

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 592  
3137021

BETWEEN	GEOFFREY MARTIN Applicant
AND	THE PRIORY IN NEW ZEALAND OF THE MOST VENERABLE ORDER OF THE HOSPITAL OF ST JOHN OF JERUSALEM Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Louise Smith, advocate for the Applicant Charlotte Parkhill, counsel for the Respondent
Submissions received:	11 March, 15 June, and 6 July 2022, 6 March and 4 July 2023
On the papers consideration:	4 October 2023
Determination:	11 October 2023

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Geoffrey Martin has applied to the Authority for an investigation and determination of a problem arising from his employment by the Priory in New Zealand of the Most Venerable Order of the Hospital of St John of Jerusalem (St John).

[2] The problem was first communicated by Mr Martin to St John in October 2018, as a personal grievance. He complained St John had unjustifiably disadvantaged him

by refusing a request made in July 2018, to join a subsidised medical insurance scheme available to other St John employees.

[3] To resolve the employment relationship problem, Mr Martin asks for a determination that he has a personal grievance. He seeks compensation of \$91,935.00 estimated for loss of a benefit of employment, and legal costs and expenses.

[4] In response, St John rejects Mr Martin's grievance claim and contends his application to the Authority is misconceived.

[5] The parties undertook mediation but were unable to resolve the problem.

[6] The Authority directed that a determination would be given on the papers without an investigation meeting. To that end the parties provided written submissions and further information in March, June, and July 2022.

### **Change in Authority and an extension of time**

[7] As a determination could not be completed by the Authority member originally assigned to the case, a change of member was made. The situation is provided for by clause 16 of Schedule 2 of the Employment Relations Act 2000 (the ER Act).

[8] That change led to a request by the Authority in February 2023 for further information or advice from the parties. This was provided in March and July 2023.

[9] The Chief of the Authority has granted an extension of time beyond the normal three-month period for giving this determination. The extension was required because of the demands of other Authority work.

[10] This determination is given in accordance with s 174E of the ER Act and does not therefore record all the evidence or information considered by the Authority, or submissions received.

### **Fixed term employment**

[11] Mr Martin was employed by St John as an ambulance officer on several occasions between 2014 and 2020. Each employment was expressed to be 'fixed term'.

[12] At other separate times he was employed in the same position under a ‘casual’ employment agreement.

[13] Mr Martin’s grievance arose from the fixed term employment he had from July 2018 until September that year, under an individual employment agreement (IEA).

[14] No issue has been raised in this case about compliance with s 66 of the ER Act, which imposes conditions on fixed term employment. St John had genuine reasons based on reasonable grounds for fixing a term, which were stated in the IEA and in a 9 July 2018 memorandum St John and Mr Martin signed in confirmation of the employment. The reason for the fixed term employment was to help St John provide coverage for expected staff shortages caused by illness over the winter period.

[15] On or about 27 July 2018 shortly after commencement of employment, Mr Martin asked St John if he could join the subsidised Major Medical Insurance scheme (MMI) available to other St John employees. St John declined the request.

### **Website extract**

[16] The IEA and memorandum made no express provision for MMI or any other subsidised medical insurance as an entitlement.

[17] Mr Martin’s request for that benefit seems to have been prompted by an extract found on an MBIE website<sup>1</sup>, which reads:

- a. Fixed-term employees have the same employment rights and responsibilities as permanent employees, except that their job will finish at the end of the fixed term (and sometimes the way in which they receive their annual holiday entitlement may be different).

[18] The advice must be read in context. It is from web pages published by MBIE, the Government department responsible for administering the ER Act and other legislation which provides for minimum entitlements, or a minimum code, including the Minimum Wage Act 1983 and the Holidays Act 2003.

---

<sup>1</sup> <https://www.employment.govt.nz/starting-employment/who-is-an-empoloyee/types-of-employee/>

[19] The meaning of the phrase 'rights and responsibilities' is qualified in the website pages by reference to 'minimum' rights and responsibilities. The minimum rights of an employee are stated by MBIE to be the responsibility of the employer, and reference is made to entitlements such as minimum wages, holiday and sick leave entitlements.

[20] The MBIE website pages Mr Martin read also included a table comparing 'minimum rights' with 'negotiable terms and conditions'. The focus of MBIE's advice is the former.

[21] It is not contended by Mr Martin that subsidised medical insurance is a minimum term or condition of employment provided by statute law, in the way minimum wages, holiday pay and sick leave are provided.

[22] Under s 65(1) of the ER Act, an employment agreement must be in writing and may contain

..... such terms and conditions as the employee and employer think fit.

[23] Subsidised medical insurance is negotiable between parties to an employment agreement and may become come a term or condition by offer and acceptance. There is no indication from the information given to the Authority that St John offered Mr Martin subsidised medical insurance as a term or condition of employment, or that he accepted such an offer.

[24] From the absence of an express contractual term supporting Mr Martin's request to join St John's subsidised medical insurance scheme, it may reasonably be inferred that there was no mutual agreement to include such a term in the fixed term contract.

[25] The IEA at clause 30 expressly acknowledged that terms could be implied into it by operation of law, and that they could be incorporated by statute. The Authority accepts the submissions for St John, that if the usual principles for the implication of contractual terms were applied, access to MMI would not become a term of Mr Martin's employment.

[26] It is also not a term or condition which has been incorporated by reference in the IEA, to general rules or policies of the employer which may be found outside the written agreement.

### **Limits on Authority's jurisdiction**

[27] Although Mr Martin's problem has been presented as a personal grievance, the Authority is not confined to treating it as such but may concentrate on resolving the problem however described. Section s 160(3) of the ER Act enables this approach.

[28] The jurisdiction of the Authority is however limited by s 161, which excludes the making of a determination about bargaining or the fixing of new terms and conditions of employment. The Authority could not determine that because subsidised medical insurance was offered by St John to permanent employees, the same should have been bargained for with Mr Martin and others entering into a fixed term agreement.

[29] In the circumstances of this case the Authority could not impose or introduce a term into the agreement that the parties had not consented to.

[30] There is no allegation that the terms and conditions of Mr Martin's employment were induced by duress or unfair bargaining.

### **Grievance derived from a 'dispute'**

[31] There is a further difficulty which St John raised in submissions, that s 103(3) of the ER Act excludes from the definition of unjustifiable action any action derived solely from the interpretation, application, or operation of any provision of an employment agreement.

[32] In this case the situation may be a step back, as there is no provision at all, express or implied, dealing in any way with subsidised medical insurance.

### **Permanent employee – the Collective Employment Agreement**

[33] The St John Operational Collective Agreement (CEA) in force in 2018 is expressed in clause 1.2.1 to apply to all employees who are members of the relevant

union. Clause 10.7 provides that the MMI scheme will be available to ‘all permanent employees’. Section 8 provides that employees employed on a fixed term shall be entitled to all conditions that apply to full time employees.

[34] A permanent employee is defined in the CEA as an employee employed on an indefinite basis. The definition of a fixed term employee includes an employee employed for a specified period. It is clear from those definitions that under the CEA a fixed term employee is not within the definition of a permanent employee. Unless an employee’s IEA expressly provides a particular definition departing from the usually accepted meanings of permanent and fixed term, the CEA definitions could be regarded as those intended to apply to employment under an IEA.

[35] The Authority finds that Mr Martin was not a permanent employee.

### **Prohibition on preference**

[36] Section 9(1) of the ER Act prohibits preference in relation to terms and conditions of employment, by reason of a person being or not being a member of a union. At material times Mr Martin was not a union member.

[37] Section 9(2) provides that prohibited preference does not arise simply because an employee’s terms and conditions of employment are different from those of another employee of the same employer.

[38] The Authority considers that the preference against access to MMI from Mr Martin’s terms and conditions, was not because of union membership but because his particular employment agreement was for a fixed term rather than permanent employment; but for the fixed term of employment, Mr Martin would have been entitled to MMI if employed permanently, whether a member of the union or not. The selection of fixed term instead of permanent employment, does not give rise to a prohibited preference under s 9 of the ER Act.

### **Unlawful discrimination?**

[39] Although not raised as an argument, the Authority has considered whether there was discrimination in employment exercised by St John, when it did not offer Mr

Martin the same access as other employees are given to subsidised medical insurance. Mr Martin was treated differently to those others, but for an employer's actions to be unlawful, discrimination in employment must be because of employment status. That term is defined in the Human Rights Act 1993 as meaning, being unemployed or being the recipient of a benefit.

[40] There is no evidence or information to support a finding of unlawful discrimination.

[41] This is not a situation where an employee is seeking to enforce or to have applied to himself, the terms of an employment agreement to which he is not a party. The CEA could have been enforceable if, as a term of it, St John had undertaken to treat fixed term non-union member employees no less favourably than permanent employees covered by the CEA. Questions of enforceability under s 12 of the Contracts and Commercial Law Act 2017 and good faith, could have arisen if the CEA had purported to confer a benefit on fixed term non-union employees such as Mr Martin, but that is not the case.

[42] Under s 62 of the ER Act, if Mr Martin had been a 'new' employee, for the first 30 days of his employment his terms and conditions of employment would have been those of the CEA but because he was fixed term and not a permanent employee, he was ineligible to access MMI from the CEA, even during the 30-day initial period of employment.

[43] The MMI scheme is also available to non-union members, provided they are permanent employees performing a role within the coverage clause of the CEA. It bears repeating that Mr Martin was fixed term, not permanent. The affidavit evidence of Megan Burns, HR Advisor for St John, is that the eligibility criteria have been consistently applied, without creating disparity in the entitlements of employees who agree to fixed term employment. There is no evidence to suggest otherwise.

### **Determination**

[44] For the above reasons, the Authority agrees with the submissions made for St John, that it did not act unjustifiably towards Mr Martin in his employment or terms

and conditions of employment. The Authority determines that Mr Martin does not have a personal grievance.

[45] The Authority finds, as a matter of the interpretation, application or operation of the IEA, St John did not provide Mr Martin with access to the MMI scheme as a term or condition of employment.

[46] The Authority has found no failure of St John resolvable by order made under the ER Act.

### **Costs**

[47] Any application for costs by St John is to be made within 21 days of the date of this determination, and any reply by Mr Martin is to be made within 21 days of any application made.

Alastair Dumbleton

Member of the Employment Relations Authority