

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA 22
5355827

BETWEEN MICHAEL JOHN ROWE
 Applicant

AND LAND MEAT NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: John Unsworth, Solicitor for the Applicant
 Rachel Webster, Solicitor for the Respondent

Investigation Meeting: 11 December 2012 at Wanganui

Determination: 1 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Rowe was employed by Land Meat New Zealand Limited (Land Meat) as the General Manager of its Wanganui plant from 16 December 2008 until 27 May 2011. Over that period he was employed on 3 fixed term employment agreements, between which there were gaps of several weeks or months during which Mr Rowe continued to work and be paid.

[2] He says there was no good reason for the fixed term nature of his employment and the gap between employment agreements gave him an expectation of ongoing employment. He claims he was unjustifiably dismissed when his employment terminated on the expiry of the third fixed term agreement. Mr Rowe claims compensation, loss of salary and benefits, and costs.

[3] Land Meat is owned by AFFCO Meats Limited. Hamish Simson, the current Chief Executive Officer of AFFCO New Zealand Limited, was Chief Executive

Officer of Land Meat before moving, first to an Executive Director position with AFFCO and then to his current position with the company.

[4] Land Meat acknowledges Mr Rowe's employment agreement did not state in writing the reason for his employment ending and therefore did not meet all the statutory criteria for a fixed term agreement. However, it says Mr Rowe was well aware of the reason before he entered into the final fixed term agreement. The reason was the operational integration between Land Meat and AFFCO which would result in the disestablishment of Mr Rowe's position.

[5] Land Meat says if Mr Rowe had not agreed to enter into the third and final fixed term employment agreement in December 2010, it would have terminated his employment for redundancy. That would have given Mr Rowe a further 3 months' employment at most, with no entitlement to redundancy compensation. The final fixed term agreement effectively gave him 6 months' notice in which to find alternative employment. Land Meat says it saw this as the fairer option, providing Mr Rowe the most favourable financial outcome.

Issues

[6] The issues for the Authority to determine are:

- (i) Whether Mr Rowe's fixed term employment agreements complied with the requirements of s 66 of the Employment Relations Act (the Act);

And, if not,

- (ii) Whether Mr Rowe was unjustifiably dismissed.

The Background

[7] Mr Rowe was interviewed for the Land Meat General Manager position (GM) by Mr Simson and Michael Talley, a director of AFFCO, in September 2008. Mr Rowe was offered the position in November 2008 with a proposed start date of 15 December 2008.

[8] Mr Rowe says there was no mention at his interview of the GM position being for a fixed term. However the employment agreement he was offered was for a

period of twelve months from mid-December 2008, with provision for the parties to agree to a renewal.

[9] Mr Simson says he is certain he told Mr Rowe the employment would be fixed term, which he says is normal for management staff in the organisation. He also thought that arrangement to be appropriate given the integration process that had started between Land Meat and AFFCO. Mr Simson says he discussed with Mr Rowe the changes that had occurred in Land Meat which had previously been headed by a Chief Executive but was now to be led by a GM.

[10] Mr Simson says a process for integrating meat sales from Land Meat into AFFCO had begun prior to Mr Rowe being offered the position of GM, and a rationalisation process between the companies was intended to continue over the coming years. This was knowledge Mr Rowe needed to have as he would be involved in the further integration process.

[11] The provisions of the employment agreement offered to Mr Rowe included the following terms:

- a. A salary of \$140,000 gross per annum reviewable annually, inclusive of consideration of \$20,000 for a 3 month restraint of trade
- b. Up to \$20,000 annual bonus, dependent on performance
- c. A company vehicle for which he would contribute \$40 per month towards private incidental expenses
- d. Medical insurance
- e. Reporting to AFFCO Directors and AFFCO Senior Managers as requested
- f. No less than one month prior to expiry of the agreement, the parties to decide on the terms if applicable for a new employment agreement, although there was no obligation on the employer to renew the agreement for a further term
- g. Provision for termination for redundancy/restructuring during the employment.

[12] Mr Rowe signed the employment agreement within days of receiving it and started in the role on 16 December 2008. He continued to work after the expiry of

the fixed term with no discussion being initiated by his employer about a new employment agreement.

[13] In mid-January 2010 Mr Rowe received a new employment agreement, which he says arrived by email. This was also for a fixed term, this time for 6 months from the commencement date of 13 January 2010. Total remuneration was \$142, 800 gross per annum with an annual bonus of up to \$20,000.

[14] The agreement contained a new clause acknowledging that steps taken to integrate Land Meat into AFFCO's management and financial structure could result in changes to the GM position during its term. Mr Simson says he discussed this with Mr Rowe and informed him of the intention to examine the management structures between Land Meat and AFFCO. He says that was the reason for inserting the new clause. The job description attached to the employment agreement also contained a new provision in the *Position Purpose* which provided:

...the General Manager is required to actively assist in the integration of Landmeat into the Affco financial and management structure;...

[15] Mr Rowe says he didn't take much notice of the 6 month term or the new clause about integration. Nor did he recall having any discussion with Mr Simson about the employment agreement which he and Mr Simson signed on 23 February 2010. While he was aware of the integration process throughout his employment, and involved in its implementation to some extent, he did not know his own position was affected by it.

[16] The mid-July 2010 expiry date of the second fixed term employment agreement passed with no discussion between the parties about the future of the employment relationship and Mr Rowe continued on as GM with no change to the role or his terms and conditions.

[17] In late November 2010 Mr Rowe and Mr Simson agreed to meet soon in Auckland. Mr Rowe emailed Mr Simson on 29 November 2010 with some thoughts for the meeting, which all involved Land Meat operational matters. Mr Simson replied on 6 December, the day before the meeting, noting that *...one of the things I need to cover with you is your own review and future contract discussions....* Mr Rowe says this was the first mention of his employment arrangements since his fixed term agreement had expired without comment nearly 5 months earlier.

[18] On 7 December 2010 Mr Rowe met with Mr Simson in Auckland. The AFFCO Industrial Relations Manager, Graeme Cox, was also present. Mr Simson told Mr Rowe he would offer him a further fixed term employment agreement for 6 months that would not be renewed on expiry. The commencement date would be 1 December 2010; his salary would be \$145,656 per annum; and he would receive a \$20,000 bonus on signing the agreement.

[19] Mr Simson says he believed he made it clear to Mr Rowe at the meeting that the operational integration of Land Meat into AFFCO was almost complete, and this meant the GM role would be disestablished. This was the reason for Mr Rowe's final fixed term employment agreement expiring after 6 months. He acknowledges he did not discuss redundancy with Mr Rowe because he believed the better alternative was to offer Mr Rowe one final 6 month fixed term agreement with a bonus.

[20] Mr Rowe is adamant Mr Simson did not tell him the operational integration of Land Meat into AFFCO was almost complete, and did not tell him the position of GM would be disestablished effective from the expiry of the final fixed term agreement he was being offered.

[21] In the meeting on 7 December 2010 Mr Simson mentioned the possibility of another position for Mr Rowe with AFFCO after the expiry of the 6 month term. This would involve Mr Rowe setting up a pilot production plant at one of the AFFCO sites and would need Mr Talley's final approval. Mr Rowe was interested in the proposal but AFFCO ultimately decided not to pursue the idea at that time, to his disappointment.

[22] Mr Rowe signed the employment agreement on 15 December 2010 and continued working in his role as GM until the expiry of the fixed term. He was unable to find alternative employment at a commensurate rate of remuneration and accepted a position as a Manager in a Wanganui Butcher shop with an annual remuneration of \$60,000 starting on 30 June 2011.

[23] Mr Rowe suffered a serious stroke while overseas on holiday in September 2011 and resigned from his Butchery Manager employment on 5 December 2011. He has been in receipt of monthly income protection insurance since that date.

First Issue – Did Mr Rowe's fixed term employment arrangements comply with the requirements of the Employment Relations Act?

[24] The relevant section of the Act is s 66 which provides:

- (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.

[25] The parties entered into 3 fixed term employment agreements between December 2008 and December 2010. None of the agreements contained reasons for the employment ending and therefore all failed to satisfy the requirements of s 66 (4) of the Act. However, that did not affect the validity of either the first or the second

fixed term agreements in accordance with s 66 (5) of the Act, and the employment relationship continued.

[26] The main focus falls on the third agreement, the fixed term of which was relied on by Land Meat to end Mr Rowe's employment. I will briefly consider the first 2 agreements for the background they supply to the third and final agreement.

[27] The parties disagree over what if anything was said about the fixed term nature of the proposed employment before Mr Rowe received an offer of employment from Mr Simson in November 2008. I accept Mr Simson's evidence that he discussed with Mr Rowe the integration already occurring between parts of Land Meat operations and AFFCO. That information would be required by an incoming General Manager of Land Meat whose key accountabilities included ensuring the effective management of the company and coordinating its strategic planning.

[28] However, I find it likely that Mr Simson did not discuss the fixed term nature of the proposed employment with Mr Rowe. It is more likely that, as Mr Simson was himself employed on a fixed term agreement, and was familiar with the concept of executive staff being employed on such arrangements, he did not see the need to bring this matter to Mr Rowe's attention. Mr Simson told the Authority fixed term employment was *normal for us*.

[29] It is questionable whether there were genuine reasons based on reasonable grounds for Mr Rowe's employment to be subject to a fixed term of twelve months. Further integration with AFFCO may have been contemplated in November/December 2008, but there was no indication at that time of the General Manager's role being directly affected.

[30] In any event Mr Rowe's employment continued on beyond the expiry date without comment from the employer, which changed the nature of the employment to open-ended¹. In both the first and the second of Mr Rowe's fixed term employment agreements the parties entered into a further fixed term employment arrangement, several weeks or months after the expiry dates.

[31] The significant feature of the second fixed term employment arrangement, which was for a 6 month period, entered into by the parties in February 2010 is that it

¹ As per *Varney v Tasman Regional Sports Trust*, EmpC Christchurch CC15/04, 23 July 2004.

flagged further changes within Land Meat. Mr Rowe said he had no recollection of Mr Simson discussing the new clause that acknowledged the possibility of Land Meat being incorporated into the AFFCO management and financial structure during the term of the employment.

[32] I accept Mr Simson's evidence that, while he did not specifically discuss with Mr Rowe the possibility of the GM position being disestablished, he did discuss the possibility of some changes to the position because of the continuing integration with AFFCO. The fixed term agreement signals potential change to the *position title, management reporting and aspects of the Job Description*.

[33] While that uncertainty may have justified the fixed term nature of the second employment agreement, the agreement did not comply with the requirements of the Act for the same reason as the first agreement. Even if it had been compliant, Mr Rowe's employment changed once again to an on-going employment relationship after 14 July 2010 when he continued to work and be paid as GM after the expiry of the fixed term, without his employer initiating any discussion or review.

[34] Counsel for Land Meat properly acknowledged the third and final fixed term employment agreement did not contain reasons for the employment ending after 6 months and therefore failed to meet the requirements of s 66 (4)(b) of the Act. Nonetheless she submitted the agreement was valid as it was entered into voluntarily with the freely given and informed consent of both parties, and there was a genuine reason based on reasonable grounds for the fixed term.

[35] I reject that submission and find Mr Rowe was not told either before, or at, the meeting on 7 December 2010 his position was to be disestablished. I accept Mr Rowe's evidence that Mr Simson told him of some exciting new plans for Land Meat; of his belief Mr Rowe would not be able *to deliver it for us*; and that his contract would be renewed for 6 months but would then expire. Mr Rowe's recollection of the meeting is confirmed by Mr Cox's notes of what Mr Simson said in the meeting:

Have a view of the type of person that will be required to fill the role going forward, type of person will need to be a born communicator, able to build relationships and move beyond current boundaries especially with new Plant coming onboard. At this stage do not see that these are your areas of strength.

Happy to extend your term agreement for another 6 months but not looking to renew after that.

...
The current role is not what the role going forward will look like.

[36] Regardless of whether the impending disestablishment of the GM position was a genuine reason for the fixed term nature of the employment, it was not the reason advised to Mr Rowe by Mr Simson. When he entered into the final agreement Mr Rowe was under the impression his position would continue beyond the expiry of the fixed term but would be filled by someone whom the employer considered more capable than Mr Rowe of delivering Mr Simson's vision. His lawyer noted in his letter of 1 August 2011 raising Mr Rowe's personal grievance:

There was no specific reasons given for his termination and the general feeling was that his face no longer fitted.

[37] Mr Rowe did not enter into the agreement with informed consent as he had not been informed that the position would be disestablished after his employment had ended. Mr Rowe acknowledged he was not pressured into signing the agreement, and he had time to take advice on it if he wished. However, faced with misinformation about the reason for the fixed term, his consent could not be informed.

[38] The fixed term employment agreement did not meet the requirements of s 66 (4) of the Act and Land Meat could not rely on its expiry to end Mr Rowe's employment on 27 May 2011.

Second Issue – Was Mr Rowe unjustifiably dismissed?

[39] The consequence of Land Meat not being able to rely on the fixed term to end Mr Rowe's employment is that the termination of his employment at the expiry of the term was a dismissal. Whether it was a justifiable dismissal depends on whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred².

[40] Land Meat submitted it was inevitable Mr Rowe's employment would be terminated for redundancy if the employer had not relied on the expiry of the final fixed term agreement. Mr Simson said he was aware, before Mr Rowe entered into his final employment agreement, that the integration with AFFCO would result in the GM position being disestablished. He had not discussed the disestablishment with Mr

² Section 103A Employment Relations Act 2000, Test of Justification

Rowe before 7 December 2010 as he wanted the discussion to take place in a face to face meeting rather than by phone or email. I have already found he did not inform Mr Rowe at the meeting of 7 December that his position was to be disestablished.

[41] Mr Simson's own evidence supports that finding. He said he *thought it would be fairer to offer Mr Rowe a further 6 month fixed term contract rather than go down the redundancy path as under redundancy he would only be employed for a further three months at the most with no redundancy being payable under the contract.*

[42] He included a \$20,000 bonus payment as a term of the employment agreement which he viewed *as part of good faith bargaining and as akin to a redundancy payment.* The bonus provision was in line with those provided in Mr Rowe's first 2 fixed term employment agreements, albeit this one was payable on signing the agreement. While Mr Simson may have seen the payment as an incentive to Mr Rowe to accept the fixed term agreement, I reject his view that the bonus payment was in any way akin to a redundancy payment. Mr Simson accepted he had not made such a suggestion to Mr Rowe at the time of offering him the employment agreement.

[43] Land Meat breached the requirements of good faith in not informing Mr Rowe his employment was at risk, as soon as it was aware there was a real possibility the GM role would be disestablished. Section 4 (1A) (c) of the Act provides that the duty of good faith in such situations:

...requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment or 1 or more of his or her employees to provide to the employees affected-

- (i) *access to information, relevant to the continuation of the employees' employment, about the decision; and*
- (ii) *an opportunity to comment on the information to their employer before the decision is made.*

[44] Mr Rowe was unaware of discussions about the future of his role that had taken place in the weeks or months before his meeting with Mr Simson and Mr Cox on 7 December 2010. He was also unaware of email correspondence between Mr Simson and Mr Cox 2 days before the meeting in which Mr Cox advised Mr Simson that if Mr Rowe did not agree to the offer of a new and final fixed term agreement they should:

advise him that with integration AFFCO now completed don't require a GM of land meats and looking at redundancy situation.

[45] Mr Rowe was neither informed of the proposed disestablishment of his position nor given information about the decision. He clearly had no opportunity to comment on a decision about which he had not been informed. At the time of the investigation meeting Mr Rowe believed the work he had undertaken as GM continued to be performed by the former Production Manager whose title was changed to *Plant Manager* after Mr Rowe's departure from Land Meat on 27 May 2010.

[46] Land Meat's evidence was that the GM position was disestablished as there was no longer a need for the role in the integrated structure. The Plant Manager, whose position required specialist production skills, undertook very few, if any, of the functions of the former GM role.

[47] I accept Land Meat's evidence that the GM position was in fact disestablished following the termination of Mr Rowe's employment. However, Land Meat's actions, and how it acted, in carrying out that disestablishment were not those of a fair and reasonable employer in all the circumstances. It misled Mr Rowe about the reason for offering him one final fixed term employment agreement; failed to provide any information to him about the real reason and gave him no opportunity to comment on its decision prior to making it.

[48] I find Mr Rowe's position was genuinely redundant but his dismissal was unjustifiable because of Land Meat's comprehensive failure to observe the requirements of good faith in undertaking the termination process.

Determination

[49] The fixed term agreement Land Meat entered into with Mr Rowe in December 2010 did not comply with the requirements of s 66 of the Act and Land Meat could not rely on its expiry to terminate Mr Rowe's employment.

[50] Mr Rowe was unjustifiably dismissed effective from 27 May 2011 and he has a personal grievance against Land Meat.

Remedies

[51] Having determined that Mr Rowe has a personal grievance I must consider what remedies, if any, he should be awarded.

[52] Ms Webster submitted it was inevitable Mr Rowe's employment in the position as General Manager would have been terminated by redundancy if he had not signed a fixed term agreement effective from 1 December 2010. At best he would have had only a further 3 months' employment following the 7 December 2010 meeting with Mr Simson, and would not have been entitled to a redundancy payment.

[53] I do not accept that submission which is based on speculation of what may have occurred had Land Meat met its obligation of good faith to Mr Rowe in December 2010, or earlier, and followed a fair procedure to disestablish his position. While I accept that the position of GM was in fact disestablished by reason of the integration of Land Meat management with AFFCO, the disestablishment did not occur until after Mr Rowe had left the company towards the end of May 2011.

[54] Mr Underwood submitted this was a case worthy of significantly more than 3 months' reimbursement of remuneration. However, as I have accepted that Land Meat genuinely disestablished the GM position following the termination of Mr Rowe's employment, I am limited in the remedies I can award. I cannot award Mr Rowe compensation for the loss of his job, in accordance with *Simpsons Farms v Aberhart*³.

[55] It is reasonable, however, for Mr Rowe to receive reimbursement of salary and benefits (company vehicle and health insurance) he lost through his employer denying him a period of good faith consultation, and notice. I find a reasonable period of consultation would have been 1 month, followed by a notice period of 3 months, in accordance with the termination provisions of his employment agreement. It is not clear whether the redundancy provisions of Mr Rowe's employment agreement, which provide for 1 month's notice of redundancy, are intended to override the general termination of employment provisions of the employment agreement. In light

³ [2006] ERNZ 825

of that lack of clarity I find the general termination of employment provisions should prevail.

[56] The salary I have awarded must be reduced to take into account the alternative employment Mr Rowe obtained at a salary of \$60,000 per annum with effect from 30 June 2011.

[57] Mr Rowe also seeks compensation for hurt and humiliation under s 123(1) (c) (i) of the Act. He believes the way he was treated by Land Meat contributed to the stroke he suffered in September 2011. Mr Rowe had no supporting medical evidence and I decline to make a finding of a link between his dismissal and his subsequent medical condition.

[58] It was evident in the investigation meeting that Mr Rowe remained upset over the termination of his employment. He spoke of the shock, embarrassment, worry and humiliation he felt in the lead up to the termination and afterwards. He believed he was being sidelined during the last months and his movements monitored by the company's Plant Accountant. I make no findings on those matters but accept Mr Rowe genuinely believed it was happening and he suffered hurt and humiliation as a result.

[59] I also accept Mr Rowe's evidence that he worked out the final months of his employment feeling, in his words, *deflated and undervalued*. Whatever his employer's motivation may have been in not being open and transparent about its decision to disestablish the GM position, the effect was to make Mr Rowe believe the work he had undertaken for the company over the previous 2 years, and the results he had achieved, had not been good enough.

[60] I also accept he was embarrassed and humiliated at having to inform family members of that loss. I award him \$8,000 in compensation.

Contribution

[61] Having determined remedies to be appropriate I am required, under s 124 of the Act, to consider the extent to which Mr Rowe's actions contributed to the situation that gave rise to his personal grievance. If he did so contribute, I am obliged to reduce any remedies accordingly.

[62] Mr Simson gave evidence of Mr Rowe's lack of interest in the position during the final months leading up to the termination of his employment and his lack of effort in the role. As there was no evidence of performance issues being raised with Mr Rowe in that time I decline to take Mr Simson's comments into account and am satisfied that Mr Rowe did not contribute in any way to the situation which led to his personal grievance. There is therefore no issue of reducing his remedies.

[63] **Orders**

Land Meat New Zealand Limited is to pay Michael Rowe:

- i. 4 months' remuneration based on his salary at the date of dismissal, less any salary earned by Mr Rowe in the 4 month period from 28 May 2011;
- ii. 4 months' loss of benefit of company car;
- iii. 4 months' loss of health insurance premiums;
- iv. Holiday pay on (i);
- v. Compensation in the sum of \$8,000 (without deduction) pursuant to s 123(1)(c)(i) of the Act.

Leave is reserved for the parties to come back to the Authority if they are unable to agree on the calculation of the sums awarded at (i) to (iv) above.

Costs

[64] Costs are reserved.

Trish MacKinnon

Member of the Employment Relations Authority