

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 186
3103692

BETWEEN MATHEW DOBBS
 Applicant

AND ACTUS TRANSPORT (NZ)
 LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Lars Hansen, counsel for the Applicant
 Mark Beech, counsel for the Respondent

Investigation Meeting: 25 March 2021 at New Plymouth

Submissions [and further 12 April 2021 from the Respondent
Information] Received: 20 April 2021 from the Applicant
 27 April 2021 from the Applicant

Date of Determination: 6 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mathew Dobbs' began working for Actus Transport (NZ) Limited ("Actus") on 26 August 2019, albeit he had been employed by it on two previous occasions, each for 4-5 months, prior to this appointment.

[2] The employment agreement recorded the relationship as 'fixed-term', for a 6 month period, scheduled to terminate on 26 February 2020.

[3] Mr Dobbs was based in Taranaki. He reported to Allan Fowell who managed the Taranaki regional depot. Steve Hart, who worked at Actus' head-office in Morrinsville was

also involved with the management of the Taranaki depot, as was General Manager, Greg Crawford, who was also located in Morrinsville.

[4] In late November 2019 Mr Dobbs sought approval to take annual leave in May 2020. On receipt of the leave application Mr Crawford contacted Mr Dobbs and inquired as to whether he was wanting a longer term with Actus.

[5] It is common ground that a permanent employment agreement was subsequently prepared. The document was initialled and signed by Mr Crawford on 2 December 2019 and sent manually to Mr Dobbs. Mr Dobbs signed the permanent agreement on 15 December 2019. However, he did not return it to Mr Crawford until 14 February 2020.

[6] In early February 2020 a dispute arose between Mr Dobbs and Mr Hart. Mr Dobbs says Mr Hart became angry and told him to bring in the permanent agreement so he [Mr Hart] could “rip it up”.

[7] Several days later, on 12 February 2020, Mr Dobbs received a letter from Mr Crawford dated 10 February 2020. The letter advised:

As per the terms and conditions of your current individual employment agreement, we hereby give your four weeks' Notice of the conclusion of your 6 Month Term Agreement.

Actus Transport (New Zealand) Limited is effectively advising that we will not be continuing your employment beyond the 26th February 2020.

...

[8] The remainder of the letter set out the arrangements for payment of the notice period.

[9] Mr Dobbs attended work on 27 February 2020 but was told he no longer had a job.

[10] Mr Dobbs raised a personal grievance soon after. However the parties have been unable to resolve their differences, and it is left to the Authority to determine Mr Dobbs' claims.

Mr Dobbs' position

[11] Via his representative Mr Dobbs says the fixed term agreement was non-compliant with the provisions contained in Employment Relations Act 2000 (the Act), that concern fixed term employment arrangements. This failure is said to have allowed Mr Dobbs to treat the fixed term nature of the agreement as ineffective, and he was a permanent employee.

[12] In the alternative, Mr Dobbs says he was offered and had accepted permanent employment with Actus in December 2019.

[13] In either circumstance, Mr Dobbs says he was unjustifiably dismissed.

Actus' position

[14] Actus was of the view that it was able to dismiss Mr Dobbs under the terms of the fixed term employment agreement.

[15] It further says Mr Dobbs verbally declined the offer of permanent employment and/or that the offer had not been executed in a timely manner and was therefore invalid.

The Authority's investigation

[16] Mr Dobbs, his wife Dianne Dobbs, and Mr Fowell attended the Authority's investigation meeting in person. Mr Crawford attended the meeting electronically via Zoom.

[17] Each witness provided a written statement in advance of the meeting and answered the Authority's questions, and where relevant, under cross examination. Both parties were represented by experienced counsel, who provided written submissions and information requested by the Authority subsequent to the meeting.

[18] This determination has been issued outside the timeframe set out at s 174C(3)(b) of the Employment Relations Act where the Chief of the Authority has decided exceptional circumstances exist.¹

The issues

[19] To determine whether Mr Dobbs was unjustifiably dismissed, the parties, in a Joint Issues Memorandum,² identified the following issues for examination:

- (a) Whether Actus Transport was able to rely on the terms of the fixed-term employment agreement to terminate Mr Dobbs' employment, and in particular:
 - (i) whether the agreement to a fixed-term arrangement complied provision with the requirements of s 66;

¹ Pursuant to s 174C(4)

² Dated 15 February 2021

- (ii) whether Mr Fowell had authority to alter the terms of the fixed-term agreement and infer the fixed term nature of the position may not be binding.
- (b) If the fixed term agreement does comply with s 66 of the Act, whether Mr Dobbs was employed under a permanent employment agreement and in particular:
 - (i) did Mr Dobbs accept the offer of permanent employment dated 2 December 2019?
 - (ii) did Actus withdraw the offer of permanent employment?
- (c) If Mr Dobbs is found to have been a permanent employee and his dismissal was unjustifiable, what remedies should he receive.
- (d) Whether Mr Dobbs' contributed in a blameworthy and causative way to the situation that gave rise to the personal grievance.

Analysis

[20] To determine first whether the fixed term employment agreement was lawful pursuant to the requirements of the Act, I must examine s 66 of the Act. The material provisions are as follows:

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
 - ...
- (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) 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;
 - ...

- (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.

[21] There is no dispute the fixed-term agreement recorded, in accordance with the circumstances allowed under the Act at s 66(1)(a), a specific date when Mr Dobbs' employment would end.

[22] There is, however, some disparity between the witnesses as to the reasons for the fixed term, and whether these were fully conveyed to Mr Dobbs, as required by s 66(2) of the Act. There are further issues as to whether there was an intention for the parties to be bound by the provision. I shall return to these issues in due course.

[23] It is not necessary to fully resolve each of the evidential conflicts at this juncture where I am satisfied, by the evidence provided, that at the time he signed the fixed term agreement Mr Dobbs was aware:

- (i) the agreement recorded Mr Dobbs' employment was for a fixed-term period of 6 months;
- (ii) Mr Crawford, on behalf of Actus, wanted the employment relationship to be for a fixed-term, at least in part, because he viewed Mr Dobbs' commitment to a permanent position as questionable, and he wanted to see "*how Mr Dobbs went [in the employment relationship]*".
- (iii) Whether intended to be conveyed or not, he [Mr Dobbs] was left with the impression, having discussed the fixed-term provision with Mr

Fowell, that the employment relationship would continue beyond 6 months if Mr Dobbs remained happy to work for Actus

[24] During the Authority's investigation meeting Mr Crawford said the fixed-term nature of Mr Dobbs' employment was primarily to address a short-term project with an external business partner, and to cover staff absences and/or shortages. I consider it more likely than not that Mr Dobbs was not advised of these additional matters before he signed the fixed-term agreement.

[25] As it transpired the project did not extend beyond 7 weeks. Mr Crawford agreed that Mr Dobbs' unreliability was also a factor in deciding the employment terms should be fixed.

[26] The difficulty for Actus is that s 66(3)(b) prohibits the use of fixed-term employment arrangements where these are aimed to establish an employee's suitability for a role. I must find on the evidence that Actus' election for a fixed term was partially aimed to give management time to assess whether Mr Dobbs should be offered permanent employment. That rationale does not provide a genuine reason for which Actus is able to rely upon as a reason for a fixed-term employment arrangement.

[27] In any event, there is a further difficulty which impacts on the lawfulness of the fixed term nature of the employment relationship. Section 66(4) requires the employment agreement to state in writing the way in which the employment will end, and the reasons for ending the employment in that way. It is clear the employment agreement did not contain any statement or explanation on either of these matters. It follows the employment agreement did not comply with s 66(4).

[28] Section 66(6)(a) of the Act provides that if an employer does not comply with subsection 66(4), it may not rely on any term agreed to end the employee's employment, if the employee elects at any time to treat that term as ineffective. By Mr Dobbs' readiness to work the day after the fixed term purportedly expired, it can be taken that he treated the fixed-term nature of the employment as ineffective, as he was entitled to do. Notably, during the investigation meeting Mr Crawford conceded the fixed-term agreement did not meet the statutory tests under s 66(4).

[29] It follows from the above that Mr Dobbs was a permanent employee. It has therefore not been necessary to determine the status of permanent employment agreement on Mr Dobbs' employment with Actus.

[30] There is no evidence that Actus sought to raise or discuss any concerns with Mr Dobbs in respect to the disputed operational issue, and Actus does not refer to that event as reason for the dismissal. Having unlawfully relied on the date in which the agreement was scheduled to terminate, and Mr Dobbs' subsequent attendance at work I must find the termination of Mr Dobbs' employment was not the action of a fair and reasonable employer in all the circumstances. Mr Dobbs' dismissal was unjustified, and he is entitled to remedies.

Remedies

[31] Remedies for an unjustified dismissal are governed by the Act. Amongst other things Mr Dobbs initially sought reinstatement and penalties. Those matters were not pursued during the Authority's investigation meeting or in final submissions and I consider these to have been withdrawn. Mr Dobbs now seeks 3 months' lost wages and compensation for the way in which he was dismissed.

[32] Actus strongly contests the remedies Mr Dobbs' seeks. There are several strands to this aspect of its challenge.

Technical breach

[33] Actus' suggests Mr Dobbs was aware of and accepted the fixed term provision and therefore Actus' failure to comply with the requirement to record in writing the way in which the employment will end and the reasons for that, was a technical breach only.

[34] I do not accept an inference that a "technical breach" of this nature alters the availability of remedies. There is nothing in the Act to indicate a failure to comply with the written disclosure requirements at s 66(4) reduces an entitlement to remedies that may flow as a consequence of the failure.

Uncertainty regarding operational requirements

[35] Actus' explanation that there was some uncertainty concerning the project does not provide a satisfactory explanation for the breach. It is clear from the wording of s 66(4) that

the obligation to record in the employment agreement the reasons for the fixed-term employment is mandatory.

[36] Counsel for Mr Dobbs points also to observations made by the Chief Judge Inglis in *Morgan v Transit Coachlines Wairapa Ltd*, as follows:

It should not be forgotten that financial uncertainty is something all business face to a greater or lesser degree. The mere fact of financial uncertainty cannot, of itself, suffice in terms of the threshold requirement 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.

[37] The Chief Judge's comments were aimed towards s 66(2)(a) of the Act, but I find they apply equally to written disclosure requirements at s 66(4).

No expectation of ongoing employment

[38] Next, it is said Mr Dobbs could have had no expectation of ongoing employment after the expiry of fixed term agreement and again, by inference, no entitlement to lost wages. The evidence does not bear out this submission.

[39] It is accepted by both parties that Mr Fowell met with Mr Dobbs at his home two days before his employment began and presented him with the fixed-term agreement. Mr Dobbs noted the employment agreement was for a fixed-term and queried why that was.

[40] Mr Dobbs says Mr Fowell told him there was no good reason for the length of the employment to be fixed, and Mr Crawford was "playing games" given Mr Dobbs history of short-term employment with Actus.

[41] Mr Fowell's evidence on this point differs from Mr Dobbs. Mr Fowell says it was his understanding that Mr Crawford wanted the employment to be for a fixed-term nature to "see how it went" with Mr Dobbs. Mr Fowell advised Mr Dobbs that he thought the role would become permanent.

[42] It is clear the evidence as to the reason for the fixed term at the time Mr Dobbs signed the employment agreement does not align exactly. But the discrepancies between their accounts is not sufficient to disregard the evidence in total. There is some consistency between the pair, particularly, that in the absence of Mr Dobbs' early departure from Actus, the position was likely to be ongoing despite the classification of the role as fixed-term. On balance I am

satisfied Mr Dobbs was led to understand that it was likely the employment relationship would continue at the end of the fixed term period if all went well with the parties.

Does Mr Fowell’s representations to Mr Dobbs regarding in respect to the fixed term alter Actus’ liability?

[43] In a joint memorandum to the Authority, the parties identified as an issue for determination whether Mr Fowell had “the authority to offer Mr Dobbs’ employment”.

[44] Notably, Actus does not challenge Mr Fowell’s evidence that he was instructed by Mr Crawford to take the fixed term employment agreement to Mr Dobbs, have him sign it and return it to Actus. It follows Mr Fowell has actual authority to offer Mr Dobbs’ employment.

[45] It appears the real concern for Actus is that it perceives Mr Fowell’s statements to Mr Dobbs concerning the fixed-term agreement were incorrect. But, no matter what Mr Fowell to Mr Dobbs said about the permanency or otherwise of the fixed-term provision, there was no reason for Mr Dobbs to conclude Mr Fowell was not acting on behalf of Actus during the discussion regarding the fixed term. Mr Dobbs was entitled to rely on Mr Fowell’s representations, and it was reasonable for him to do so. The doctrine of ostensible authority³ must apply to these circumstances. If Mr Fowell exceeded his authority as to what he said to Mr Dobbs that is a matter between him and Actus. Actus is not able to avoid liability in respect of Mr Dobbs’ claim on the basis that it is unhappy with Mr Fowell’s actions as its employee.

Contribution

[46] Actus alleges Mr Dobbs’ contributed to the situation giving rise to the personal grievance. It says it is apparent Mr Dobbs’ had no intention to be bound by the December 2020 offer of permanent employment.

[47] It is asserted (in the statement of problem and in final submissions) that Mr Dobbs had verbally rejected the offer of permanent employment. During questioning however, Mr Crawford was unable to say to whom Mr Dobbs had rejected the offer, and Mr Crawford agreed he could not be certain this was the case. Next, Actus further suggests it was known Mr Dobbs was seeking work with another entity after the offer of permanent employment was made. No evidence was produced to support this assertion.

³ See *Freeman v Lockyer* [1964] 2QB 480. The doctrine has been accepted into New Zealand law, see for example *Clark v Nelson Marlborough District Health Board* [2002] 2 ERNZ 483 at [56].

[48] Actus primarily points to Mr Dobbs' failure to return the permanent agreement until two months after it was given to him, to demonstrate its position on this point.

[49] I note firstly there is no evidence to establish the offer of permanent employment was conditional on Mr Dobbs returning the signed document by a certain date. Nor is there any evidence that Actus withdrew the offer.

[50] Mr Crawford says at some point he asked Mr Hart to follow up with Mr Dobbs on the matter. However, Mr Dobbs says Mr Hart did not raise any issue about the permanent agreement or its return with him until 4 February 2020 (or thereabouts) when they argued. During the Authority's investigation Mr Crawford agreed Mr Hart made no subsequent mention of a "follow up" on the issue.

[51] Against a background where Mr Dobbs' had been informed that the fixed term employment would likely become permanent, and where this presumption was, in fact, borne out when Mr Dobbs' was offered a permanent role in December, I consider it likely that Mr Dobbs simply did not turn his mind to returning the permanent agreement until he received notice dated 10 February 2019 that the fixed term was coming to an end. In these circumstances it was reasonable for him to consider the position would simply transfer to a permanent classification, and that the return of the permanent employment agreement was a formality. I pause to note Actus' correspondence was silent as to the existence of the permanent employment agreement, and nothing in the letter indicated Actus was dissatisfied with Mr Dobbs approach on this matter.

[52] Actus further alleges Mr Dobbs did not act in good faith by failing to return the agreement, but it is clear there was no communication or action taken by either party on the matter. In this respect I am cognisant of the inherent inequality of power between the parties. If it was important for Actus to retrieve the agreement it did not advise Mr Dobbs of that requirement.

[53] Taking into account Actus' position that Mr Dobbs employment was terminated because the fixed-term arrangement had concluded, there is no apparent link between the grounds on which Actus dismissed Mr Dobbs, and Mr Dobbs actions concerning the offer of permanent employment. I am therefore not at all convinced Mr Dobbs' actions regarding the offer of permanent employment can be characterised as conduct giving rise to the dismissal.

Lost wages

[54] Having established Mr Dobbs was unjustifiably dismissed, s 128(2) of the Act requires the Authority to award lost wages at the lesser of either a sum equal to his actual loss or a sum equal to 3 months' ordinary pay.

[55] There is evidence that Mr Dobbs sought alternative employment for the 3 months after his paid notice period came to an end and I am satisfied he sought to mitigate his losses.

[56] Mr Dobbs is entitled to 3 months' lost wages. He is therefore owed lost wages of \$19,998.42.⁴ He is further entitled to have Actus pay the employer's KiwiSaver contribution on this sum.

Compensation

[57] Mr Dobbs seeks somewhere between \$12,000 to 15,000 as compensation for humiliation, loss of dignity and injury to feelings corresponding to his personal grievance.

[58] Mr Dobbs provided information about the effect his dismissal had on him. I am satisfied he felt distressed by the loss of his job and the flow-on impact on his perception as the bread winner of the family.

[59] Mr Dobbs says his distress was exacerbated as he was compelled to sell several personal items which had significant sentimental value to him to meet outgoings.

[60] Mrs Dobbs reports he became increasingly and disproportionately agitated in response to minor irritations. This caused tension in the home.

[61] Based on the evidence before the Authority I consider \$14,000 is an appropriate sum to compensate Mr Dobbs for the way in which he was dismissed and the distress and hurt feelings he experienced as a consequence.

Contribution

[62] Mr Dobbs did not contribute to the situation that led to his dismissal. A reduction in remedies is therefore not warranted.

⁴ Mr Dobbs' average gross earnings over the six weeks prior to his dismissal equates to \$1,538.34 (gross) per week. \$1,538.34 x 3 months (13 weeks) = \$19,998.42

Summary of Findings and Orders

[63] Mr Dobbs was employed on fixed-term employment agreement with Actus Transport (NZ) Ltd. The fixed-term provisions set out in the employment agreement did not satisfy the statutory requirements of s 66 of the Act. Mr Dobbs treated the fixed-term provision as ineffective as he was entitled to do.

[64] Mr Dobbs was a permanent employee, and his dismissal was not justifiable.

[65] Actus Transport (NZ) Ltd is ordered to pay Mathew Dobbs the following:

- (a) \$21,505.13 (gross) in lost wages pursuant to s 123(1)(b) of the Employment Relations Act 2000;
- (b) The sum equal to the Employer's KiwiSaver contribution in relation to the sum of lost wages (above at (a));
- (c) \$14,000 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act.

Costs

[66] Mr Dobbs' claims have been successful. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination is needed, Mr Dobbs' may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Actus Transport (NZ) Ltd will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[67] The parties can expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless there are circumstances or factors that allow for an upward or downward adjustment to the tariff.⁵

Michele Ryan
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1