IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 48
ARC 66/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CARTER HOLT HARVEY LIMITED Plaintiff
AND	IAN McAULEY Defendant

Hearing: 23 and 24 February 2012
(Heard at Rotorua)

Appearances: Rob Towner, counsel for plaintiff
Anne-Marie McInally, counsel for defendant

Judgment: 14 March 2012

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The issue for decision in this challenge from a determination of the Employment Relations Authority[1] is whether Ian McAuley was disadvantaged unjustifiably in his employment. That decision in turn depends upon whether Mr McAuley was an employee engaged on two lawful fixed term employment agreements, the expiry of the latter of which entitled the company to reject his claim to benefits that would have been available to a so-called 'permanent'[2] employee.

[2] The Employment Relations Authority, in its determination issued on 17 August 2011, found that Mr McAuley was not subject to lawful fixed term employment agreements pursuant to s 66 of the Employment Relations Act 2000 when his employment came to an end and so, by implication, he was a permanent employee to whom the benefits of that status attached. These benefits included

[1] *Ian McAuley v Carter Holt Harvey Limited* [2011] NZERA Auckland 361.
[2] Although less mellifluous, this can be referred to properly as employment of indefinite duration.

redundancy compensation, payments of employer contributions to a superannuation scheme, interest on such payments, medical insurance premiums for Mr McAuley and his wife, life insurance premium payments for Mr McAuley and his wife, earnings protection and insurance premium payments, and interest on those payments. In addition, Mr McAuley sought further nominal compensation of $4,000.

Relevant facts

[3] Mr McAuley was a professional firefighter. Ever since the pulp and paper mill near Tokoroa, now owned by Carter Holt Harvey Limited (CHH) has been in operation, there had been crews of firefighters employed at the mill and based at a fire station on the premises. Because of the chemicals and other materials with which the mill operates, the risk of fire and other large-scale emergencies is high.

[4] As part of a proposed workforce restructuring, from as early as March 2002 and known as "Project Green", CHH planned to reduce the numbers of, or even eliminate, its full time firefighters at the mill. Potential ways of doing so included replacing some firefighters with production workers who would perform firefighting and other emergency duties as and when required. There was consultation from March until December 2002 between CHH and what was later to become Mr McAuley's union (the New Zealand Engineering Printing and Manufacturing Union), during which period, on 27 November 2002, Mr McAuley was offered and accepted a first fixed term employment agreement beginning on 29 November 2002.

[5] Mill maintenance, but not including fire services, was outsourced (performed by an independent contractor rather than by CHH's own employees) to an international corporation known as ABB in January 2003. In the following month, on 24 February 2003, the union was advised by CHH that the company was investigating a contracting out of its emergency services including its fire service. On 7 March 2003 Mr McAuley accepted a second fixed term employment agreement which expired on 31 May 2003. There is no challenge to the lawfulness of this second fixed term agreement.

[6] In May 2003, CHH and the Union settled a new collective agreement, the coverage of which included firefighters. One element of the settlement was that the company withdrew or abandoned its proposal for production workers to carry out firefighting duties, meaning that there was no immediate prospect of redundancy for its firefighters. However, the terms of settlement of the collective agreement included, under the heading "Consultation", that "[t]he review of the fire service would fit into this category of challenges" referring to items to be dealt with after the new collective agreement was ratified. The restructuring of the fire service, therefore, remained on CHH's agenda.

[7] Other operational restructuring at the mill was concluded by 7 June 2003 and, on 18 June 2003, Mr McAuley was offered a third fixed term employment agreement which provided that work under it would cease "on completion of the Kinleith Restructure". This was said to be expected to occur "following 31 August 2003" and that "[t]he temporary role undertaken under the terms of this agreement will cease on the implementation of the new structure".

[8] Mr McAuley's third successive fixed term agreement expired on 31 August 2003 shortly after CHH's offer to, and acceptance by, him of another (fourth) new fixed term agreement on 29 August 2003. This provided for its expiry by reference to an event, not a date, and said that it was a "fixed term agreement commencing on 5 September 2003 and terminating on the event of the completion of the restructure".

[9] On 20 August 2003 there had been a meeting between CHH management and the Union which did not get to deal with the mill's emergency (including fire) services in respect of which the company described itself then as being "back at the drawing board". CHH wished to address all emergency services' functions at the mill including the Occupational Health Centre as well as the fire service. Its stated objective was to "design and implement an integrated, modern, effective and cost efficient emergency service" for the purpose of removing "unnecessary cost".

[10] Although progress overall, and from this point in particular, progress on fire service restructuring was slow, this resulted from a combination of other workplace issues having higher priority and effective delaying tactics by the Union which must

have come increasingly to accept the inevitability of change. Ultimately, progress of its intended restructuring lay with CHH and there is no suggestion that it took issue with the firefighters' responses to its proposals.

[11] The next event was on 6 April 2004 when the company's representatives sent the Union what it described as its "principles" for a new integrated service model for emergency services. There was further delay arising out of the same or similar circumstances as I have just outlined. It was then not until 11 January 2005 that the Union was advised by the company that it proposed a further form of restructuring that could be put to the employees. Negotiations about this were unsuccessful and in 2006 the company met with the Union advising that it was considering "outsourcing" and that negotiations would cease and be replaced by consultation on the outsourcing proposal.

[12] In February 2007 a letter was sent to staff about the commencement of consultation and there was then a new restructuring proposal which was eventually implemented. The Union notified CHH of Mr McAuley's personal grievance (unjustified disadvantage in employment) on 4 April 2007 and affected staff, including Mr McAuley, were given notice of their dismissals on 14 December 2007.

The Employment Relations Authority's determination

[13] The Authority found that by the time the third fixed term agreement was entered into between Mr McAuley and the company, it did not have "a sufficiently specific proposed event upon which to base a fixed term agreement" and that "[t]here was no particularised proposal in place at that time". The Authority held that a general, albeit genuine, desire to effect change (to the arrangement for the company's emergency services) was not sufficient to invoke the provisions of s 66 of the Act reflected by the element of specificity in subs (1). The Authority concluded that the third and fourth fixed agreements were invalid as being in breach of s 66 and that, therefore, Mr McAuley was "a permanent employee". The Authority decided that he became so from the settlement of the collective agreement in May 2003 and left the parties to attempt to resolve issues of remedies, reserving leave to return to

the Authority if they were unable to do so. The Authority likewise reserved but timetabled questions of costs.

Relevant legislative provisions

[14] Section 66 of the Act governs the underlying questions of law in this case and provides materially (with particularised emphasis italicised):

> **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*.
>
> (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.
> (c) to exclude or limit the rights of an employee under the Holidays Act 2003.
>
> *(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.

[15] The case turns in part on a disputed interpretation of statutory phrases, the resolution of which is not clear from the words used themselves or in light of the

relevant object sections of the Act (ss 3 and 60). It has therefore been necessary to try to ascertain the purpose of enacting s 66 as Parliament did in 2000 to achieve the principle of statutory interpretation under s 5 of the Interpretation Act 1999, text (words) in light of purpose.

[16] Unfortunately, but not unexpectedly, the recognised extraneous legislative materials do not assist in determining what Parliament intended to mean by reference to a specified event or a specified project. The Associate Minister of Labour, delivering the Ministerial second reading speech on the Employment Relations Bill, and in reference to what was then cl 81, said:

> Fixed-term agreements are not outlawed by this provision [clause 81], but they are constrained, and so they should be. Fixed-term agreements have become one of the most popular methods of ensuring that workers do not have the right to challenge a dismissal through the personal grievance provisions. This part of the bill makes it clear that people can have a fixed-term agreement, but there has to be informed consent to that agreement. It has to be for a real and proper reason that there is a fixed term, and the term must not be used as a device to avoid the unjustified dismissal provisions of the bill. Again, these are entirely reasonable protections for vulnerable workers. Why should individuals not be allowed to challenge a dismissal at the end of the term if there was no good reason for the term, and the effect is to override the personal grievance provisions?

[17] This passage was referred to by the Court of Appeal in examining the section in *Norske Skog Tasman Ltd v Clarke*[3] when it noted that the Parliamentary history was of limited assistance and, in relation to the aforementioned speech, described this as "the only Parliamentary speech which addressed this issue even though obliquely".

[18] All that can be usefully taken from those materials is an emphasis on genuineness, reasonableness and propriety for fixed term validity, which concepts also inform the need for "a specified event" or "a specified project". The existence of genuine, reasonable and proper specified events and specified projects is not, however, the same thing as requiring a sufficiency of them which connotes a quantitative rather than a qualitative analysis.

[3] [2004] 1 ERNZ 127; [2004] 3 NZLR 323 (CA).

[19] Some clues as to the Legislature's intention reveal themselves in other parts of s 66. For example, Parliament provided expressly, but not exhaustively, that "genuine reasons" for entering into a fixed term agreement would not include the intended avoidance by the employer of employee rights elsewhere in the Act or in the Holidays Act 2003.

[20] So, too, can the section be seen to have been enacted to avoid employers appointing employees for fixed terms to assess their suitability for employment, a matter dealt with in the same legislation by other express provisions relating to probationary periods. I simply note here that there is no suggestion of any of these being CHH's reasons for engaging Mr McAuley on any of the fixed term agreements.

[21] As this Court has held before, in enacting s 66 Parliament modified the previous common law position which permitted fixed term agreements to be entered into, except as constrained by other legislative requirements. Section 66 limited the circumstances in which fixed term agreements might lawfully be entered into by specifying prerequisites to these.

[22] Reference to dictionary definitions of key words may also assist in determining what Parliament meant by their use and, in particular, whether it intended a test of sufficient specificity as the defendant has advanced and the Authority concluded. The following definitions are all taken from the New Zealand Oxford Dictionary 2005. "[S]pecified" (used three times in s 66(1)) means, in this context: "named or mentioned expressly". An "event" is: "a thing that happens or takes place" and "a result or outcome". A "project" (perhaps the most important term for the purposes of this case) means: "a plan, a scheme, [or] a planned undertaking".

Grounds of challenge

[23] The following requirements are in issue and must be met. Have the employee and the employer agreed that the employment would end on the occurrence of a "specified event" or at the conclusion of a "specified project"?

[24] There is no argument advanced by Mr McAuley of other statutory non-compliance. There is no authority (case law) directly on point so that the Court's first task is to interpret the phrases "at the conclusion of a specified project" and "on the occurrence of a specified event". For the sake of completeness, I record that there is no challenge to the genuineness of CHH's reasons for wishing to engage Mr McAuley on a fixed term agreement. Also at issue consequentially is compliance with s 66(4), that is whether the third and fourth fixed term agreements stated the way in which Mr McAuley's employment would end and the reasons for ending it in that way.

[25] The third fixed term agreement, which took effect on 23 June 2003 when Mr McAuley signed it, provided that it and the work performed under it "will cease on completion of the Kinleith Restructure". This was expected to occur after 31 August 2003. This agreement also contained the same alternative cessation formula that had appeared in its predecessor, "on the implementation of the new structure". It was also terminable by either party on seven days' written notice.

[26] The fourth temporary agreement began by noting that the third fixed term agreement was due to expire on 31 August 2003 although that proposition must be in doubt given the wording of the third fixed term agreement. Nevertheless, the fourth agreement provided, by way of preamble:

> At this stage the Kinleith restructure has not been finalised and we have the need to appoint another fixed term position until the restructure is completed.

[27] The fourth fixed term agreement was said to commence on 5 September 2003 and to terminate "on the event of the completion of the restructure". This agreement, too, was said to be terminable upon seven days' notice by either party. Other provisions of the fourth fixed term agreement included:

> Nothing in this Agreement shall prevent the parties, at or before the expiry date, from entering into a subsequent Employment Agreement, but nothing in this Agreement should be understood to give you any expectation that it will be renewed, or that any subsequent Agreement will be entered into following the completion of the term.

[28] The nature of the restructuring referred to in the third and fourth impugned employment agreements must be determined by relevant background events.

[29] It is clear that from 2001, CHH intended consistently to change the Kinleith Mill's fire fighting and other emergency arrangements from those which then and had, for some time, prevailed. This intention related to the costs to the company of maintaining a full-time dedicated fire service for the mill site. A variety of alternative arrangements was open to CHH to achieve this cost saving. On a continuum, these arrangements included, at one end, the divestment by CHH of its in-house emergency services functions and the contracting out of such of these as remained necessary. At the other end of the range of possible ways of saving the costs of the fire service was the achievement by agreement with the employees affected of greater working arrangement flexibilities still within an in-house fire service. Alternatives within this range of possibilities included having a combination of fewer professional firefighters with production workers assisting to perform those duties, combining emergency response and security functions within one team of multi-function employees, and potentially other similar possibilities. Although at different times different means were favoured by CHH, the consistent theme was fire service cost saving by restructuring. The status quo ante was never accepted by CHH as a long-term option.

[30] Although the fire service elements of CHH's mill-wide restructuring plans occupied the extraordinary long period of about seven years before changes were eventually made to that part of the mill's structure, CHH never abandoned its intention to restructure its fire service. At worst from its point of view, it postponed strategically those intentions from time to time because they were of modest proportions in the overall scale of wider mill restructuring. So, for example, in order to achieve a return to work after a three month strike in 2005, CHH agreed to reassess fundamentally its approach to what was nevertheless its longstanding intention to restructure the fire service. Different ways of doing so, that is by negotiations with the union with a view to collective agreement provisions or variations and unilateral restructuring following consultation, occurred over that period.

[31] There was, nevertheless, a consistency of purpose and the various phrases in the two impugned individual agreements including "the implementation of the new structure" are all references to the same intention to change the way in which fire fighting and associated emergency services were provided at the Kinleith Mill.

[32] The crucial parts of the Authority's determination are at [22] and following. These include its finding that by 18 June 2003, when Mr McAuley and CHH entered into the third fixed term agreement, "there were no longer any particularised proposed changes". The Authority acknowledged at [23] that CHH's intention was to continue to review its emergency services, "but that is not the same thing as having a specific plan or proposal". It concluded that "any past proposal had lapsed" and that a new set of proposals needed to be implemented if CHH was to continue to review its emergency services. The Authority decided that it was only on 11 January 2005 that CHH had developed and conveyed to Mr McAuley's union "a proposal for restructuring that could be put to the employees". The Authority also appears to have determined that CHH's proposal, which was eventually implemented (in respect of Mr McAuley at least) on 14 December 2007, was not promoted to employees by the company until February 2007.

[33] At [32] of its determination, the Authority concluded:

> At the time that the third agreement was entered into, the Company did not have a sufficiently specific proposed event upon which to base a fixed term agreement. There was no particularised proposal in place at that time.

[34] At [33] the Authority concluded that while "[t]he Company continued to wish to review and implement changes to its emergency services … a genuine but general desire to effect change is not sufficient to bring the provisions of s66 into effect. That is why there are references to specificity in s66 (1)."

[35] How the Authority arrived at that interpretation of s 66, being one requiring a sufficiently specific proposal, was not analysed or at least expressed by it in its determination. There was no case on which the Authority relied and indeed there is not any to support that proposition.

[36] Mr Towner, counsel for the plaintiff, did not disagree with the general proposition that the greater the numbers of consecutive fixed term agreements under which an employee may work, and/or the greater the length of any or all of these agreements, the more carefully the Court or the Authority should scrutinise them to ensure their compliance with s 66. But if, following that scrutiny, either or both of repeated consecutive agreements and a lengthy fixed term agreement or agreements are shown to have complied with s 66, then agreement multiplicity and/or long terms do not lead to invalidity of such agreements.

Decision

[37] I have concluded that the Authority misinterpreted s 66 by requiring CHH to meet a test of sufficient specificity which is not only absent from the section but adds a gloss to it that is contrary to its scheme. Not only did the Authority apply the wrong legal test to the validity of the agreements, but when the correct test is applied (whether there was "a specified event" or "a specified project"), either or both of those tests are satisfied.

[38] CHH's restructuring of its fire service was a project at all relevant times albeit, until 2006, a project within a broader project of mill-wide restructuring. At the times the third and fourth fixed term agreements were entered into, that "project" existed and the fixed term agreements were proposed by CHH for the purposes and duration of that project. Likewise, I conclude that the event of the completion of the restructure referred to expressly in the agreements was an event for the purpose of s 66(1)(b).

[39] The third and fourth individual fixed term agreements therefore comply with s 66. It follows, in turn from that conclusion, that Mr McAuley was not disadvantaged unjustifiably in his employment by being refused the benefits he now claims which were, clearly and pursuant to the relevant collective agreement, applicable only to so-called 'permanent' employees and not to temporary employees as he was.

Costs

[40] Both parties agreed that the Court should fix costs in accordance with the result of the challenge and without the necessity of making submissions on these.

[41] The plaintiff having succeeded, it is entitled to an order for contribution towards its costs, both on the challenge in this Court and as should have been awarded by the Authority if it had found for CHH.

[42] Dealing first with costs in the Authority, there is nothing in the information before the Court which would dictate other than a standard award of costs for a one-day investigation meeting followed by written submissions and conducted by junior counsel for the successful party. I accept that the case warranted counsel from Auckland and it was properly investigated by the Authority in Rotorua, the nearest location for most of the witnesses. I fix Authority costs in favour of CHH in the sum of $3,000 and also allow $400 travelling and associated costs.

[43] So far as the challenge was concerned, CHH was justified, in the circumstances of the case, to have it argued by a senior practitioner. Again, despite the hearing having taken place in Rotorua to suit the convenience of witnesses, it was justifiable for CHH to engage Auckland counsel. The hearing occupied one and a half sitting days and was efficiently and economically presented by both parties. I fix a reasonable contribution to reasonable legal fees for CHH in the sum of $7,500 and allow $750 for travelling and associated expenses. The plaintiff is also entitled to reimbursement of the filing and hearing fees.

GL Colgan
Chief Judge

Judgment signed at 11.30 am on Wednesday 14 March 2012