IN THE EMPLOYMENT COURT
AUCKLAND

AC 54/06
ARC 48/05

IN THE MATTER OF	a point of fact or law challenge to a determination of the Employment Relations Authority
BETWEEN	YUAN CHENG INTERNATIONAL INVESTMENT GROUP LTD Plaintiff
AND	KELLY BUER Defendant

Hearing: 13 and 14 February 2006
(Heard at Auckland)

Appearances: Howard Keyte QC, counsel for plaintiff
John Coyle, advocate for defendant

Judgment: 20 September 2006

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff is an international company which is engaged in property management in New Zealand. It has challenged one of the remedies awarded to the defendant, Ms Buer, who worked for it for some three weeks during January 2004.

[2] The award challenged was for nine months' lost remuneration, over and above the award of three months' lost remuneration, which has not been challenged. The award for a total term of 12 months, less one week's paid notice and other earnings received, was $55,108.34. It was based on the defendant's claim, which the Authority apparently accepted, that the term of her employment was 12 months, after which it was to be reviewed.

[3] The company did not seek a de novo hearing of the whole determination, which included findings that Ms Buer had been unjustifiably dismissed, had not been provided with a written employment contract or paid holiday pay. The Authority awarded her, in addition to the 12 months' lost remuneration of $55,108.34, underpaid wages, holiday pay, $5,000 compensation for humiliation and imposed on the company a penalty of $7,000 of which the defendant received $4,000. The company has paid to the defendant all the amounts awarded in her favour except the nine months' lost remuneration.

The scope of the hearing

[4] The parties agreed that the challenge would be dealt with by the parties giving evidence as to the alleged terms of employment, with the defendant proceeding first. The company's position from the outset was that if the evidence it led on its behalf was accepted then there was no fixed term of employment and it would be over to the Court to determine what if any, additional sum over the three months remuneration should be awarded. If the Court accepted the defendant's evidence and found that this was a 12 month fixed term employment agreement then the company alleged there had been a failure to comply with the requirements of s66(2) of the Employment Relations Act 2000, which deals with fixed term employment, and contended this too should impact upon any award that might be made.

[5] The company's amended statement of claim stated that it did not challenge the following findings, decisions and determinations of the Authority:

1 That the defendant was employed on a contract of service by the plaintiff;

2 that she was employed as the personal assistant to the company's Managing Director, Mr Huang.

3 that her contract was breached and she was unjustifiably dismissed;

4 that there was no employment warning;

5 that she was not provided with a written employment agreement;

6 that there was a failure to provide a statement for the reasons for dismissal;

7 that there was a failure to keep time and wage records;

8 that holiday pay had not been paid;

9 that Ms Buer did not contribute to the situation which gave rise to the personal grievance.

[6] The company's position was that the employment agreement was either casual or permanent employment, it was not for any fixed term, it came to an end on 3 February 2004, and the plaintiff had been paid all the sums to which she was entitled.

The conflict in evidence

[7] It was clear from the outset that there was a direct conflict of evidence between the defendant's account and that of Andy Lai, the company's Business Development Manager, with whom she had key dealings over the terms of her employment. The other two witnesses called on behalf of the company were not directly involved in the negotiations and their evidence dealt with peripheral matters from which I was invited to draw certain inferences.

[8] One of the few matters on which the parties were agreed was that in the "Weekend Herald" newspaper on 22 November 2003, the company had advertised for a personal assistant in the following terms:

> *An energetic person is needed to assist with a variety of general duties and to act as a personal assistant to the Director of the company. Required to work on flexible hours. Assisting non English speaking Director. Good Salary, close to $1200.00 a week.*

[9] The following is Ms Buer's account. She was working for a property development company based in Tauranga when she saw that advertisement. She thought the job looked similar to what she was currently doing, but was to be based in Auckland. As her family lived in Auckland, she decided it was a role with more scope which would be closer to her family and would be ideal. She was in Auckland at the time, so telephoned the company and was given an interview that same day and a second interview with "*the Director*", Mr Huang, later that day. There were other people present during the interview which she found odd, but she was told that they were the last candidates and because Mr Huang's time was very valuable he had chosen to see them all at once to draw comparisons and make his decision.

[10] She was called later that day by Mr Lai who wanted her to start immediately. She told him she was currently working and would have to give two weeks' notice and had to move from Tauranga. She also had a holiday planned over the Christmas period and so it was agreed that she would not start until the following year.

[11] They discussed over the phone the terms of her employment. She asked for it to be "*a 12 month fixed term of employment*" at $4,800.00 per month, after tax, as she had a similar contract with her current employer. This suited her best as she was familiar with it and it would guarantee that she would progress her career. Mr Lai agreed and assured her that this suited the company too as they needed a PA who would be willing to work at least that period, so that Mr Huang could form a good working relationship of trust with her and also be forced to learn more English while she worked in the role with him. The hours were to be 8.30am to 5.30pm, Monday until Saturday. She was to have a company car park. If travel was involved then all expenses would be paid by the company and days in lieu given for the extra time spent overseas.

[12] The start date was to be 12 January 2004, and Mr Lai would meet her in the car park entrance and give Ms Buer her swipe card. She requested a copy of the contract be sent to her and Mr Lai assured her that he would have it drafted.

[13] After the discussions with Mr Lai and their agreement on the terms and conditions, she carried on working her current role and gave notice in December 2003 and moved to Auckland. She did not receive a written contract from Mr Lai and tried to follow this up before she took her holiday, but was not successful. Ms Buer gave detailed evidence as to what happened to her in the course of her employment and how it was brought to an end by the company. As these matters were not the subject of the challenge, but may well bear on credibility findings, I will, in due course, set out the Authority's factual findings which the company has not disputed.

[14] I turn now to Mr Lai's account. Mr Lai produced a copy of the evidence he gave to the Authority. He said the situation was difficult for him as he did not wish to change any of his previous evidence in his attached statement because that was his memory of the events which had occurred. He said in spite of his evidence the

Authority had made a decision that Ms Buer was employed by the company and made several orders in her favour which the company had decided not to appeal.

[15] After Ms Buer was interviewed by Mr Huang on 26 November, Mr Huang instructed Mr Lai to advise all the applicants that none of them were suitable for the job. Mr Lai carried out this instruction and so advised Ms Buer in a telephone conversation with her on that same day. This, he said, was very different from her evidence concerning that conversation. In particular he denied that in any telephone conversation on 26 November, or at any other time, had he had any discussions about her being employed for a fixed term of 12 months. That, he said in evidence, was not the nature of the job that had been advertised and no employee of the company had been employed on a fixed term contract for 12 months.

[16] Mr Lai accepted that some of the other matters raised by Ms Buer in her statement of evidence may have been raised at the earlier interviews with Mr Huang, but were not discussed when he rang to tell her that she had not been chosen for the job. They did not discuss her moving from Tauranga nor the start date.

[17] In Mr Lai's statement to the Authority he said that after he had called Ms Buer and told her that he she did not get the job, he believed she was very desperate as she called him several times asking if there were any other vacancies. He told her "*No*" but he would let her know if something did come up and would keep her curriculum vitae for information purposes. "*At the very same time*" he said he was told by Mr Huang that his parents would be coming to visit New Zealand soon and they would need someone to accompany them, taking care of their needs and showing them around New Zealand. While he was trying to find someone, Ms Buer called again and so he told her that the only vacancy available at the moment was a "*temporarily PA job*", where she had to take care of Mr Huang's family while they were in New Zealand. He told her this was for a maximum of one month. She would have to work long and flexible hours including weekends and public holidays but the company would give her good pay as a reward. She would be paid $1,200 a week after tax. Ms Buer understood this and said yes to the job immediately and "*…understand* [sic] *that this job was a good stepping stone for her giving her some quick and good cash while she could find another proper job in Auckland later on*".

[18] Mr Lai explained he had placed the advertisement "*because like when the boss comes he needs to have someone to like be with him for a period of time, for a short time, for like look after his family. Yeah a personal assistant for*", and that is what he meant by a PA to the Director. He said the advertisement was "…*looking for a someone who can like help the director with the company duties*".

[19] When asked about his agreeing to the salary at $4,800 per month he replied:

> ***Q.*** *In her evidence, Ms Buer stated that the salary was agreed, she talked about this with you, and you agreed to the salary of $4,800 per month.*
> ***A.*** *I remember at the time she didn't get a job, but after she call me then I say* oh, this is a part time position, are you willing to take it? *And she say yes, because, like, even last time in the court, she say like,* yes I am coming back to Auckland anyway because like I have got a boyfriend in Auckland, I have to come here, *and she say yes to this to the Judge before as well. So no matter what she have to come so OK, this is the position, OK you can try this out.*

[20] I have assumed that the reference to the "*last time in the Court*" and "*the Judge*" were to the investigation in the Authority, as this matter had not been before a Court previously. His reference to an Auckland boyfriend is not mentioned at all in his written statements to the Authority and the Court, nor in the Authority's determination and was not part of the challenge to any other aspects of the Authority's awards. Because it was mentioned for the very first time, it appears, in Mr Lai's cross-examination in the Court, Ms Buer was not cross-examined on it by Mr Keyte, no doubt because it was not part of Mr Lai's brief of evidence. I therefore find that her evidence on this point must be regarded as unchallenged and shall deal with the consequences of this conclusion as well as the Authority's findings, when resolving the conflict of evidence.

[21] Mr Lai maintained that the only position being offered to Ms Buer was a short term position taking care of the family and there was no real need for a written employment contract as it would be so short a term. Mr Lai could not remember when Mr Huang told him that he was bringing his family to New Zealand, nor could he remember when he had offered Ms Buer the job to look after the family. He thought it was might have been a fortnight after the interviews in November.

[22] As a result of cross-examination and questions from the Court, it became clear that Mr Huang, who owns a number of companies in China and travels extensively throughout Singapore, Japan, China, Australia and New Zealand, had initially been

intending to remain in New Zealand for some time in order to obtain a New Zealand passport. Mr Huang did not give evidence in either the Authority or the Court.

[23] Mr Huang's intentions were confirmed by the evidence of Jack Yan, then the company's Project Manager. He was called by the company to say that although he had nothing to do with the employing of Ms Buer, at no time had any employee, including himself, ever been guaranteed employment for a year. For Ms Buer to have been employed on that basis would have been an extraordinary departure from the terms upon which all other employees of the company were employed.

[24] Mr Yan said that Mr Huang had attained permanent residence in New Zealand but wanted to get a passport, and that is why he needed to stay for up to 8 months but he had changed his mind and had returned to China.

[25] Nancy Wei, who is employed by the company as an Accountant, gave evidence that, although she was not present during any discussions between Mr Lai and Ms Buer, the information related to her by Mr Lai was that Ms Buer would only be with the company temporarily for the short time that Mr Huang would be in New Zealand. Ms Buer was to fill in at the Auckland office for approximately one week until Mr Huang arrived and then she was to assist him whilst he was in New Zealand. She was not sure how to treat this in the books of the company, but on the advice of an external accountant, treated Ms Buer as an independent contractor. Ms Wei had understood that Mr Huang would be in New Zealand only for about three weeks, in January 2004, and that he would have needed to have been in New Zealand for some three years to get his New Zealand passport.

Resolution of conflicts

[26] The accounts given by Mr Buer and Mr Lai are completely incompatible. Ms Buer's said the terms and conditions of her employment as a PA to Mr Huang involved commercial property matters, and included a salary of $4,800 after tax, each month for a 12 month period. This bears no resemblance at all to Mr Lai's account that she was employed on a temporary basis for no more than one month in order to look after Mr Huang, his elderly parents and his children, and to provide assistance as a tour guide while they were visiting New Zealand in January 2004. In

resolving the conflict in that evidence I first look to the Authority's determination and the parts of it which have not been challenged by the company.

[27] The Authority rejected Mr Lai's account that he had rung Ms Buer and told her that she did not have the job and that she continued to ring the company to ask if there was any work. The Authority found, "*Given that Ms Buer had a well paid and secure job in Tauranga this seems very strange*" (page 1).

[28] The Authority reviewed the telephone records produced by Ms Buer and found that these supported the veracity of her evidence relating to her attempts to obtain an employment contract and found that there would have been no reason for her to have attempted to contact the company's solicitors in December 2003 if she had not been offered and accepted employment in November, as she had deposed. The Authority found that it was unbelievable for an employer to pay $1,200 per week for a person employed effectively as a nanny for a short period. It found, contrary to Mr Lai's statement that he had given Ms Buer an employment warning, that no such warning had been given. It also found that any advice Mr Lai had received about Ms Buer's competence had come from a maid who spoke no English and would have had no notion whether allegedly personal calls being received and being made by Ms Buer during work hours were business or personal. In conclusion the Authority stated:

> *It is not often that accounts about what has happened are as disparate as they were in this case. Where there are disparities it is usually because people genuinely remember that particular version of events. This is one of the rare cases where I have no doubt that the company's version of events was an utter fabrication. Mr Huang did not bother to appear to give evidence or provide an affidavit. He was in China.*

[29] I too prefer Ms Buer's account and reject that of Mr Lai for similar reasons.

[30] Mr Keyte contended that Ms Buer's evidence as to the terms of the contract was highly suspect because, when giving evidence to the Authority, she had said nothing about the company's reasons for a fixed term. He invited the Court to take the view that the extra evidence she had given to the Court, when compared to that which she had given to the Authority, showed it had been made up more recently in order to make it appear that the requirements of s66(2) of the Act had been met.

[31] This is contrary to the assessment I made of Ms Buer when she was cross-examined on this issue. She explained that when she first wrote her witness statement to the Authority, she did not put in as much detail as she had in the present

one. She genuinely appeared to have no understanding that she was being accused of adding items that were important to her position in order to satisfy s66(2) of the Employment Relations Act, about which she had no knowledge. She said it was only because she had been asked to provide every single detail to the Court, because it was a more formal matter, that she had included these in her statement. She said that she had never written a statement before and did not have any experience in so doing. She confirmed in re-examination that her witness statement was prepared by her in Australia without any directive from Mr Coyle, her advocate.

[32] I note that Ms Buer had turned 21 in December 2003 and it is hardly surprising that she does not appreciate the nuances of s66 of the Act.

[33] I also observed that in her witness statement to the Authority she stated "*The verbal contract discussed was to be a one year term*". Something further must have been said to the Authority, possibly in response to questioning (although I am unable to check this as the Authority is not required to provide a transcript) because the Authority found; "*It was also agreed that the contract would be reviewed after 12 months*".

[34] Additional evidence given to the Court was that the 12 month fixed term best suited her as this was the contractual arrangement she had with her last employer, she was familiar with it and it would guarantee that she would progress her career. She produced from her previous employment what can only be described as a glowing reference, which showed an employment period of 12 months from 10 March 2003 until 10 March 2004, even though on the evidence, she had left that employment in December 2003. Her evidence satisfies me that she did have a 12 month fixed term agreement with her previous employer although this was able to be varied by mutual consent to release her on two weeks notice. I find it is more likely than not that she would have told Mr Lai this when explaining why she required a 12 month term with the plaintiff.

[35] I also accept Ms Buer's evidence that she gave to Mr Lai as her reasons for moving to Auckland that she wanted to progress her career in commercial property. I reject entirely Mr Lai's account, apparently given for the first time in cross-examination, and therefore not put to Ms Buer in cross-examination, that she was determined to come to Auckland even without a permanent job in order to be with

her boyfriend. I have found that her evidence on this point should be treated as though it was unchallenged.

[36] From the way Ms Buer delivered her evidence and responded to questions in cross-examination she appeared to be confident and clear thinking. I agree with the Authority that she would have been unlikely to have left a better paid fixed term arrangement in Tauranga, where she was highly regarded, unless she had employment in Auckland on a similar fixed term.

[37] Mr Lai on the other hand was shaken in cross-examination. Even accepting that English was not his first language, he seemed very hesitant in responding to some questions and on other occasions did not answer them directly but provided discursive, blustering replies. The passage I have set out above, which refers to Ms Buer's Auckland boyfriend, is one example of this type of response.

[38] In answers to questions from the Court Mr Lai said that he had placed the advertisement in the newspaper because the plan was for Mr Huang to stay in New Zealand for a long time and to have a PA with him while he was overseas in order to deal with the company's issues in New Zealand. He was unclear as to the dates and times when things had happened and initially denied that there had been two interviews on the one day and then accepted that two had taken place. He could not remember when Ms Buer had told him that her boyfriend was already in Auckland.

[39] I referred Mr Lai to Ms Buer's evidence that she had worked in the company's office in January 2004 to perform property searches of certain land titles and sites of interest. He said that she never did those sorts of things and never dealt with any real estate agents to obtain property details or set up meetings, because she never dealt with property. I referred him to the following statement he had given to the Authority:

> *Well, it is true that Kelly had been asked to find some information on the property market and also on building material (which we definitely did not need to pay someone $1200 a week just to find out some very general information) and that was only because she had started work a week before Mr Huang's family arrived* [in] *Auckland and we had basically nothing for her to do prior to that!*

[40] When asked what he meant by that he said that he could not remember which properties she had been looking at.

[41] The manner in which Mr Lai gave his evidence and the conflicts in his various responses have undermined his credibility. His account was inherently illogical. As the Authority found it is highly unlikely, that someone with an excellent job in Tauranga would leave it to become a highly paid temporary nanny in Auckland. I therefore conclude that Mr Lai is an unreliable witness and I prefer the evidence of Ms Buer wherever there is a conflict between them.

[42] I do not accept the company's evidence that it would not have given Ms Buer a 12 month fixed term contract simply because it had not given such contracts to any other person. I find that it is more likely than not that at the time Mr Lai prepared the advertisement it was on the basis that Mr Huang would be remaining in New Zealand for a considerable period of time in order to obtain a New Zealand passport. Mr Huang required a personal assistant to deal with the company's developments in New Zealand, especially while he was on his frequent overseas trips to deal with his interests in China and elsewhere. By the time Ms Buer took up her appointment in January 2004 it appears that Mr Huang had changed his mind about remaining in New Zealand for more than a few weeks. This may well account for the treatment Ms Buer then received, the unilateral contractual changes that were made without her agreement and her subsequent unjustifiable dismissal.

[43] It follows from this conclusion that I accept Ms Buer's evidence that it was agreed between the parties that there would be a 12 month fixed term of employment at $4,800 per month after tax, to be reviewed at the expiration of the 12 month term.

Requirements of s66(2) of the Act

[44] Section 66 as first enacted, provided:

> ***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.*
> …

[45] A third non-genuine reason was added by the Holidays Act 2003:

> …
> *(c) to exclude or limit the rights of an employee under the Holidays Act 2003.*

[46] The section was further amended by s27 of the Employment Relations Amendment Act (No 2) 2004, which came into force on 1 December 2004 as follows:

> ***27 Fixed term employment***
> *Section 66 of the principal Act is amended by adding the following subsections:*
> *"(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"*

[47] It was common ground that the 2004 Amendments do not apply as the employment came to an end in February 2004. The transitional provisions of the 2004 Amendment Act provide:

> ***73 Transitional provisions***
> *(1) The amendments made by this Act do not apply to anything done or any matter arising before the commencement of this Act.*

[48] Mr Keyte in supplementary submissions, at the request of the Court, made the following points. Neither the Labour Relations Act 1973 nor the Employment Contracts Act 1991 dealt with fixed term agreements as a separate species of employment contract. They were first dealt with in a way previous legislation had not by Parliament in the 2000 Act in s66: *Clarke v Norske Skog Tasman Ltd* [2003] 2 ERNZ 213 at paragraph [32].

[49] Mr Keyte noted that the case law had illustrated two different approaches to fixed term employment agreements, one of which held that they would not automatically terminate on the date specified, if in certain circumstances, that was against the employee's will and the employer had the burden of proving there was a genuine reason for a fixed term: *Smith v Radio I Ltd* [1995] 1 ERNZ 281. The second and different approach was that taken by the Court of Appeal in *Principal of Auckland College of Education v Hagg* [1997] 1 ERNZ 116 which held that, in all but exceptional cases, the end of a fixed term employment agreement would terminate the relationship, though this would not amount to a dismissal. Judge Colgan's view in *Clarke* was that s66 of the 2000 Act could be seen as a legislative compromise between the two lines of authority and was intended to alter the common law position established in *Hagg*. He found that s66 "*…altered and tightened the tests for exclusion of the personal grievance jurisdiction...*" (paragraph [50]).

[50] This decision was appealed (*Norske Skog Tasman Ltd v Clarke* [2004] 1 ERNZ 127; [2004] 3 NZLR 323). A majority upheld Judge Colgan's decision that there was non-compliance with s66(2)(b) and therefore the fixed term agreement was ineffective. In paragraph [66] of the *Norske Skog* decision the majority of the Court of Appeal said that the Parliamentary history was of limited assistance. The original clause was somewhat more stringent than s66 as enacted, but did not impose an obligation on employers to advise employees of the reasons for the fixed term agreement. What was now seen as fundamental to an effective fixed term agreement were the provisions of s66(2)(b) which require the employer to advise the employee of when or how the employment will end and the reasons for it ending in that way. The Court referred to the following sentence from the then Associate Minister of Labour's parliamentary speech on 9 August 2000:

> *This part of the bill makes it clear that people can have a fixed-term agreement, but there has to be informed consent to that agreement.*
> (paragraph [66])

[51] The Court of Appeal also referred to the majority report of the Employment and Accident Legislation Committee on the Employment Relations Bill which noted that:

> [A] *fixed-term agreement is a valid option so long as it is for genuine reasons and the employer explains those reasons to the employee before the fixed-term agreement is entered into*".

(paragraph [51])

[52] Mr Keyte referred to the dissenting judgment of Heath J, which had rejected Judge Colgan's view, and that of the majority in the Court of Appeal, that the legislative purpose of requiring the employee to be advised of the reasons for the fixed term was to provide an additional basis for an unjustifiable dismissal claim arising out of a purported fixed term agreement. He submitted that the dissenting view of Heath J was that where there is a genuine and actual agreement as to a fixed term, a breach of s66(2)(b) will not result in a fixed term agreement being transformed into an employment agreement of indefinite duration ([paragraph 142]). He submitted therefore that there was a difference as to the effect of a breach of s66(2)(b) although both the majority and the minority judgments seemed to agree that the breach would result in a determination that a purported fixed term agreement was not genuine.

[53] Mr Keyte submitted that although the position may have been changed by the amendment in 2004, as the law stood before that amendment, the majority of the Court of Appeal had held that non-compliance with s66(2)(b), resulted in the fixed term agreement being ineffective. He submitted that this was a binding authority which the Employment Court was obliged to follow. Thus a breach of s66(2)(b) was sufficient for a determination that the agreement in question was not a genuine fixed term agreement.

[54] Mr Keyte's submissions, at my request, also addressed the decision of *Pearce v Attorney-General in respect of the Department of Labour* [2005] 1 ERNZ 731. That was a case where the full Court of the Employment Court considered the effect of an amendment to the Parental Leave and Employment Protection Act 1987 on the interpretation of the original section. The Court accepted there were three possibilities that can be gained from the authorities:

- *The original legislation was ambiguous and therefore the amending legislation sought to clarify that ambiguity.*
- *The original legislation was not ambiguous, but the text did not give effect of Parliament's intention and therefore the amending legislation sought to fix the meaning.*
- *The original legislation was not ambiguous and Parliament has now sought to change the meaning by its amending legislation.*

(paragraph [50])

[55] The full Court reached the conclusion there was no ambiguity in the original legislation therefore the matter needed to be taken no further. Mr Keyte submitted that a fourth possibility existed. Parliament through its amendments had sought neither to clarify nor to change the original "*meaning*" but rather had sought to expand upon the existing meaning – to deepen and strengthen existing rights in an area of employment relations where individuals operate in a position of considerable vulnerability. Counsel's research did not uncover any commentary in the Select Committee Report relating to the amendment of s66 or in the parliamentary debates on the matter and he submitted that, arguably, the 2004 amendment was a reflection of the majority's decision in *Norske Skog* and perhaps a legislative response to Heath J's dissenting judgment.

[56] Mr Coyle, in his memorandum in response, accepted that the employment terms were to be governed by the 2000 Act prior to its amendment on 1 December 2004 and any fixed term agreement would be subject to the Court of Appeal's interpretation of s66 in the *Norske Skog* case. He submitted that the company should not be able to rely on any non-compliance on its part to better its position to the detriment of the defendant, citing *Warwick Henderson Gallery Ltd v Weston* [2005] 1 ERNZ 921. There, in relation to an oral individual employment agreement, the Court of Appeal found that a failure to comply with s65(1)(a), which requires such an agreement to be in writing, did not make the agreement unenforceable or illegal and the consequences of the employee's failure to provide a written agreement should not be visited on the employee, for whom the provisions of s65 were designed to protect (paragraph [35]).

Conclusions on s66

[57] It appears clear that the provisions of s66, like those of s65 were intended to protect employees from certain consequences which flowed from the ending of a fixed term of a contract. Heath J, in his dissenting judgment in *Norske Skog* stated:

> *[170] However, I prefer not to place any weight on that particular argument as it is clear that s 66 is designed to protect employees against unscrupulous acts by employers that operate to remove, otherwise, proper claims for unjustified dismissal.*

[58] As to the consequences of any breach of s66(2)(b), by the employer failing to advise the employee of when or how the employment will end and the reasons for it ending in that way, the majority in *Norske Skog* stated that although they agreed with

the approach of Judge Colgan they preferred to express their conclusion in somewhat different terms. Judge Colgan had said at first instance:

> *The legislation places a positive obligation on employers to advise before a fixed-term agreement can lawfully be agreed to. The statute is clear that the test is what the employer tells or advises the employee, not what the employee may or may not know independently of such advice as is, or is not, given.*
> (paragraph [44])

[59] The Court of Appeal expressed the consequences of non-compliance as follows:

> *We are of the view that a provision as to termination of a fixed-term agreement is ineffective when s 66(2)(b) has not been satisfied.*
> (paragraph [70])

[60] Section 66(1) permits an employee and an employer to agree that the employment will end in certain specified circumstances. Sub-section (2) provides that before they agree that it will end in those specified ways, the employer must have genuine reasons, based on reasonable grounds, for specifying that the employment is to end and then must advise the employee of when, how and its reasons for ending. If the employer breaches those provisions, then it may not be able to rely upon the termination of the contract at the date fixed and may instead face an unjustifiable dismissal grievance claim from an employee, terminated against his or her will.

[61] The section does not address the situation where it is the employee who has the reasons for wanting a fixed term contract. That was the situation in *Smith v Radio I* where the parties had initially had a fixed term contract for two years and on its expiry the employer had offered a further two year term. Instead the plaintiff had insisted that the contract be for a one year term. The Court found that it had not emerged from the evidence why the plaintiff had preferred a shorter term but it inferred that it was in her mind to keep her options open and to enable her to earlier seek to renegotiate her terms and conditions upwards, based on the ever improving ratings she was receiving from the listening public.

[62] In the present case it was Ms Buer who had insisted upon a fixed term of 12 months. It appears that her reasons for so doing were communicated to Mr Lai, who accepted them and agreed to a fixed term contract, as both the Authority and I have found. She clearly had the necessary "*informed consent*" and obviously knew the reasons for the fixed term.

[63] This situation does not fit comfortably with the wording of s66 which emphasises the employer's reasons and the communication of these to the employee. However, it is still possible to bring the present situation within the plain wording of s66(2). Ms Buer required a 12 month fixed term as a condition of her employment. If, as appeared to have been the case, the company wished to employ her on that condition, this would have given the company a genuine reason, based on reasonable grounds for agreeing to such a term. Mr Lai's assent on behalf of the company would have sufficiently communicated those reasons back to the employee. In substance this would mean the company was in fact saying that the reason it was hiring her for a fixed term was because it was what she wanted and this was a condition of her agreeing to be employed by the company.

[64] This approach is consistent with the findings in *Norske Skog* that if an employee already knew the reasons for the fixed term it would affect the determination of whether the employer had failed to comply with the requirements of s66(2)(b) to provide the reasons. The majority of the Court of Appeal stated:

> *We regard the background knowledge of an employee as being potentially highly relevant. This is because what, at first sight, might seem an elliptical statement of reasons on the part of an employer may well have been sufficient to bring those reasons fairly to the attention of the employee if the employee already knew all the missing details.*
> (Paragraph [53])

[65] The majority found that there was no evidence that the grievant did know about some aspects of the reasons and therefore it accepted Judge Colgan's conclusion that the employer had not complied with s66(2)(b). In a situation where it is the employee that has advanced the reasons for the fixed term contract that would appear to obviate the need for the employer to set those reasons out again in order to comply with s66(2)(b). This is particularly so given that s66 is a provision intended to protect employees against the consequences of the termination of a fixed term contract, rather than to deprive them of a benefit that it was their wish to have included in their contractual arrangements.

[66] A similar theme runs through the dissenting judgment of Heath J, who stated

> [145] Section 66(2)(b) of the Act does not, in express terms, indicate the specificity with which advice must be communicated by employer to employee. Neither does s 66 prescribe the extent to which an employer is entitled to rely on knowledge possessed by the employee at the time the advice is given. Finally, s66 does not

> address at all the consequences of non-compliance by an employer with either s66(2)(a) or (b).

[67] This approach also meets with statements of the Associate Minister of Labour that there has been informed consent to the agreement.

[68] To allow the company to rely on s66(2)(b) when it has failed to provide a written individual employment agreement as required by s65 and requested by Ms Buer, and has been penalised by the Authority for that failure, would be to allow the company to benefit from its own wrong. I conclude that there has been compliance with s66(2)(b) and the fixed term of 12 months has not therefore been rendered ineffective in any way.

[69] The finding that this term was agreed provided a basis for the Authority's award of the entire 12 month term, and for these reasons the challenge must fail. Ms Buer is therefore entitled to the balance of the nine months' lost remuneration as awarded by the Authority.

[70] At the request of counsel for the company, costs are reserved. If the parties cannot agree, the first memorandum as to costs is to be filed and served within 60 days of the date of this judgment.

B S Travis
Judge

Judgment signed at 11.30am on Wednesday, 20 September 2006

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