

**DISPUTE RE UNION MEMBER'S EMPLOYMENT
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2019 WAIRC 00817

CORAM : COMMISSIONER D J MATTHEWS

HEARD : MONDAY, 28 OCTOBER 2019

DELIVERED : THURSDAY, 14 NOVEMBER 2019

FILE NO. : PSAC 3 OF 2019

BETWEEN : THE CIVIL SERVICE ASSOCIATION OF WESTERN
AUSTRALIA INCORPORATED
Applicant

AND

THE DIRECTOR GENERAL, THE DEPARTMENT OF JUSTICE
Respondent

CatchWords : Industrial law (WA) – Dispute in relation to applicant’s member’s employment status – Applicant’s member was a permanent public service officer – Did new contract affect status – In the alternative as a matter of fairness ought the applicant’s member be considered to have permanent status – Applicant’s member cannot be both indefinitely appointed and appointed for a fixed term – Fixed term contract extinguished permanent employment status – Nothing unfair about this in all of the circumstances – Application dismissed

Legislation : *Public Sector Management (Redeployment and Redundancy) Regulations 2014* r28, r30

Public Sector Management Act 1994 s64(1)

Result : Application dismissed

Representation:

Counsel:

Applicant : Mr M Ritter SC (of counsel)
Respondent : Mr J Carroll (of counsel)

Reasons for Decision

- 1 The applicant says its member is a permanent public service officer. The respondent disputes this.
- 2 It is common that the applicant's member was a permanent public service officer at the Department of Education Services when, in August 2014, she was informed that her position was to be abolished.
- 3 It is also common that in May 2015 the applicant's member was notified that she had become a registered redeployee under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014*.
- 4 Relevantly, regulation 28 of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* contains a definition of "redeployment period" which, when it was applied to the applicant's member, meant that her employment would terminate pursuant to regulation 30 *Public Sector Management (Redeployment and Redundancy) Regulations 2014* in early November 2015.
- 5 It is not in dispute that the applicant's member did not wish her employment within the public sector to end pursuant to any part of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014*. She did not wish to take a severance under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* and she certainly did not wish to be terminated pursuant to regulation 30.
- 6 It is not in dispute that the applicant's member wanted to remain employed in the public sector and also fervently, and understandably in my view, wished to maintain her permanent status.
- 7 Permanency is something that is sought after and highly valued within the public sector.
- 8 It is common that as at November 2015, indeed from June 2015, the applicant's member was on secondment working within the Department of Corrective Services, which is now part of the Department of Justice.
- 9 It is common that on 11 November 2015 the applicant's member signed a contract of employment with the Department of Corrective Services.
- 10 The terms of the contract of employment and the circumstances surrounding the applicant's member's execution of it are the key matters in this case.
- 11 The respondent says the contract of employment signed by the applicant's member ended her permanency. The applicant rejects that contention and says that as a matter of law the contract of employment did not have that effect. In the alternative the applicant says that, as a matter of fairness, the contract of employment ought not be considered to have that effect.
- 12 The applicant seeks a declaration against the respondent, being the current chief executive officer of the Department of Justice, that its member was at all relevant times a permanent public service officer.
- 13 The applicant put on evidence from its member and also two employees of the Department of Corrective Services she had contact with in relation to her employment status being:
 - (1) Mr Darian Ferguson, the Director Human Resources at the Department of Corrective Services from July 2014; and

(2) Mr Patrick Leach, the Director Change and Capability at the Department of Corrective Services from late September 2015.

14 Mr Darian Ferguson, at [9] and [13] of his witness statement, gave evidence that he was told, he cannot recall by whom, that the applicant's member was to be offered a position within the Department of Corrective Services and that the appointment was intended to stop the regulation 30 *Public Sector Management (Redeployment and Redundancy) Regulations 2014* clock ticking down against her.

15 Mr Ferguson gave evidence, at [13] of his witness statement, that he understood the Department of Education Services "would not suspend the registration period or revoke the registration unless [the applicant's member] was transferred into the Department of Corrective Services".

16 At [14] of his witness statement Mr Ferguson gave evidence, however, that for various reasons it was not possible to have the applicant's member transfer into a position with the Department of Corrective Services.

17 He gave evidence that something else had to be done to get the applicant's member across and into the employment of the Department of Corrective Services and to stop the clock ticking.

18 At [16] of his witness statement he gave the following evidence about what was done and why it was done:

Given the limitations affecting DCS and in order to overcome the issues with DES it was proposed that [the applicant's member] be employed as a Principal Policy Officer with a term of three years. This was a means to an end. [The applicant's member] accepted this and on this basis DES agreed to suspend or revoke registration which I seem to recall happened with one day left on the redeployment period.

19 At [22] of his witness statement Mr Ferguson gave evidence that:

Although, I do not specifically recall the exact conversations with [the applicant's member], I know that I did reassure her on several occasions that she was still permanent and that the fixed term contract was used as a 'work around' to beat the redeployment process timeframe.

20 Mr Patrick Leach gave evidence, at [19] of his witness statement, that he was aware of the background as at November 2015 and he urged the Acting Chief Executive Officer of the Department of Corrective Services to offer the applicant's member a three-year fixed term contract so that the regulation 30 *Public Sector Management (Redeployment and Redundancy) Regulations 2014* clock did not tick down to zero and result in the termination of the applicant's member's employment in the public sector.

21 Mr Leach gave evidence, at [25] of his witness statement, that he was aware that the applicant's member was a permanent public service officer and he thought the offer of the fixed term contract was the best that could be done in all of the circumstances to continue her employment in the public service and that it was not intended to affect the applicant's member's status as a permanent public service officer.

22 Much later, on 18 May 2018, when it was brought to his attention that the applicant's member's status was in question, Mr Leach wrote, in an email to the Executive Director Corporate Services of the Department of Corrective Services, as follows:

"My understanding of the process is as follows:

- [The applicant's member] was a permanent officer at Education, and initially seconded into DCS, and then eventually transferred permanently.
- She was a displaced officer at Education, and therefore became a displaced officer here, as there was no permanent position for her.
- She voluntarily relinquished her Spec Calling for a level 8 classification and was salary maintained for 6 months.
- She was then temporarily held against her current level 8 position via a fixed term contract, which is clunky, but may have been a system workaround.

It appears during this process [the applicant's member's] system status as a permanent public servant was changed to a temporary employee. This doesn't seem to be the intent of any of the parties, and I've recently confirmed this with Darian. And I don't think we had any mandate for actually conducting that change.

I think the resolution is simply to amend the system to reflect [the applicant's member's] original permanent public servant status, but will defer to any other information held in HR that I do not have access to."

- 23 The applicant's member gave evidence, at [25] and [26] of her witness statement, that before signing the fixed term contract she questioned with some officers of the Department of Corrective Services whether the fixed term contract would affect her status as a permanent public service officer and that Mr Darian Ferguson told her that the fixed term contract was "a 'work around' to get me appointed in the current environment and that I was already permanent and so [the paragraph which said that the contract did not confer on me permanent status] was not applicable."
- 24 The reference to "current environment" is a reference to the need to stop the regulation 30 clock in circumstances where a transfer could not be effected.
- 25 The respondent led no evidence.
- 26 The applicant argues its member was a permanent public service officer at the Department of Education Services and that nothing ever happened to change her status as a permanent public service officer. If she was employed by the Department of Corrective Services, and indisputably she was, she was employed as a permanent public service officer.
- 27 The applicant says the contract signed simply brought its member across to the Department of Corrective Services in the most convenient manner in all of the circumstances and was not intended to, and should not be interpreted to, affect her permanent status. The applicant says anything in the fixed term contract that says anything different, or which might be argued have a different effect, is "inapt".
- 28 The applicant submits, in the alternative, its member ought be declared to be a permanent public service officer with the Department of Justice as a matter of fairness.
- 29 On this score, the applicant submits that Mr Darian Ferguson and Mr Patrick Leach ought be held to their word insofar as they represented to its member that her status was unaffected by the fixed term contract she signed. The applicant says that taking those representations into account, and the state of mind they created in the applicant's member, it would be unfair to allow the respondent to deny that its member joined the respondent's employ as anything other than a permanent public service officer.

30 The respondent says that as a matter of law the applicant's member's permanency came to an end when the contract of employment was executed. He disputes that it would be unfair to so hold.

Consideration

31 The assertion that the fixed term contract did not, as a matter of law, affect the applicant's member's status as a permanent public service officer must fail.

32 In my view one need look no further than clause 1 of the contract, which is a term that the applicant's member's appointment to the position within the Department of Corrective Services "is in accordance with section 64(1)(b) *Public Sector Management Act 1994*."

33 Under section 64 *Public Sector Management Act 1994* appointments are either on a permanent or fixed term basis. The two kinds of appointment are mutually exclusive with the "or" between them being disjunctive in the normal manner. A person cannot be an appointee for an indefinite period and an appointee for a finite term at the same time.

34 As the contract expressly appointed the applicant's member under section 64(1)(b) *Public Sector Management Act 1994* it is completely inconsistent with, and must defeat, an assertion that her appointment was under, or continued under, section 64(1)(a) *Public Sector Management Act 1994*.

35 If the applicant's member had previously been employed under section 64(1)(a) *Public Sector Management Act 1994*, entry into a contract under which she was employed under section 64(1)(b) *Public Sector Management Act 1994* has, as a matter of law, the effect of ending employment under section 64(1)(a) *Public Sector Management Act 1994*. As I say, you cannot be both an appointee for an indefinite period and an appointee for a finite term.

36 The applicant, as I noted above, argued that clause 1 was "inapt", by which I understood it was being submitted that it was "ill fitted" to the situation of a permanent public service officer who everyone involved in the contract formation considered would, and should, continue as a public service officer.

37 As "inapt" or "ill fitted" as it may have been, a contract containing clause 1 was entered into and clause 1 is inconsistent with permanency.

38 There is no argument that clause 1 should be severed.

39 Rather, there is an argument that it may simply be ignored.

40 I do not see how, as a matter of law and without more, I may simply ignore a clearly expressed contractual term having a clear legal effect. I do not ignore it and I find that as a matter of law the contract ended the applicant's member's permanency and commenced her as an employee under section 64(1)(b) *Public Sector Management Act 1994* as a "term officer".

41 I have read and carefully considered [42] of *Black Box Pty Ltd v Terravision Pty Ltd* [2016] WASCA 219 and find nothing within it to give me pause for thought in relation to my conclusion on this point. In fact, as the case emphasises the primacy of the text, when that text is clear, I am emboldened in my conclusion that the construction argument of the applicant must fail.

42 The parties may not have intended the contract of employment to end the applicant's member's permanency but the "search is for the meaning of what the parties said in the instrument, not what the parties meant to say". Whatever their intentions may have been they have here been

resoundingly superseded by, and have merged into, the contract. (See [42] of *Black Box Pty Ltd v Terravision Pty Ltd* [2016] WASCA 219)

43 Clause 1 could not be more clear and its effect could not be more obvious.

44 That leaves for consideration the question of fairness.

45 It is said by the applicant that it is unfair to allow the respondent to assert that the applicant's member was not a permanent public service officer, taking into account the following circumstances:

- (1) The applicant's member was a permanent public service officer at the Department of Education Services;
- (2) The applicant's member wanted to maintain her permanent status;
- (3) Everyone involved in the contract of employment at the Department of Corrective Services (Ms Dharmananda, Mr Leach, Mr Ferguson and Mr Cinquina) wanted to maintain the applicant's member's permanent status;
- (4) The only thing which might be said to affect the applicant's member's permanent status, the fixed term contract, was entered into for reasons wholly unrelated to the applicant's member's status;
- (5) The fixed term contract was entered into as a "work around", or device, being the only way to stop the clock under regulation 30 *Public Sector Management (Redeployment and Redundancy) Regulations 2014* and was not intended to affect the applicant's member's employment status;
- (6) It would be unfair for that device, entered into to assist the applicant's member, to work a result against her;
- (7) The applicant's member was assured by Mr Darian Ferguson that entry into the contract would not affect her permanent status; and
- (8) Mr Patrick Leach later assured the applicant's member that entry into the contract was not intended to, and should not have, affected her permanent status.

46 In short, the applicant asks whether it is fair for its member to suffer an effect of the contract which no one involved in the contract formation intended?

47 The applicant invites me to do what is fair and that is, it says, to recognise that the circumstances, including inhibitive public sector processes and practices, forced the parties into a document which none intended to have a certain consequence and to recognise that, given those circumstances and the impact of reliance on the consequence, it would be unfair to allow a party to now rely on that consequence.

48 On balance, I do not consider that it is unfair for the respondent to now assert that the applicant's member was employed by it on the terms provided for in her contract of employment.

49 Firstly, I say that Ms Dharmananda, Mr Leach, Mr Ferguson and Mr Cinquina having in mind that the contract was not intended to affect the applicant's member's permanency is neither here nor there in terms of the respondent now saying that the contract means what the contract says.

- 50 In terms of fairness, what is relevant is what the employee thought, or had in mind, and the role those officers, or others, had in the formation and consolidation of those thoughts.
- 51 In other words, it is what officers communicated to the employee that matter when I come to assess the fairness of the respondent later relying upon the written words of the contract of employment.
- 52 Of course, evidence about intention may inform an assessment of what was represented to the applicant's member, but what was said, and when it was said, is not really in dispute in this matter.
- 53 I am also of the view that only communications which pre-date entry into the contract the terms of which it is sought to depart from as a matter of fairness are relevant.
- 54 For instance, I am not much impressed or influenced by the evidence of Mr Patrick Leach that he had in mind, when the contract of employment was put before the applicant's member, that her permanency would not be affected and that he later told the applicant's member that the contract of employment was not intended to affect her permanency.
- 55 Unless Mr Patrick Leach actually said something to the applicant's member at or around the time she entered the contract about the issue in dispute, his thought processes and later assurances would not make the respondent now relying upon the terms of the contract of employment an unfair thing, absent some evidence from the applicant's member that the later representation caused her to act to her detriment.
- 56 On review of everything I have read and heard, the only relevant evidence in favour of the applicant's position in relation to fairness is that found at [26] of the applicant's member's witness statement where she recounts what Mr Ferguson and Mr Cinquina told her prior to entry into the contract, and Mr Ferguson's evidence confirming that he had such conversations.
- 57 At [26] the applicant's member says:
- After I received the contract from Mr Cinquina to sign, I noticed that at paragraph 9 of the contract stated that 'nothing in this letter shall confer upon you 'permanent officer' status in this position within the meaning of s64 (1)(a) of the Public Sector Management Act 1994'. I discussed the contract briefly with Mr Cinquina who told me that the contract was a generic contract used by the Shared HR Services. I then had a brief conversation with Mr Ferguson who confirmed it was a 'work around' to get me appointed in the current environment and that I was already permanent and so paragraph 9 was not applicable.
- 58 I accept the contents of [26] to be true and accurate.
- 59 At [22] of his witness statement, and at ts 18, Mr Ferguson, in general terms, confirms what the applicant's member says.
- 60 Mr Cinquina gave no evidence and we may assume he would not dispute what the applicant's member says. However what he said, according to the applicant's member, does not amount to much. He simply told her that the contract of employment was generic.
- 61 The representations of Mr Ferguson, and the effect they had on the applicant's member, are the most relevant but they are not enough to make the respondent now relying upon the terms of the contract of employment unfair.
- 62 My reasons for this are as follows:
- (1) Clause 1 was the crucial clause and not clause 9. As the applicant's member notes at [27] of her witness statement, there is a construction of clause 9 which is not fatal

to an assertion that she remained permanent. It was clause 1 that the applicant's member really needed to worry about. Mr Darian Ferguson's representation was not really on point;

- (2) The applicant's member was a lawyer who was concerned about the effect of the contract upon her permanency. Objectively assessed, she should not have and, could not have, relied upon Mr Darian Ferguson's assurances about clause 9 as being conclusive on the issue she was concerned about. It is not, in my view, unfair for the respondent to say that Mr Darian Ferguson's assurances were not conclusive about anything in particular and I do not consider it unfair for him to take the position he does in spite of them; and
- (3) A contemporaneous but wholly different representation from a different person may have made it unfair for the respondent to now rely upon the terms of the contract of employment, but such a representation is absent. For example, if Ms Dharmananda had told the applicant's member that she could ignore all the terms of the contract of employment going to tenure, including clause 1, before the applicant's member executed the contract of employment we might be entering, or even within, the ballpark. But there is no such evidence here.

63 In my view, there is nothing unfair in all of the circumstances for the respondent to assert the contract of employment means what it says.

64 I find the intentions of persons to be irrelevant to that question except insofar as they were communicated to the applicant's member contemporaneously to execution by her of the contract of employment.

65 I find Mr Patrick Leach's evidence to be basically irrelevant given he first spoke to the applicant's member about the relevant matter in May 2018.

66 Mr Darian Ferguson did say some things to the applicant's member at the relevant time but those statements were not so clear and convincing on relevant matters as to make it unfair for the respondent to now rely on the contract of employment.

67 The application will be dismissed.