



## 'Fixed Term Agreements' - 20 Years On

### Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
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It is 20 years since Issue 1 of "The Advocate" was carefully typed, printed, folded, placed in an envelope and 'posted' off to our clients! That issue, headed "Kerry Smith, Radio 1's Breakfast Announcer is Unsuccessful in Her Personal Grievance Claim against Her Former Employer", dealt with the issue of fixed term contracts. We thought it timely to again review the status of fixed term agreements.

Of course 20 years ago we were dealing with a vastly different legislative environment with the Employment Contracts Act 1991 in force. Fixed term agreements were regulated by a series of principles set by Judges through case law. The introduction of the Employment Relations Act set down specific requirements concerning the validity or otherwise of fixed term agreements.

Section 66 of the Employment Relations Act 2000 provides that employers and employees can agree to fixed term agreements. However an employer must have a genuine reason or reasons for the fixed term agreement and must advise the employee of how the employment will end and the reasons for it ending. It is expressly required that these matters be recorded in the applicable employment agreement as follows:

"[(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.]

In the event the applicable individual employment agreement does not include these matters then ss6(6) provides:

[(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.]” (section 66).

In addition to the above requirements for inclusion into an individual employment agreement there are a number of considerations when appointing an employee on a fixed term basis:

#### (i) Duration

There are no limits on the duration of a fixed term agreement however of course there is still a requirement for there to be a **genuine reason** for the limited term agreement.

#### (ii) Consecutive Fixed Term Agreements

While there is no restriction on entering into a number of consecutive fixed term agreements, it is essential that all fixed term agreements meet the requirements of s.66 of the Employment Relations Act 2000. In 2004 the Court of Appeal determined in **Norske Skog Tasman Ltd v. Clark** [2004] 1 ERNZ 127 that if a fixed term agreement is held to be invalid, then any subsequent fixed term agreements entered into, irrespective of whether they meet the requirements of s.66 of the Act; will also be invalid.

Of course a number of successive fixed term agreements may detract from an argument that there is a genuine reason for entering into an agreement for a limited term.

#### (iii) Genuine Reasons

The Act provides that genuine reasons do not include the following:

- "to exclude or limit the rights of the employee under this Act;
- to establish the suitability of the employee for permanent employment;
- to exclude or limit the rights of an employee under the Holidays Act 2003."

However genuine reasons can include such things as working on a specific project, undertaking seasonal work or covering a permanent employee who is absent.

## Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

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### (iv) Notice

It is essential that you reserve the right in the employment agreement to terminate the fixed term agreement during its term, in order to avoid a requirement to pay an employee, whose employment has been terminated prior to the expiry of the term, for the remainder of the fixed term.

For example in ***Ouwerkerk v Keys Preston Maskell & Co Ltd*** [1993] 2 ERNZ 1081 the employee was employed on a fixed term contract for 2 years. The contract made no provision for termination or redundancy during that period. The Employment Tribunal held that the company had intended to provide employment for 2 years and that on the facts the employee was entitled to reimbursement for the balance of that period.

### (v) Continuation of Employment after Expiry

Where an employee is allowed to continue in employment after the expiration of the fixed term agreement the Employment Court has held that employment continues on the same terms but on a permanent basis.

A relatively recent decision by the Employment Court on fixed term agreements is ***Turner v Talley's Group Ltd Limited*** [2013] NZEmpC 31 which determined:

1. Although the employment agreements used in this instance to engage employees in the fish processing industry were described as being "seasonal agreements" they clearly fell within the definition of 'fixed term' agreement provided for in s.66 of the Employment Relations Act 2000.
2. The Employment Court determined that Talley's did not have genuine reasons based on reasonable grounds for engaging the employees in these circumstances on a fixed term agreement:

*"Although I accept that fish processing is seasonal in the sense that the duration of the work depends upon the provision of raw materials which is seasonal, the history of Mrs Turner's employment in practice tends to cast doubt, in her case at least, on whether there were genuine and reasonable grounds for requiring her employment to be for a series of fixed terms.*

*[45] Despite the seasonality of the supply of different fish products to the factory, the evidence establishes that, for practical purposes, Mrs Turner was able to be employed on those different tasks but continuously throughout each year over a long period. She was not laid off at the end of each season and re-engaged, either later or even immediately, to work on another product. As work on one product wound down, she was reallocated to other work in the factory and then told that henceforth she would be working on a full-time basis on another seasonal product and this pattern was repeated over the course of each year of a number of years.*

*[46] I am not satisfied in these circumstances that Talley's had genuine reasons, based on reasonable grounds, for specifying that Mrs Turner's employment was to end at the end of the specified period or even at the conclusion of a fish-type season."*

3. The Court also determined that the employer in the circumstances did not meet the requirements under s.66(4) of the Act because the relevant agreement did not state in writing the way in which the employment was to end and the reasons for this:

*"The relevant agreements do not state in writing the way in which Mrs Turner's employment under each agreement was to end and the reasons for ending the employment in that way. For fixed term employment to be lawful, that requirement must be met and it follows that the absence of compliance in this instance means that Mrs Turner's employment was not for fixed terms or at least her employment which terminated on 14 July 2011 was not for a fixed term."*

4. In light of the Court's determination as outlined in 2. and 3. above the Court concluded:

*"[49] For reasons set out previously, the law presumes that, in these circumstances, the employment was of indefinite duration so that its termination, which was at the initiative of the employer, was a dismissal and not the expiry of an agreed fixed term. The defendant did not attempt to argue its individual agreements' compliance with the requirements of subs (4): rather, it reiterated its position that these could not be categorised as fixed-term agreements so that subs (4) was not in issue. So noncompliance by Talley's with s 66 is explicable, but not excusable."*

So 20 years on, the message to employers using fixed term agreements is that careful compliance with the Act is required for a fixed term agreement to be lawful.

## Minimum Wage Rates to Increase –

The adult minimum wage is to rise to \$14.75 an hour (currently \$14.25). The Starting Out and training minimum wages will increase from \$11.40 an hour to \$11.80 an hour. The new minimum wage rates will come into effect on 1 April 2015.

20 years ago the adult minimum wage rate was \$6.25 and the youth rate (16 – 19 year olds) was \$3.75.

1995-2015  
YEARS

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