ROLLING OVER FIXED TERM AGREEMENTS

How often can fixed term agreements be rolled over? As long as there's a genuine reason based on reasonable grounds, the Employment Court says.

The Court recently considered the case of a school bus driver employed for 18 years on a series of fixed term contracts *(Paul Morgan v Tranzit Coachlines Wairarapa Limited [2019] NZEmpC 66 EMPC 262/2018)*. Its judgement provides much-needed guidance for employers and a reminder of the rationale for the ban on fixed term employment agreements.

Section 66 (2) provides that –

> *"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."*

The company's case was that there is a risk that the MoE contract could be lost, which would adversely affect the company's revenue and its ability to employ the employee as a bus driver. This financial uncertainty was offered as a genuine reason based on reasonable grounds for fixed term employment.

The Court accepted that there was a risk that the contract be lost, and that that would very likely affect the company's financial circumstances. That, however, was not a genuine reason based on reasonable grounds in this case.

The Court reasoned that -

- The risk was speculative. The history of MoE contracts to the company showed a solid pattern of stability over 18 years.
- Financial uncertainty was something all businesses faced and could not in itself be a genuine reason held on reasonable grounds for fixed term employment.
- The company had produced no evidence of its financial circumstances, of the value of the MoE contract or of the extent to which a loss of that contract would affect the company.
- The redundancy provision in the employment agreement undermined the claim that a fixed term is genuine and reasonable.
- The employee was not employed on a distinct project of an expected limited duration. His work was part of the employer's wider business operation, and his duties required him "to carry out any other duty we may reasonably require and … assist all other employees as necessary in any part of the business."

It concluded by saying that the fact that a fixed-term agreement has been rolled over, even several times, does not automatically mean that the arrangement is illegal. "There is no magic number or bright-line test", it said. The **reasons** for the fixed term should be examined.

Comment - ILO Convention No 158

The ban on fixed term agreements comes from International Labour Organisation Convention No. 158. The Employment Court's review of the ban is quoted below –

"[8] It is for the employer to show that there was a genuine reason based on reasonable grounds for the fixed-term agreement. 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:

> 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.

[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.

[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)." *(Emphasis added).*

Predictably, economic difficulties and technological changes, and their effect on permanent employment have accelerated out of sight since 1982. Maybe it's time for a rethink about permanent employment as a standard model. The pesky Millennials seem to want to change jobs every year or two, anyway. Quite unpredictable, really.

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