



Gerard Kilpatrick

Fixed Term Employment

Hullo and Goodbye! Are fixed term employment agreements permitted under the current employment law? Gerard Kilpatrick, a partner in the Warkworth Lawlink firm of Webster Malcolm & Kilpatrick, looks at this issue, which has recently been the subject of several high profile employment disputes.

Internationally, the level of protection the law gives to employees against unjustified dismissal varies. Some countries, such as the United States, treat employment as being determinable at will, although often there will be a union award or contract giving the worker protection. New Zealand, together with most other countries that base their law upon the common law of England, recognise that notwithstanding the strict terms of an employment agreement, an employer must not end the agreement and dismiss the worker other than for good cause. In addition, the law of these countries requires employers to observe a fair procedure when undertaking an enquiry that may lead to the dismissal of a worker. Not even the freedom of contract espoused by the Employment Contracts Act 1991, the high water mark of employer and employee freedom to agree what they will, had any effect upon this principle. This was made clear in the *Norske Skog decision (Norske Skog Tasman Ltd v Clarke [2004] 3 NZLR 323)* in which the Court of Appeal determined that there were circumstances where a fixed term contract would not expire against the will of the employee; these included instances where the reason for the fixed term did not relate directly to the employer's operational requirements, and also where the employer had made an express or implied promise of renewal upon expiry.

THE EMPLOYMENT RELATIONS ACT 2000

Upon coming into office, the present government used its majority to ensure that Parliament moved rapidly to repeal the Employment Contracts Act, and to enact into law the Employment Relationships Act 2000. Contrary to popular belief, this Act left employment "contracts" in place, cosmetically changing their name to "agreements". Basically, the new Act

still left employer and employee free to negotiate their own employment arrangements. However, for the first time, the new Act specifically addresses "fixed term employment".

In the normal course of business, circumstances may arise where the parties wish to enter into an agreement that provides that the employment is to end either after the expiry of a fixed term or on the happening of a certain event. For example, there have been high profile cases in the entertainment industry, and also persistent calls at a political level to allow employers and employees to enter into agreements for "trial periods", under which the employer (or the employee) would have an absolute right to end the employment relationship in terms of specific provisions in the agreement.

SECTION 66 OF THE EMPLOYMENT RELATIONSHIPS ACT 2000

Section 66 of the Employment Relationships Act 2000 is the statutory provision that permits short term employment agreements in some circumstances. The section provides that an employer and an employee may agree that the employee's employment will end:

- "at the close of a specified date or period", for example, after a period of one year has elapsed from the commencement of the employment;
- "on the occurrence of a specified event", for example, the return of another employee following a period of parental leave;
- "at the conclusion of a specified project", for example, upon completion of a building project (the examples are not taken from the Act).

The section continues to provide that the employer's reasons for making the employment temporary must be genuine, and the employer must advise the employee of the reasons why the employment must end,

and how it will end. In addition, the employment agreement must state in writing the way the employment will end, and the reasons for ending the employment in that way.

The provisions of section 66 are strict and a little tautologous. As a result, it is not perfectly clear just from reading the Act exactly how the employment agreement must be worded for compliance.

Note that there is a specific prohibition against using the provisions of section 66 to establish the suitability of an applicant for permanent employment, or to otherwise exclude or limit the rights of an employee under the Act.

In at least one recent high profile case, there was only a clumsy attempt at compliance, resulting in the Employment Court ruling that the employer had to retain an unwanted highly paid permanent employee on her present terms and conditions, which the employer desperately wished to renegotiate. The case does illustrate the dangers of "do it yourself" drafting in this particular area. Always consult your Lawlink lawyer.

It is unfortunate that the section is clumsily expressed, but notwithstanding this, compliance is possible for employers who need to manage their business in this way.

THE ST KENTIGERN DECISION

The Employment Court has now provided guidance as to how section 66 might operate (and not operate) in practice. This is a result of the decision of the Court in *St Kentigern Teachers Association Incorporated v St Kentigern Trust Board (2006) 7 NZELC 98,069*. The St Kentigern Trust Board (the "Trust Board") had a number of administrative positions that it wished to allocate to suitably qualified teachers at the two St Kentigern schools. The Trust Board wished to make some

of these administrative positions temporary, so that a suitable teacher could be appointed to the position for a period of three years. At the end of the three year period, the teacher must surrender the position. The Trust Board had good reasons for this, which might have included the need to ensure that the administrative positions were shared around, and also to enable successive housemasters to bring different administrative skills to their houses. The Court commenced its deliberation by considering whether appointment to the housemaster position was within the teacher's existing contractual arrangements with the Trust Board – in other words, could the Trust Board make the appointment without the teacher first entering into a new employment agreement?

In this case, the Court held that the employment as a housemaster contemplated by the Trust Board was within the teacher's existing collective agreement and no new employment agreement was necessary.

In its judgment, the Court said

[22] I do not accept the plaintiff's argument that the head of house position is the employment contemplated by section 66. I agree with the Employment Relations Authority and the defendant that the employment is "employment" as a teacher with additional temporary management responsibilities. It follows that section 66 is not applicable to the circumstances of this case.

The Court found that secondment as a housemaster, even though that brought additional work, remuneration, and responsibilities, was not new employment at all, and was covered by the existing employment relationship. In effect, this was a finding that section 66 did not apply to the situation at all.

The situation would have been different had the Trust Board gone out and advertised the housemaster's position to persons who had no existing position at the school, and who were employed by the school only for the housemaster's position for a fixed term of, say, three years. Had the Trust Board done that, then section 66 would have applied. It would have been necessary to comply with that section, and include the matters required in the employment agreement.

SUMMARY

1. The Employment Court has made it clear that secondment to a temporary position within the terms of an existing employment agreement is not "employment" that brings section 66 into play.
2. In other cases, and despite recent publicity which might indicate otherwise, in proper cases, it is possible to draft an employment agreement that runs only for a fixed term. For example, an employment agreement that operates only while another employee is on parental leave will need to meet the requirements of section 66.
3. Where the employee is already a staff member, an appointment can be made to a temporary position, for example, that of housemaster at a school, provided the appointment is consistent with the employee's existing employment agreement. At the end of the temporary posting, the employee reverts to the position held before the appointment.
4. In all cases, where section 66 applies, the requirements of that section must be carefully met. The drafting required by section 66 to meet the Act's requirements is not straightforward, and legal input should be considered as essential.
5. Rely on your Lawlink lawyer for specific advice as the wording required in meeting the very specific requirements of section 66.

email

g.kilpatrick@wmklaw.co.nz
[Website www.wmklaw.co.nz](http://www.wmklaw.co.nz)