your transition.

Once again, Tracey and I thank you all for your massive contribution to IC Motor Group and we look forward to the future success of the newly formed business model. ...

[20] The number of staff employed by IC Group and Mark Cromie Group following the sale totalled 80.

Fixed term employment agreement – 10 January 2019

[21] Ms Crossley signed the fixed term employment agreement on 15 January 2019 and Mark Cromie for Mark Cromie Group signed it on 23 January 2019.

[22] The agreement signed by the parties stated that Ms Crossley's employment would start on 8 February 2019 and end on 7 June 2019.

[23] Paragraph 1.3 set out the reason for the fixed term agreement. It states:

The employer and employee agree there is a genuine reason for the fixed term and for employment to finish when the term ends. The reason for it being fixed term, and finishing at the end of the term, is within this four-month period there will be a merger between the two existing entities, this will more than likely create some role duplications across most departments and therefore require some restructuring.

[24] Other relevant clauses included paragraph 24, a redundancy clause which stated that even though Ms Crossley was on a fixed term agreement, there could be circumstances that mean her role might no longer be needed before the term had ended. Clause 24 also stated that

if, following a good faith restructuring process the employee was made redundant, he or she would be given notice under the termination clause. The termination clause provided for two weeks' notice in writing. No redundancy compensation was payable.

[25] At the conclusion of the agreement, Ms Crossley made the following acknowledgement:

I accept this is a genuine fixed-term employment agreement. I understand the reason for the fixed-term, including why employment will finish when the term ends, as set out in this agreement. I accept it is a genuine reason based on reasonable grounds. I have no expectation of continued employment after the term ends.

[26] Ms Crossley also acknowledged that she had been given adequate opportunity to read, consider and take independent advice before agreeing to the terms of the employment agreement.

[27] Ms Crossley says that she spoke about the employment agreement with her partner, Mr Boccock, and decided to sign the agreement. She says she was not given an option of continued employment if she did not sign the agreement and so she signed it. Ms Crossley says she was aware it was a fixed term agreement but that she felt assured that even if the business was restructured because of duplications in roles, she would still retain her position because Mark Cromie had informed all staff they would be "looked after" at the meeting in December 2018 at which the merger was announced.

Reason for fixed term

[28] The evidence for Mark Cromie Group was that the final structure for the merged business was not known at the time of the merger. The fixed term employment agreement was to enable it to determine the final structure. It was important for Mark Cromie Group when taking over a new business that it review the structures and make changes.

[29] Mr Evans says IC Group was not being run as an efficient business. Mr Evans says that prior to discussing the merger with IC Group he and Mark Cromie calculated that Mark Cromie Group had a gross profit per employee of approximately \$14,000 whereas IC Group had a gross profit of approximately \$6,000 per employee. The conclusion reached by Mr Evans and Mr Cromie was that IC Group had too many staff. This was knowledge which they were aware of prior to purchasing IC Group. When Mr Evans met with Ms Crossley in January 2019 to give

her the fixed term employment agreement he was not aware of what the future structure of the merged group would look like. However, he and Mr Cromie were aware of IC Group's profitability, there were inefficiencies, too many staff and that it was likely there would be redundancies. A number of employees were offered fixed term employment agreements for a four-month period and for the first three months Mark Cromie and Mr Evans monitored and reviewed the business and came up with a structure which they felt would be the most effective and affordable structure moving forward.

[30] Mr Evans says that when the decision was made to let Ms Crossley's employment agreement expire, he was aware of Mark Cromie Group's obligations in respect of redundancy. However, it was his view that it wasn't a redundancy situation.

Termination of Ms Crossley's employment

[31] Ms Crossley says that she was asked to attend a meeting on 8 May 2019. She was not given prior warning and did not know what it was about. Ms Crossley assumed that as new staff were being employed by Mark Cromie Group, some of whom she was training, her position was secure. Ms Crossley met with Mr Evans, Mr Cromie and Mr Kendall and was informed that her employment agreement was due to expire in one month and that she was not going to be offered a new role.

[32] Ms Crossley says she became upset at the meeting because she had not expected the meeting was to discuss the termination of her employment agreement. She did not have a support person at the meeting and felt intimidated at having to meet with three senior managers, alone.

[33] At the conclusion of the meeting Ms Crossley says Mr Evans confirmed to her that she did not have to work out her notice period and that she would be paid until 7 June 2019. Ms Crossley was given a letter as follows:

Dear Kerry

When Mark Cromie Motor Group offered you an employment contract in February it was a four-month fixed term contract which terminated on the 8th June 2019. The reason for offering all IC Motors staff a fixed term contract was because we were merging two large entities and there was obviously going to be some duplication of roles which would lead to some restructuring. After three months of trading we've now identified a structure that we feel is needed to effectively and profitably operate the Dealership. Regrettably this means that we will not be offering you a new contract at the end of this term. We

thank you for your efforts over the past three months and by notifying you of our intentions one month in advance, we hope that we are giving you the opportunity to seek further employment prior to 8th June.

Regards
Richard Evans
General Manager, Mark Cromie Motor Group.

[34] The letter of termination makes it clear in my view, that the merging of the two entities led to the duplication of roles and that meant there was to be “some restructuring.” In other words, after three months of operation, Mark Cromie Group determined that Ms Crossley’s role was surplus to requirements. Rather than terminating her employment for redundancy in accordance with her employment agreement, Mark Cromie Group sought to rely on the expiry of the fixed term employment agreement to terminate Ms Crossley’s employment.

[35] As stated by Her Honour Chief Judge Inglis in *Morgan v Tranzit Coachlines Wairarapa Limited*, it is for the employer to show that there is a genuine reason based on reasonable grounds for the fixed-term agreement³.

[36] The reason stated for the fixed term contract was that there would be a merger between two existing entities which would more than likely create some role duplications which may mean some restructuring. Mark Cromie was unsure that the merger of the existing entities would be financially sustainable. This was the reason given for the fixed employment agreement.

[37] At paragraph 20 of *Morgan v Tranzit*, Chief Judge Inglis states:

It should not be forgotten that financial uncertainty is something all businesses face to a greater or lesser degree. The mere fact of financial uncertainty cannot, of itself, suffice in terms of the threshold requirements of s 66 (2)(a). If it were otherwise, virtually every employment agreement could lawfully proceed on a fixed-term basis. That is plainly not what parliament intended in enacting s 66.

[38] The employment agreement includes a provision which deals with a situation of redundancy. Redundancy is stated to be a situation in which “an Employee’s role is no longer required.” Mark Cromie Group employed Ms Crossley on a fixed term employment agreement when the agreement itself provided for termination if her role became surplus to requirements.

³ At para [8].

[39] Her Honour stated in *Morgan v Tranzit*⁴:

So where the fixed-term agreement mechanism is but one of a range of possible options available to an employer addressing an operational need, might it not be that the option which least encroaches on the principles underlying ILO158, and the employment rights referred to in it, is to be preferred? Such an approach may be said to sit comfortably with the safeguards against termination of employment at the initiative of the employer reflected in s66, and the mischief that provision is clearly designed to address.

[40] Mark Cromie Group had a process in clause 24 of the employment agreement in which to deal with its operational need. Relying on the fixed term to terminate Ms Crossley's employment undermines Mark Cromie Group's claim that the fixed term agreement was genuine..

[41] At paragraph 28 of *Morgan v Tranzit*, Her Honour states:

In the present case any financial uncertainty relates to ordinary business risk (potential loss of a revenue stream); it does not comprise a genuine reason based on reasonable grounds to enter into the two fixed-term agreements at issue. Nor does it constitute a genuine reason based on reasonable grounds to end Mr Morgan's employment. I would otherwise have held that even if there was a specific (rather than generic) business risk, there was insufficient financial uncertainty to justify the two fixed term agreements for the purposes of s 66.

[42] In that case, Her Honour agreed that Mr Morgan was entitled to claim that the two fixed term agreements were ineffective.

[43] The possibility of a business needing to restructure and employees becoming surplus to requirements is an ordinary business risk. It was a risk contemplated by clause 24 of Ms Crossley's employment agreement.

[44] In my view the fixed term agreement falls foul of s66 of the Act. Accordingly, Mark Cromie Group was not able to rely on the expiry of Ms Crossley's fixed term employment agreement to end her employment.

⁴ At para [13].

Issue Two**If the fixed term employment agreement did not comply with s 66 of the Act, was Ms Crossley unjustifiably dismissed?**

[45] Following the meeting on 8 May 2019, when Ms Crossley was informed she was not going to be offered employment following the expiry of her fixed term employment agreement, Ms Crossley wrote to Mr Evans.

[46] In a letter dated 9 May 2019 Ms Crossley stated:

Good morning Richard, I'm really upset about what happened yesterday. I definitely would have wanted someone to be there for me if I knew I was going to be fired. I was suddenly called to meet, didn't know what it was about, three management waiting for me, just told me my job no longer exists, can't afford to pay for my job, the first time you guys have ever had a meeting regarding my job disappearing and notifying me of this. Maybe I could have said something to change your minds, go down in hours, do other jobs etc but didn't get the chance. People had said I was doing really well at my work after June, I loved it here. No suggestion I could do other jobs, I could have done the service advisor job as I am back up advisor when we are short staffed. How come I was not offered one of the positions before you had them filled. What about the training I gave Jenni to be able to back up my job?

[47] Mr Evans responded to Ms Crossley stating that it was not his intention that she be intimidated and the reason the 3 senior managers were present was to offer different views on suggestions that may arise. He stated:

Unfortunately, you did not give us the opportunity to further discuss the issue or any options because you stood up and demanded to leave the room immediately after the explanation of the meeting, you will recall that I asked you not to leave but to hear us out. It was your wish to leave immediately. It was by your choice that you did not get the opportunity to suggest lower hours, other jobs etc. You referred to being "Fired". This was not the case. You had a fixed term contract and the reasons for not extending it were the reasons given for making the initial contract fixed term. Training given to Jenni was to be extended to all Service Advisors, as I stated the role that you were in will eventually be absorbed by the Service Advisors, therefore eliminating an extra overhead, you are correct Jenni will now have to do your role until the 8th June as you have elected to remain away from work for the last month of your four month contract. There was always going to be restructuring, this was not vague, it was stated as part of your contract. We were just not sure to what extent until we had traded for the three-month period. Hopefully this clarifies the situation.

[48] Staff of IC Group remained on permanent employment agreements, it was the Mark Cromie Group staff that were offered the fixed term employment agreements.

[49] Mark Cromie Group did not revisit its decision to terminate Ms Crossley's employment or consider other options for her. It relied on the fixed term contract.

[50] It is my view that Mark Cromie Group failed to comply with s103A of the Act. Its actions and how it acted were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[51] Mark Cromie failed to comply with processes set out in the employment agreement which would apply in the event an employee's position was to be made redundant. There was no consultation about the reasons for Ms Crossley's termination of employment, Ms Crossley was not given the opportunity to have a representative at the dismissal meeting and little if no notice was given to her of the dismissal meeting or what it was to be about.

[52] I find Ms Crossley's dismissal was unjustified.

Issue Three

If Ms Crossley was unjustifiably dismissed, what remedies are available to her?

Compensation

[53] Ms Crossley says she has been on "an emotional roller coaster" since her dismissal. She felt she had been "used" in order to train new staff and then dismissed without good reason. She was devastated by the decision. As a result Ms Crossley has suffered anxiety, humiliation when telling family and friends and her confidence has been severely impacted. Her partner, Mr Boccock also told the Authority about the impact the dismissal has had on Ms Crossley.

[54] I consider the sum of \$20,000 compensation under s 123 of the Act to be an appropriate sum to award Ms Crossley for the humiliation, loss of dignity and the injury to her feelings.

[55] I order Mark Cromie Group to pay Ms Crossley compensation in the sum of \$20,000 under s 123 of the Act within 21 days of the date of this determination.

Reimbursement of wages

[56] Ms Crossley had to obtain work immediately because of her family's financial obligations. She finally obtained a part time role on 9 June 2019. Ms Crossley is claiming reimbursement of wages lost for 3 months under s 128 of the Act.

[57] Ms Crossley was paid \$20 gross for 42.5 hours a week by Mark Cromie Group. This amounts to \$950 gross a week. For 13 weeks (3 months) this amounts to \$12,350 gross. Ms Crossley has earned wages of \$22 an hour for a 30-hour week since 10 June 2019 with her new employer. This amounts to \$660 a week and \$8580 gross for 13 weeks. The difference in what Ms Crossley would have earned at Mark Cromie Group but for her dismissal would have been \$12,350 gross. Ms Crossley actually earned \$8,580 gross for that period. The difference amounts to \$3,770 gross.

[58] I order Mark Cromie Group to reimburse Ms Crossley lost wages totally \$3,770 gross within 21 days of the date of this determination.

Contribution

[59] I am required by s124 of the Act to consider whether Ms Crossley's actions contributed to the situation that gave rise to her personal grievance. Mr Crossley did not contribute and therefore her remedies will not be reduced.

Costs

[60] Costs are reserved. Ms Crossley has fourteen days from the date of this determination to file a memorandum as to costs. Mark Cromie Group has fourteen days within which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority