

When is a fixed term unlawful?

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The requirements for fixed-term employment agreements often catch employers out. To stay on the right side of the law, employers must advise fixed-term employees of how their employment will end, and the reasons for this. Importantly, the reasons must be genuine, based on reasonable grounds. The Employment Court has recently provided further clarity on this in *Morgan v Transit Coachlines Wairarapa Ltd* [2019] NZEmpC 66.

Mr Morgan was employed by Transit as a bus-driver for over 18 years, on a number of rolled-over fixed-term employment agreements. Transit's rationale was that, as it relied on a funding from the Ministry of Education, and this revenue was uncertain, it could not be sure of its ability to sustain Mr Morgan's employment in the long-term.

The Court disagreed that this was a genuine reason based on reasonable grounds under s 66 of the Employment Relations Act 2000. The risk of loss of funding was 'speculative', and there was insufficient evidence as to the extent to which a loss of funding would impact on Transit's financial circumstances. The Court was of the view that "financial uncertainty is something all businesses face to a greater or lesser degree. The mere fact of financial uncertainty cannot, of itself, suffice in terms of the requirements of s 66(2)(a)".

Further, Mr Morgan's employment agreement contained a redundancy provision that provided for potential loss of funding. If he had been employed permanently and the funding was lost, this clause would have covered the situation. The Court said that where other mechanisms are reasonably available to the employer, other than using a fixed term, this may be a factor which causes the employer to 'fall foul' of s 66.

The pattern of rollovers also undermined Transit's case, although the Court emphasised that this was not determinative. While rollover will attract the Court's attention and scrutiny, the mere existence of multiple agreements does not make the fixed term ineffective. Ineffectiveness must be based on the reasons for the fixed-term agreement.

To avoid any legal issues, employers engaging employees on a fixed-term basis should ideally have evidence available to support the arrangement, and have due regard to other reasonable alternatives. Where a potential loss of funding is the rationale, employers should be specific about the reason for the fixed term being tied to the funding and tie the risk explicitly to the loss of employment. Otherwise, 'falling foul' of s 66 is a real possibility, and the fixed-term employee may be deemed to be permanent.

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