IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2019] NZEmpC 66
EMPC 262/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	PAUL MORGAN Plaintiff
AND	TRANZIT COACHLINES WAIRARAPA LIMITED Defendant

Hearing:	25 February 2019 (Heard at Wellington)
Appearances:	G Clarke, advocate for plaintiff M Gould, counsel for defendant
Judgment:	28 May 2019

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff drives school buses. He has been employed by Tranzit Coachlines Wairapapa Ltd (Tranzit) for over 18 years on a series of fixed-term employment agreements. The employment model has given rise to numerous issues over time as to Mr Morgan's leave and other entitlements.[1] It has now spawned a further issue, namely whether Tranzit can rely on the expiration of Mr Morgan's most recent fixed-term agreements (at the end of December 2014 and at the end of the fourth school term in 2017), and whether re-engagement on a fixed-term basis following each termination

[1] *Tranzit Coachlines Wairarapa Ltd v Morgan* [2013] NZEmpC 175, [2013] ERNZ 638; *Morgan v Tranzit Coachlines Wairarapa Ltd* [2015] NZEmpC 121, [2015] ERNZ 909.

breached s 66 of the Employment Relations Act 2000 (the Act). The answer to these questions will have a consequential impact in terms of Mr Morgan's entitlements.

[2] One of the company's revenue streams is via a funding agreement with the Ministry of Education for the delivery of school bus services. The essence of the company's argument is that it has no certainty, from one funding agreement to another, whether it will retain the school bus contract. This uncertainty, it is said, means that it is reasonable to employ Mr Morgan as a school bus driver on a fixed-term basis. Mr Morgan says that the 18-year period of contractual stability undermines the company's assertion of reasonableness; the two fixed-term agreements at issue did not comply with the requirements of the Act and the company cannot rely on them.

Analysis

[3] While fixed-term agreements received a considerable amount of judicial attention, including appellate attention, prior to the enactment of s 66,[2] they have sparked remarkably little attention since. The Employment Relations Authority has considered fixed-term agreements on occasion, but the issue of certainty and the features which relate to that (namely the length of contract or the number of times a contract has rolled over) have not been comprehensively dealt with.[3]

[4] The strength of each party's position in the present case depends on an analysis of s 66. It provides:

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2 See, for example, *Actors Equity IUOW v Auckland Theatre Trust Inc* [1989] 2 NZLR 154 (CA); *NZ Food Processing etc IUOW v ICI (New Zealand) Ltd* (1989) ERNZ Sel Case 395 (LC); *Smith v Radio i Ltd* [1995] 1 ERNZ 281 (EmpC); *Principal of Auckland College of Education v Hagg* [1997] 2 NZLR 537 (CA).

3 See, for example, *Timmis v Benefitz DMA Ltd* ERA Auckland, AA395/10, 1 September 2010: financial and economic uncertainty, as a general and not specific concern, is not a genuine reason; *Canterbury Westland Free Kindergarten Assoc (t/a Kidsfirst Kindergartens) v New Zealand Educational Institute* [2004] 1 ERNZ 547 (EmpC): kindergarten teacher positions were ongoing and there was no constant need for the fixed-term agreements; *Gethen v Board of Trustees of Kerikeri High School* [2012] NZERA Auckland 48: funding for special needs students is proportional to the number of students. Fluctuations in the school roll gave genuine reasons based on reasonable grounds; *Maritime Union of New Zealand Inc v Ports of Auckland Ltd* [2010] NZEmpC 32, (2010) 7 NZELR 257: specific economic events and industry-specific economic conditions led the Court to find that the fixed-term agreements were lawful.

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.

[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 met;[4] 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:

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[4] Employment 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.

(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 s 66(2) may elect to treat the expiry of the agreement as ineffective. That is essentially what Mr Morgan is seeking to do in the present case. If Mr Morgan is correct, the termination of his employment in December 2014 and 2017 had no effect and he is to be treated as though he was a permanent employee throughout this period. Any accrued entitlements would be assessed on that basis.

[7] The argument in this case was squarely focussed on whether the requirement in s 66(2)(a) had been met. There was no issue with s 66(2)(b).

[8] It is for the employer to show that there was a genuine reason based on reasonable grounds for the fixed-term agreement.[5] What are "genuine reasons based on reasonable grounds"? The answer to that question is informed by the history to the provision.

[9] A statutory framework for regulating fixed-term agreements first appeared in 2000. Prior to that time the Court exercised a degree of control over the circumstances in which such agreements could be entered into, and exited out of, by reference to International Labour Organisation Convention No. 158 (Termination of Employment Convention, 1982 – Convention concerning Termination of Employment at the Initiative of the Employer). While the Convention recognises that there may be circumstances in which fixed-term agreements may legitimately be utilised, it states that:[6]

> Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

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5 *Smith v Radio i Ltd*, above n 2.
6 Article 2(3).

[10] As is noted in the preamble to the Convention, the ILO considered it appropriate to adopt new international standards on termination of employment in light of the "serious problems in this field resulting from the economic difficulties and technological changes experienced in recent years in many countries." New Zealand has not ratified the Convention but, as the Court of Appeal has recognised, s 66 gives effect to it.[7]

[11] Section 66 provides an exception to the normal rules of termination, but explicitly not if the point of the fixed-term nature of the employment agreement is to get around those normal rules. This is reflected in s 66(3)(a)-(c), which set out three reasons which are not genuine reasons (namely where the reason for the fixed-term agreement is for the purposes of excluding or limiting employee rights under the Act and/or the Holidays Act 2003, and where it is for the purpose of establishing the suitability of the employee for permanent employment).

[12] In *Canterbury Westland Free Kindergarten* it was said that:[8]

> [16] I do not read subs (3) as containing an exhaustive list of non-genuine reasons. It indicates that reasons that are meant to be exploitative of employees are not to be treated as genuine. On the borderline are reasons that are not so intended but which nevertheless have that effect. I will return to that issue later. *For now, it is sufficient to record that, in terms of the clause and of s 66 of the Act, reasons must be not only sincerely held but they must also not be improper reasons*. Informed by this statutory elucidation of what is meant by genuine reasons, I turn to the rest of the evidence.

[13] Sincerity and/or improper motive are likely to be helpful markers in assessing the genuineness or otherwise of the expressed reasons for a fixed-term agreement. There may however be room for a broader approach. So where the fixed-term agreement mechanism is but one of a range of possible options available to an employer for addressing an operational need, might it not be that the option which least encroaches on the principles underlying ILO 158, 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

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7 *Norske Skog Tasman Ltd v Clarke* [2004] 3 NZLR 323 (CA), [2004] 1 ERNZ 127 at [157].

8 *Canterbury Westland Free Kindergarten Assoc (t/a Kidsfirst Kindergartens) v New Zealand Educational Institute*, above n 3 (emphasis added).

employer, reflected in s 66, and the mischief that provision is clearly designed to address.

[14] The reasons for the two fixed-term agreements at issue in the present case are stated in each of the agreements. The first provides that:

> The reason for the fixed term is because our School Bus Driving Contract with the Ministry of Education will expire on 31st December 2017.

[15] The most recent agreement (for the current fixed term) provides that:[9]

> The reason for the fixed term is that you are employed to drive school bus services, transporting pupils to and from school during term time only, and our contract for this work with the Ministry of Education will expire on 31 December 2020. Therefore, from the end of the fourth term 2020 we will not have on-going work for you.

[16] Tranzit essentially submits that there is a risk that it will not secure a renewal of the contract with the Ministry of Education and if the contract is lost, the company's revenue will be adversely impacted along with its capacity to engage Mr Morgan as a bus driver. The financial uncertainty associated with renewal or otherwise of the school bus contract is said to provide a genuine reason based on reasonable grounds for engaging Mr Morgan on a fixed-term agreement.

[17] Is there a risk that the pattern of contract renewal in the present case will break at some point? Yes. Would that impact on the company's financial circumstances? Very likely. Is this sufficient to satisfy s 66(2)(a)? No.

[18] The first point is that the risk on which the company seeks to rely is speculative. The degree of speculation is heightened, as Mr Morgan says, when regard is had to the contractual history between Tranzit and the Ministry of Education. Rather than contractual uncertainty, it reflects a solid pattern of stability over an 18-year period.[10] The second, related, point is that there is no evidence before the Court as to Tranzit's

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9 Individual Employment Agreement - Fixed Term School Bus Driver, commencing 29 January 2018, Parties and Term of Agreement at [2].

10 The fixed-term agreement dated 13 November 2008 was for a period of six years; the fixed-term agreement dated 17 December 2014 was for a year (and signed by Mr Morgan "without prejudice" to his legal rights).

financial circumstances; the value of the Ministry's contract to it; and the extent to which loss of the contract may impact on it.

[19] Mr Gould, counsel for the company, submitted that the pattern of renewals reinforced the genuineness of the reasons for the fixed-term agreements, because it reflected that the company was not seeking to use the fixed-term mechanism to cease employing Mr Morgan. On one level, that is correct (the company *has* continued to employ Mr Morgan under various agreements over time); on another, it is not. The fact is that the company has utilised the fixed-term agreement model on a repeat basis as a mechanism for reserving to itself the ability to dispense with Mr Morgan's services in the event that its revenue stream is impacted (to an unquantified degree) by loss (speculative) of the school bus contract.

[20] 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.

[21] I do not overlook the fact that uncertainty is a concept that has a tendency to evaporate with the benefit of hindsight. But in the present case, the two contracts at issue were preceded by a lengthy history of contractual stability and were themselves followed with renewals. If I am wrong in my characterisation of the generic financial uncertainty point, then the pattern of rollovers tends to suggest that there has been little (specific) financial uncertainty. That means that even if financial uncertainty can be said to be a genuine (as in sincerely held) reason for entering into the fixed-term agreements at issue, it was not a reason in this case based on reasonable grounds.

[22] The redundancy provisions of the agreement further undermine the company's position. That is because they deal with precisely the situation Tranzit contends justifies the fixed-term nature of the agreement (the loss of the revenue stream from the Ministry of Education contract if the contract is not secured). In this regard cl 13 of the 2018 agreement provides that:

> 13.1 *Where your position becomes surplus to requirements due to*: closure of the business; *loss of our contract for which your services are required*, natural disaster or financial downturn in our business, you will be given not less than *two weeks notice of termination of your employment*, inclusive of the notice period stated in cl 11.1 above.
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> (emphasis added)

[23] The point is that employing Mr Morgan on a fixed-term agreement, when the agreement itself provides for termination in the circumstances said to justify the fixed term, strongly undermines the company's claim that the fixed term is both genuine and reasonable.

[24] Tranzit seeks to rely on obiter comments in *Carter Holt Harvey* to the effect that, once the s 66(2)(a) test is satisfied, agreement multiplicity cannot render a fixed-term agreement ineffective.[11] The point is, however, that there may be circumstances in which a fixed-term agreement is entered into on a number of occasions for genuine reasons based on reasonable grounds. In such circumstances the tail (agreement multiplicity) does not wag the dog (effectiveness). This is reflected in the approach in *Maritime Union*,[12] where the Court highlighted the caution raised in *Canterbury Westland Free Kindergarten Assoc* against the misuse of s 66:[13]

> … What s 66 contemplates is that fixed-term employment should be confined to special discrete projects of limited duration as opposed to situations of ongoing employment.

[25] Mr Morgan's work is not directed at a discrete project of anticipated limited duration. It is part of Tranzit's wider business operation, as cl 1.2 of the 2018 agreement reflects. It provides that, in addition to the duties set out in Schedule 1, Mr Morgan is to "carry out any other duty we may reasonably require and … assist all other employees as necessary in any part of our business."

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11 *Carter Holt Harvey Ltd v McAuley* [2012] NZEmpC 48, [2012] ERNZ 76.

12 *Maritime Union of New Zealand Inc v Ports of Auckland Ltd*, above n 3.

13 *Canterbury Westland Free Kindergarten (t/a Kidsfirst Kindergartens) v New Zealand Educational Institute*, above n 3 at [55].

Conclusion

[26] The position as to the multiplicity of fixed-term agreements can be summarised as follows. The fact that a fixed-term agreement has been rolled over, even several times, does not automatically mean that the arrangement falls foul of s 66(2)(a). There is no magic number or bright-line test that applies. In other words, while rollover is likely to represent a flag that attracts the Court's attention and scrutiny, the mere existence of agreement multiplicity does not of itself give rise to ineffectiveness. Ineffectiveness, if it is to be invoked by an employee, must be based on the *reasons* for the fixed-term agreement.[14]

[27] When assessing whether a fixed-term agreement has been entered into for genuine reasons based on reasonable grounds, it will be relevant to consider whether the stated reasons were sincerely held (at the time the agreement was entered into) and whether they were for proper purposes. It may be arguable that an agreement will fall foul of s 66 where the employer utilises the fixed-term employment model where other mechanisms were reasonably available, that would have less violated the protective principles underlying the provision and ILO 158.

[28] 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 a generic) business risk, there was insufficient financial uncertainty to justify the two fixed-term agreements for the purposes of s 66.

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[14] See, for example, the discussion in *Carter Holt Harvey Ltd v McAuley*, above n 11, at [36] (a decision which fell to be decided under s 66(2)(b), not (a)), where it was said that: "…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.").

[29] Mr Morgan is accordingly entitled to claim that the two fixed-term agreements are ineffective. It follows that the individual employment agreements entered into for fixed terms commencing 26 January 2015 and 29 January 2018 do not comply with s 66 and are ineffective.

[30] I understood Mr Gould to accept that if the Court found that the fixed-term agreements at issue did not comply with s 66, the result would be that the company would be liable to meet the resulting leave entitlements. These parties should be able to resolve those residual issues (including outstanding issues of costs) through discussions, which can be mediated if necessary. If they cannot otherwise be resolved leave is reserved for either party to apply, on reasonable notice, for further orders of the Court.

[31] I record for completeness that Tranzit accepts that it should pay the plaintiff the difference between the payment of eight per cent of his annual earnings for each of the years 2008-2012 (inclusive) and four weeks ordinary pay for each of those years.

Christina Inglis
Chief Judge

Judgment signed at 4.15 pm on 28 May 2019