

NOTE: An order prohibiting the publication of documents appears on p 6 of this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 340/08  
5089212

BETWEEN

NEW ZEALAND  
EDUCATIONAL INSTITUTE  
(INC)  
First Applicant

VIVIEN SMITH, LESLEY  
PARTON, ANTOINETTE  
CASSRELS, GAIL LEDGER,  
NEIL MAHONEY, HEATHER  
BARRAR, SALLY  
MCCAULEY, SONIA WHITE  
Second Applicants

AND

VICE CHANCELLOR,  
UNIVERSITY OF  
AUCKLAND  
Respondent

Member of Authority: R A Monaghan

Representatives: J Robson, P Kumar and D Martin, Advocates for Applicants  
J Rooney and L Jenkins, Counsel for Respondent

Investigation Meeting: 31 January, 1 February and 1 April 2008

Submissions received: 15 April and 6 May 2008 from Applicants  
29 April 2008 from Respondent

Determination: 26 September 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The New Zealand Educational Institute (Inc) (“NZEI”) is a registered union and represents the interests of Vivien Smith, Lesley Parton, Antoinette (Toni)

Cassrells, Gail Ledger, Neil Mahony, Heather Barrar, Sally McAulay and Sonia White. At relevant times these people were employed at the University of Auckland, Faculty of Education (“the university”). Their positions were described as ‘facilitator’, and were part of the faculty’s TEAM Solutions business unit (“TEAM Solutions”). When discussing matters concerning them as a group I refer to them as “the second applicants”.

[2] The second applicants have each been employed in a succession of fixed term appointments of varying terms. When their respective fixed term agreements came to an end, new fixed term positions were advertised. This was because the university considered it was obliged to advertise the positions under the cea and certain statutory obligations. Even so, the positions advertised were variously the same as or arguably similar to the positions covered by the expired agreements. The second applicants were obliged to undergo a recruitment and appointment procedure in order to secure appointment to the renewed positions or alternative positions. They, and the NZEI, say the various fixed term appointments:

- a. breach s 66(2)(a) of the Employment Relations Act 2000 in that there are no genuine reasons based on reasonable grounds for the fixed terms; and
- b. breach s 66(2)(b) of the Act in that they provide either no reason, or an inadequate reason, for the fixed terms.

[3] The NZEI says further that it sought to engage with the university about these ongoing breaches in an attempt to resolve the matter, but the university has failed to engage in a meaningful way.

[4] According to the amended statement of problem, the remedies sought are:

- a. findings that the fixed term arrangements of the second applicants do not comply with s 66, and that the second applicants are consequently permanent employees;
- b. an order that the university comply with s 66 and make the second applicants permanent employees;

- c. a finding that, because the university has failed to engage in meaningful discussions about its ongoing breach of s 66, the second applicants have suffered personal grievances under s 103(1)(b) of the Act (“disadvantage grievances”); and
- d. a finding that, in twice redesigning certain of the letters of appointment (knowing that previous versions did not comply with s 66), the university breached its obligations of good faith and caused the second applicants to suffer disadvantage grievances.

[5] There was also a blanket request for an order for the payment of penalties. During the investigation meeting Mr Robson advised that all claims for penalties were withdrawn.

[6] Certain difficulties arose out of the framing of the amended statement of problem. During a telephone conference between another member of the Authority and the parties it was agreed that the Authority would investigate and determine whether the fixed term appointments complied with s 66, and, if appropriate, make the orders for compliance which the applicants seek. If necessary, the second applicants’ personal grievances would be referred to mediation.

[7] The university says it has genuine reasons based on reasonable grounds for the fixed term appointments, and that it has provided these reasons to the applicants. The reasons centre on its funding arrangements with the Ministry of Education.

[8] The university denies failing to engage in a meaningful way. In addition it has raised an estoppel, saying the NZEI led it to believe that it concurred with the approach being taken to the fixed term engagements. The university acted accordingly.

## **Section 66**

[9] In the period to December 2004, material provisions in s 66 read as follows:

- “(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. ...

(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.”

[10] On the coming into force in December 2004 of an amendment to the Employment Relations Act (“the 2004 amendment”), the following provisions were included in s 66:

“(4) If an employee and an employer agree that the employment of the employee will end on 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 the employment ending in that way.

(5) Failure to comply with s 66(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.”

[11] In addition, there was a ‘Teacher Support Service Employees Collective Employment Agreement’ (“the cea”) in force from 2 June 2000 – 1 June 2001, and there are successors to that document. The cea and its successors permitted fixed term appointments, and incorporated the wording of s 66. The circumstances of the incorporation form the basis of the university’s defence of estoppel.

[12] Otherwise this employment relationship problem has been argued with particular reference to the meaning and application of s 66, rather than with reference to the meaning and application of the wider provisions in the ceas.

**Whether there were genuine reasons for the fixed term arrangements: s 66(2)(a)**

## A. The background facts

## 1. The funding arrangements with the Ministry of Education

[13] TEAM Solutions was formerly known as Teacher Support Services (“TSS”) and was part of the School Support Service (“SSS”) at the Auckland College of Education (“ACE”). Since 2004 ACE itself has been part of the university’s Faculty of Education. Among other things, TEAM Solutions provides in-service professional development support for primary and secondary schools in the Northland and Auckland regions.

[14] In providing this support it employs ‘facilitators’, whose services it makes available to the schools. The individual facilitators are appointed to address the particular areas of activity specified in their employment agreements. The second applicants are a representative group and do not comprise all facilitators employed by TEAM Solutions.

[15] Further, although the second applicants have argued that they were employed as facilitators and no further distinction between their positions is required, all of the agreements with all of the second applicants expressly identified the scope of the curriculum or other areas within which the facilitation was to occur. The university says this is because facilitators are appointed not on the basis of their generalised skills as facilitators, but because of their specialist curriculum-related skills. These skills match the areas in which they are employed to provide facilitation. That has clearly been the case with the appointments of the second applicants.

[16] The facilitators’ services are funded through a series of contracts between the university and the Ministry of Education (“the Ministry”).

[17] A core contract covers both base funding and additional funding for core curriculum areas. Since 2003, core contracts have had a 3 year term, although the required outputs are renegotiated annually. Non-core curriculum areas are also negotiated annually in supplementary contracts. The contracts were produced in evidence, and details contained in their schedules are sensitive. As a result, during the

investigation meeting I made an order prohibiting the publication of all or any part of the schedules. I confirm that order except to the extent that part of a schedule was reproduced, with permission, in correspondence between the parties dated 24 April 2006.

[18] The Ministry's funding model determines the size of the financial 'pie' it makes available to pay for services. The 'pie' is divided up to reflect general curriculum requirements as well as particular curriculum initiatives according to the Ministry's policy. The various curriculum requirements are reflected in the contracts under the heading 'outputs'. Outputs may vary from contract to contract according to changes in policy or emphasis. The university contracts to deliver the specified outputs, and negotiates with the Ministry about the number of basic and additional hours to be purchased from the funding in order to do so. Nicola Jamieson, the general manager of facilitation and business management at ACE from 2002-2006, and Camilla Highfield, the director of the SSS from January 2007, gave helpful evidence explaining the nature of the SSS contracts and the associated negotiations.

[19] For example a core contract commencing in January 2006 identified the outputs as:

- a. 'Output A: Leadership and Management' - a single heading all of which was covered by the purchase of 'basic agreement hours';
- b. 'Output B: Quality Teaching' - containing 16 subheadings including literacy (primary which was included in the basic agreement hours, and secondary which attracted 'additional agreement hours'), numeracy (one output was funded from the basic agreement hours and 5 more were additional agreement hours), the arts (roughly 0.6 of the hours purchased for this output were included in the basic agreement hours and 0.4 were included in additional agreement hours), and with the most significant subheading of the remainder being 'curriculum, pedagogy and assess support' (funded substantially from basic agreement hours);
- c. 'Output C': contained 12 subheadings - including gifted and talented - all of which attracted additional agreement hours; and

- d. 'Output D: Special Projects' - containing a single item, Te Kotahitanga.

[20] The schedules also include considerable detail about how the outputs are to be achieved, and how the achievement is to be reported on and demonstrated.

[21] Once these matters are finalised, the university addresses its staffing needs, and how to translate the hours it has purchased into the positions necessary to deliver the contracted outcomes. The exercise as far as the facilitators' positions is concerned is like putting together a jigsaw. For some the core and basic nature of the applicable output, and the number of hours purchased, means there can be certainty about the need for associated full time positions for a full 3 year period. Ms Jamieson said less than 50% of current outputs would be established for the full three years. To varying degrees other positions rely on basic core hours plus additional or supplementary hours. Depending on the output in question, this affects whether employment is likely to be offered for a period of one year or two. Some positions are also less than 1FTE in themselves, but aspects from other outputs, and the associated hours purchased, are added to make a 1 FTE position.

[22] All of this, too, is affected by changes in the Ministry's policies and priorities. This can be seen in shifts over time in the balance between primary and secondary education, as well as spikes and later falling-off in emphasis when a particular curriculum initiative has been introduced. Increases in funding associated with increases in emphasis in one area result in corresponding decreases elsewhere, since the size of the financial 'pie' does not increase.

[23] Finally, the university was concerned about contestability. On their expiry the SSS contracts are renegotiated with the current holder, although from time to time there is uncertainty about whether or not that will change and some or all of the outputs will be available for tender. ICT, for example, was made contestable although the wider question of contestability appears to depend on government policy. During the period relevant to this problem there has been no policy that the outputs, or parts of them, are to be contestable in principle. Ministerial statements have been to the opposite effect. A previous government has, however, raised the possibility.

[24] I address the point by saying I accept the university's concern about that matter was genuinely held, and it is appropriate to take into account the possibility of contestability from a fiscal planning point of view.

## 2. Terms of the core and supplementary contracts

[25] The following summarises the terms of the core and supplementary contracts in force during the relevant period.

Contract	Start date	Termination date
*Core contract	1 Jan 2001	31 Dec 2002
Variation (outputs varied)	Jan 2002	31 Dec 2002
*Core contract	1 Jan 2003	31 Dec 2005
Variation No 1 (2004) (outputs varied)	Jan 2004	31 Dec 2006
Variation No 4 (2005) (outputs varied)	Jan 2005	31 Dec 2007
*Core contract	1 Jan 2006	31 Dec 2008
Variation No 1 (outputs varied)	Jan 2007	31 Dec 2009

[26] There was discussion during the investigation meeting of the way in which aspects of the negotiations associated with these contracts - and the resulting terms of the core and supplementary contracts - affected the second applicants' positions.

[27] For example, Ms Jamieson was asked why some of the applicants had been offered three year agreements, while others did not. An overall answer to the way in the terms of the appointments were decided was that, prior to the conclusion of its

negotiations with the Ministry, the university seeks such assurances and ‘levels of comfort’ as it can obtain about the foci to be associated with the contracted outputs, and the likely term of the applicable contract when additional hours and supplementary contracts are being negotiated. This is seldom obtained with outputs C and D, but can be gauged with outputs A and B.

[28] There was also a question about why several of the second applicants were offered a one year term, then a further two year term in association with the 2006 core contract. By letter dated 8 August 2005 the Minister of Education (“the Minister”) had provided a letter of comfort agreeing to extend the contract to the 2008 school year, also giving a brief indication of areas of focus and areas requiring particular emphasis. Otherwise Ms White’s circumstances, as discussed below, illustrate one of the difficulties for the university in offering three year terms to the affected applicants.

[29] Against that background I turn to the positions of the second applicants.

### 3. The individual positions of the second applicants

[30] The application of s 66 to any individual’s position must be determined on the facts relating to that position.

#### (a) Vivien Smith

[31] Ms Smith was employed as a .2 FTE arts facilitator (dance and drama) for a six month term from July 2001. Leaving aside a period of maternity leave, Ms Smith was subsequently employed on a series of one year, full time terms each year until her last appointment in January 2007.

[32] Each time the position was advertised as .5FTE dance and .5FTE drama. It included reference to the Arts in the New Zealand Curriculum contract, although this detail was not included in the applicable letter of appointment. Ms Smith’s positions were based in Northland, but the university also employs dance and drama facilitators in Auckland on a similar basis.

[33] The university says changes in funding between 2002 and 2007 led to a reduction in the number of FTE positions in 'Output B - The Arts' from 11.5 to 7.7. It also made the wider comment that teachers are expected to become more adept with new curriculum initiatives over time, so the need for support services reduces. Finally, increased emphasis on numeracy, technology and nutrition has contributed to relatively less funding for the arts. As a result, no dance and drama facilitator's positions were available in TEAM Solutions for the 2008 year.

[34] By letter dated 24 January 2008 the NZEI advised the university's solicitors that Ms Smith elected to treat as ineffective each of the termination provisions as ineffective. She had obtained temporary alternative employment, without prejudice to her position that she continued to be permanently employed by the university.

(b) Lesley Parton

[35] Ms Parton has been employed in a series of fixed term advisory positions since 1992. She says the advisory positions were comparable with facilitators' positions. The university says her long history means Ms Parton is familiar with the way in which the Ministry funds facilitators' positions.

[36] Ms Parton's employment as a facilitator began in January 2000 with a one-year term in a .4FTE position as co-ordinating facilitator managing changes. From January 2001 she had a full time position as a school leadership and management facilitator at Northland Primary for a two year term; then from January 2003 in a three year full time role as a leadership and management facilitator at Northland Primary.

[37] From January 2006 Ms Parton was employed on a two year term as a primary leadership and management/assessment facilitator. In that period the leadership and management role was .7 FTE while the assessment role was .3 FTE. I comment on assessment roles when discussing Toni Cassrells' position.

[38] In January 2008 Ms Parton was appointed to a full time leadership and management role having a three year term.

(c) Toni Cassrells

[39] Ms Cassrells was employed as a primary mathematics facilitator for a little less than a two year term from April 2001; then as a .5FTE primary mathematics and .5FTE primary assessment facilitator for a two year term from January 2003. The evidence of Claudette Rillstone, the manager of human resource services, was that the Ministry's focus on numeracy meant the university could appoint Ms Cassrells to a two year term.

[40] Ms Cassrells was appointed under a similar arrangement for a further one year term from January 2005. Ms Rillstone said by then the Ministry's funding of numeracy had been limited. Moreover, the evidence was that the position was funded from another contract, and that the contract in question was contestable.

[41] I understood the contract was the 'Assessment to Learn' contract, which covers support for effective teaching across all curriculum areas. It has been contestable since 2002. However I was told, too, that 'assessment' is partly funded from the TSS contracts. On Ms Cassrells' account, her assessment facilitation role involved working with teachers to help them use information gained from informal classroom conversation and formal tests in order to assess students' progress.

[42] Ms Cassrells was appointed next as a full time primary assessment facilitator for a two year term from January 2006. There was no mathematics component in the position. The same position was offered with a 3 year term from January 2008.

(d) Gail Ledger

[43] Ms Ledger was employed as a primary numeracy facilitator on a one year term from January 2004, then a two year term from January 2005. In late 2005 four three-year positions for a primary numeracy facilitator were advertised, and Ms Ledger was one of the successful applicants. She was offered a three year appointment from January 2006 – January 2009, but has been on secondment elsewhere for a period during that time.

[44] The university says the number of FTE roles in facilitating numeracy has dropped by 1.6 since Ms Ledger has been employed, but an increased drive by the

Ministry on numeracy skills in primary schools allowed it to make appointments for two and three years respectively.

(e) Neil Mahoney

[45] Mr Mahoney was employed as a leadership and management (principals) facilitator on a three year term from January 2003, then on a further three year term from January 2006.

[46] The university says funding for Output A – leadership and management has grown, although overall the number of FTE positions for Output A has decreased over the period of Mr Mahoney’s employment from 15 to 13.8.

(f) Heather Barrar

[47] Ms Barrar was employed as a .6FTE reading recovery tutor (Oranga) from October 2002 – January 2003, then as a full time reading recovery tutor (Oranga) until January 2004, then was to be a .8FTE reading recovery tutor (Northland) for a further year to January 2005. Reading recovery is not part of TEAM Solutions’ activities, and is covered by a different funding contract.

[48] In May 2004 Ms Barrar commenced a new one year position as a primary literacy facilitator. The Ministry had made primary literacy a priority following an OECD report which ranked New Zealand poorly, although Ms Barrar’s subsequent appointments have been as a primary literacy facilitator on a nine month term from May 2005; then a one-year term from January 2006; then a two year term from January 2007.

(g) Sally McCaulay

[49] Ms McCaulay was employed in a seconded position as a literacy facilitator, commencing 21 January 2002. This appointment covered a period of parental leave.

[50] Ms McCaulay was subsequently employed as a primary literacy facilitator on a 3 year term from 20 January 2003, then a one year term from 26 January 2006, and a two year term from 30 January 2007.

(h) Sonia White

[51] Ms White was employed as a gifted and talented facilitator on a one year term from January 2002; then a three year term from January 2003, during which the gifted and talented position was reduced to .7 FTE; returning to 1 FTE positions as a gifted and talented facilitator for a one year term from January 2006 and a two year term from January 2007.

[52] The university says the three year term was available following an increase in funding, although from March 2003 the reduction to .7FTE was offset by an appointment and transfer to a .3FTE position as project coordinator on an online professional development talent development initiative. This was not a TEAM Solutions role.

[53] Ms White expressed particular concern about the genuineness of the reason why she was appointed only to one and two year terms after 2005. She had obtained information from a source in the Ministry which she believed indicated her position would be funded for a three year term commencing in 2006, and noted that her counterparts elsewhere were being offered three year terms. Ms Jamieson answered this by saying she was aware the Ministry representative in question had been giving that indication regarding funding, but she was not able to obtain the necessary reassurance about the matter herself when she was negotiating the contract.

## B. Determination

[54] Section 66(3) sets out some of the reasons which do not amount to genuine reasons for specifying that employment will be for a fixed term. There was no direct allegation that the university was motivated by any of the three reasons set out in that provision.

[55] In recent judicial comment on the matter of genuineness, the Employment Court was satisfied in **Canterbury Westland Free Kindergarten Association (t/as Kids First Kindergartens) v NZEI**<sup>1</sup> that the reasons for the fixed term arrangements in question were genuine in the sense of being the sincerely held real operative and operational reasons for the policy adopted. Although expressed in a dissenting judgment, there was also a reference in **Norske Skog Tasman Limited v Clarke**<sup>2</sup> to the requirement that fixed term agreements be entered into for genuine reasons. Justice Heath referred to the undesirability of allowing an unscrupulous employer to seek to mask the true nature of an indefinite employment agreement by pretending that it is a fixed term agreement. No such pretence occurred here.

[56] Regarding the university's position, Ms Jamieson for example was a credible and apparently respected witness who had considered very carefully the operational needs of the university. She acknowledged considering the possibility of making certain positions permanent rather than engaging the individuals concerned for a fixed term, but as far as the facilitators are concerned she concluded that funding remained too uncertain. Team leaders' positions, however, were made permanent because of the ongoing need for those positions with particular reference to their managerial component. Reading recovery positions have also been made permanent, because the university believes there is less variability in the Ministry's priorities and the associated needs are relatively consistent.

[57] I conclude that the university's reasons for entering into the fixed term arrangements were genuinely held. This is so in terms of its approach to offering fixed term agreements to facilitators in general, and to the second applicants in particular.

#### **Whether the reasons were based on reasonable grounds: s 66(2)(a)**

[58] The applicants challenge the reasonableness of the grounds on which the university relied. As I understand one of their concerns, the university employs 150 facilitators, all of whom are engaged on fixed term agreements. The applicants do not believe that such 'wholesale fixed term employment' is lawful under s 66. To the

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<sup>1</sup> [2004] 1 ERNZ 547, at [57]

<sup>2</sup> [2004] 3 NZLR 323 (CA); [2004] 1 ERNZ 127, at [149]

extent that each facilitator's position must be assessed on the basis of its own facts, I agree that a 'wholesale' or 'across the board' approach is not appropriate.

[59] The applicants also say that the university has exaggerated the nature and extent of the uncertainty or fluidity it faces in respect of funding. On the information I was given it is conceivable that at least some facilitators are employed in positions that are closely aligned with specific initiatives, the funding for which is likely to be very fluid. At the other end of the scale, the university acknowledged that core areas are reasonably constant. The positions of some facilitators, and particularly of the second applicants, appear to lie at that end of the scale. All of this underlines the need to consider each position on the basis of its own facts.

[60] As was pointed out, there is relatively little case law on the meaning of 'reasonable grounds' for the purposes of s 66.

[61] A finding that the positions in question were ongoing and the need for them was constant was a key one in the **Canterbury Westland Free Kindergarten** case. Although the case is distinguishable on its facts, it remains appropriate here to address the applicants' concerns with reference to whether the second applicants' positions were ongoing and the need for them was constant.

[62] The case also stands as a warning against seeking to use fixed term agreements to deal with what are essentially training or continuing education issues.

[63] A decision of the Employment Court in **Saint Kentigern Teachers Association Inc v Saint Kentigern Trust Board**<sup>3</sup> addressed whether the promotion of teachers to managerial roles was a breach of s 66 in respect of the fixed term nature of the promotions. Re-appointment could be sought. Again the case is distinguishable on its facts, and because the court found s 66 did not apply at all. However I take account of the following comments on the legislative purpose of s 66:

“[18] ... In some extreme cases [during the 1990s] a number of fixed term employment contracts had been rolled over consecutively so that continuous employment was effectively long-term, yet the failure or refusal of the employer to renew that roll-over arrangement did not amount to a dismissal or disadvantage in employment that may have allowed the bringing of a personal grievance claim.

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<sup>3</sup> [2005] ERNZ 1001

...

[19] ... it was the consequences of those cases decided by the courts before 2000 that Parliament purported to address in constraining, but not outlawing, fixed term contracts of employment or employment agreements. Job losses, sometimes after many successive fixed term agreements, were the undesirable outcomes that Parliament sought to avoid by enacting a regime that was intended to make fixed-term employment transparent and dependent upon the establishment of a series of tests of justification and clear notice imposed on employers.”

[64] I turn first to ‘leadership and management’. I consider it significant that leadership and management positions been funded from output A, and covered by the purchase of basic agreement hours. For that reason there has been more certainty associated with leadership and management positions than with any of the others. That might change, but there was nothing to suggest the risk was high. Moreover I was not convinced that any changes of emphasis in the funding for leadership and management positions would necessarily translate into a need to create an essentially new position. In short, any need to address such changes could probably be addressed as a matter of training or continuing education.

[65] Accordingly I believe there is strong argument for saying there is a constant and ongoing need for Mr Mahoney’s position. Ms Parton’s position is also in that category.

[66] Broadly speaking, literacy and numeracy also appear to be curriculum areas for which support services would always be required. From the university’s perspective matters are not quite that simple, as for example the contracts do reveal shifts in emphasis on various aspects of numeracy and literacy over time. There are also shifts in emphasis between primary and secondary education, and geographical shifts.

[67] At the same time, there was also an acknowledgement that some of the shifts are ‘drastic’ and some are ‘evolutionary’. Further, the university says on the job training and professional development are available. This would suggest there is scope for a less conservative approach from the university to the question of whether at least some positions at the ‘evolutionary’ rather than the ‘drastic’ end of the scale could be made permanent.

[68] There was nothing to indicate Ms Ledger's position as primary numeracy facilitator involved shifts at the 'drastic' end of the scale, or that the need for the position was other than ongoing and constant. Ms McCaulay's and Ms Barrar's positions as primary literacy facilitators were also in this category.

[69] Ms White's position is slightly different in that continued funding for it may be more at risk because it has been funded from Output C, but its history at least suggests there is an ongoing and constant need for a gifted and talented facilitator.

[70] Overall I conclude there is enough in the circumstances set out above to establish an ongoing and constant need for the positions in question. To the extent that changing priorities affect the terms of the positions, I am not persuaded that the changes are such that they cannot be addressed by the provision of suitable training or continuing education.

[71] Ms Cassrells' position is different because of the way in which assessment positions are funded. The fact that a different contract was involved in the funding of Ms Cassrells' position emerged during the course of the investigation, and on reflection I have concluded more information is necessary regarding that contract, its effect on Ms Cassrells' position, and the state of her knowledge of the application of that contract.

[72] Finally, as I understand it Ms Smith's position no longer exists. She is the only one of the second applicants without a renewed position of some kind. She has elected to treat as ineffective the termination provision in her last agreement. However if her position no longer exists, and if she was entitled to treat the termination provision as ineffective, this has implications in the context of a possible redundancy.

[73] I was not asked to address the possibility of redundancy in Ms Smith's circumstances. I have reservations about her position, too, in that I was not addressed in any detail on the ongoing relevance and application of the 'Arts in the NZ Curriculum' contract.

[74] For these reasons I refer the resolution of Ms Cassrells' and Ms Smith's circumstances to further mediation.

**Whether the employees were advised of reasons: s 66(2)(b)**

A. The background facts

1. The wording of letters of appointment prior to 2006

[75] Ms Smith's initial letter of appointment, dated 13 July 2001, identified the term of the employment, and stated that the university would reassess its staffing needs on completion of the term to determine whether another or similar position was required. It also referred to the 'Arts in the NZ Curriculum' contract', and said:

“We both acknowledge that your employment is oriented towards the completion of the Arts in NZ Curriculum' contract, the programme for which requires completion within the agreement period.”

[76] Ms Parton's and Ms Cassrells' letters dated early 2001 also identified the term of their respective employment, and made a similar statement regarding the review of teaching needs. Neither letter referred even to funding, although funding was referred to in their subsequent letters of appointment.

[77] Ms White's, Ms McCaulay's, Ms Barrar's and Ms Ledger's initial letters of appointment opened by setting out the term of their respective agreements, then stated: “This agreement is fixed term due to funding from the Ministry of Education.”

[78] Mr Mahoney was employed initially on an individual employment agreement. Clause 3 of that agreement set out the term of the agreement, and added: “The position is fixed term due to funding arrangements with the Ministry of Education.”

[79] Wording of the above kind continued to be used in the various letters of appointment until after discussions about the effect of s 66 in or about mid-2006.

[80] The university also pointed to clause 2.3(c)(ii) of the 2000 – 2001 cea, which provided:

“Appointment

All persons appointed to positions covered by this contract will be appointed either ...

(a) ...

(b) [limited tenure positions]...

(c) as fixed term appointments, the tenure of which will be as specified at the time of appointments:

(i) the positions of director of teachers centres ...

(ii) the tenure of other fixed term appointments (other than those covered by 2.3(b)) will be set to meet specific operational or curriculum needs of the Teacher Support Services for a period of two years.”

## 2. The wording of letters of appointment from mid-2006

[81] By letter of offer dated 16 October 2006 Ms McCauley (for example) was advised:

“This is a fixed term employment agreement. The position of ... is funded through a Ministry of Education contract which provides funding for the period [period specified] Your employment will end on ... (unless terminated earlier under the terms of this agreement), when this funding expires. Nothing contained or implied in this agreement creates a commitment by either party to an ongoing relationship beyond the end of the term of this agreement.”

[82] Subsequent letters followed this format in respect of the fixed term nature of the employment of the individual concerned.

[83] I digress to say the changes in wording described above are the changes which the applicants say were made in the knowledge that the earlier wording did not comply with s 66. The applicants have also alleged a failure to act in good faith in respect of the matter.

[84] However the argument assumes the earlier wording did not comply with s 66, when the matter was disputed. Moreover there was no evidence that the university acted in the knowledge that previous versions of the letter did not comply with s 66.

Finally, there was no evidence of any deliberate attempt to provide non-complying letters at any time.

[85] In turn I do not accept that anything in the original or redesigned letters amounted to the failure to act in good faith alleged in the amended statement of problem.

### 3. Oral advice

[86] Prior to about mid 2006 the second applicants were advised during the interviews for their positions that the positions were fixed term because of funding, but no further information was provided. After about mid-2006, the applicants were informed during their interviews that their positions were fixed term because the position was funded for the term being offered. In other words, they were given similar information to that subsequently set out in their corresponding letters of appointment.

[87] Information was also available from other sources. Leslie Den Harder, a field officer employed by the NZEI, said in evidence that, from 2001, the union had ongoing discussions with its members regarding fixed term agreements. She summarised the law, and encouraged members to take detailed notice of what happened during their job interviews. Initially this was done through meetings, attendance at which was characterised frankly as 'pretty ghastly'. More recently communication was through monthly newsletters.

[88] Further, in or about August 2002 Ms Jamieson gave a power point presentation to the staff in which she explained the nature of the Ministry contracts and the associated funding arrangements. She also explained the procedure the university would follow once it had received a general indication from the Ministry of the outputs for the upcoming 2003 contract negotiations. In a letter to Ms Den Harder dated 9 August 2002, Kurt Dammers, the university's employee relations manager, answered a number of detailed questions on funding and its effect on staffing, and responded to further issues in subsequent correspondence. For its part the union called a special meeting of members on 23 August 2002 in order to discuss fixed term employment in TEAM Solutions.

[89] In addition, in or about September each year Ms Jamieson would attend a 'combined team day', where she would discuss the hours and types of contract available. Ms Highfield has discussed issues with the groups affected by declines in funding. Several of the second applicants acknowledged attending meetings with Ms Jamieson in particular, while some did not recall whether they had attended.

## B. Determination

### 1. Effect of disestablishment of ACE

[90] The NZEI submitted that, when the ACE was disestablished and became part of the university's Faculty of Education, the university acquired most of the ACE's debts and liabilities but did not acquire any obligations under any of the employment agreements binding the ACE.<sup>4</sup> Accordingly it was said that the second applicants' employment by the university can only have occurred by offer and acceptance, following the second applicants' redundancies from the ACE on the disestablishment. There was no evidence that the fixed term nature of these agreements was explained at the time, hence the university failed to comply with s 66(2)(b).

[91] That point was not argued in detail in the submissions. I address it by saying s 217(9) of the Education Act 1989 applies where an institution is disestablished and incorporated into another institution. The subsection substitutes the new institution for the disestablished institution in any contract other than a contract of employment.

[92] I do not accept it follows that the second applicants' employment by the university can only have occurred by offer and acceptance in the sense apparently being contended. Some notional form of offer and acceptance must have occurred but there was nothing in the evidence to suggest anything other than that the disestablishment of the ACE resulted in technical redundancies, or that the re-employment of its staff by the university proceeded in anything other than the usual way in such circumstances.

[93] As a result I am not satisfied the university was obliged to advise the applicants of the reasons for their fixed term appointments at the time when it

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<sup>4</sup> Sections 217(5)(b) and 217(9) Education Act 1989.

effectively took over as the employer party. I do not accept the submission that the university failed to comply with s 66(2)(b) in that respect.

## 2. The adequacy of the ‘advice’ given to the second applicants

[94] The applicants say the reasons given for their fixed term appointments are elliptical in the same way as the reason given to the employee in **Norske Skog Tasman Limited v Clarke**<sup>5</sup>.

[95] In that case the reason given in a series of letters of appointment was ‘you are being employed to maintain agreed manning levels’. The Court of Appeal addressed the adequacy of that reason in the light of s 66(2)(b), and prior to the coming into force of the 2004 amendment.

[96] The judgment of the majority was that to ‘advise’ an employee of when and how employment will end means to ‘give notice of’ when that will happen. It is sufficient to bring the relevant reasons to the attention of the employee.<sup>6</sup>

[97] The majority also found that what might seem to be an elliptical statement of reasons might nevertheless be sufficient for the above purpose if the employee knew the missing details.<sup>7</sup> On the facts before the court, bargaining about manning levels between the union and Norske Skog had not been completed and an interim arrangement was in place. If Mr Clarke had known of the substance of the interim arrangement and in particular of its interim nature - and probably that there was to be a contestable selection process for permanent positions - this would have satisfied s 66(2)(b). The court found there was no evidence that Mr Clarke had the necessary knowledge at the time of his first appointment. Norske Skog had not complied with s 66(2)(b).

[98] Mr Clarke was, however, aware there was an interim arrangement when he signed a second fixed term agreement. The court found he would have appreciated that no permanent appointments could be made until final decisions had been made in relevant respects. The court hesitated about Mr Clarke’s knowledge that there would

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<sup>5</sup> See footnote 2

<sup>6</sup> at [52]

<sup>7</sup> at [53]

be a contestable selection process if positions were made permanent, and proceeded by assuming s 66(2)(b) was complied with in respect of the second and subsequent agreements.

[99] Turning to what the result should be, the court found that a provision as to termination of a fixed term agreement is ineffective when s 66(2)(b) has not been satisfied. It then approached the question of whether Mr Clarke had been dismissed by assuming there was non-compliance with s 66(2)(b) in respect of the first of the fixed term agreements, but compliance in respect of the later agreements. It found Mr Clarke's employment was eventually brought to an end pursuant to processes which depended for their validity on the effectiveness of all of the agreements. In those circumstances he was dismissed.

[100] Here, since no issue has been taken with the reworded letters of appointment issued from mid-2006, it appears the relatively small amount of additional information contained in the letters is considered sufficient to address any shortcomings in the advice available to the second applicants before then. More particularly, there has been no allegation that the reworded letters fail to satisfy s 66(4). I therefore assume that it is accepted the letters offered from mid-2006 contained sufficient advice in terms of s 66(2)(b) of the reasons for the relevant position ending in the specified way.

[101] However all of the second applicants began their employment with the university before mid-2006 – that is, before the most recent change in wording was implemented.

[102] Accordingly the questions are whether the references to 'staffing needs' and to 'funding arrangements' in the letters dated before mid-2006 are elliptical to the extent that they amount to failures to comply with s 66(2)(b), and if so, what is the effect on the second applicants' employment.

[103] The **Norske Skog** decision means it is also necessary to:

- a. consider what information was available to the second applicants in addition to the information contained in the letters of appointment; and

- b. start with the information available at the time of entry into the initial appointment because, even if adequate information subsequently became available, the decision was that the processes in question depended for their validity on the effectiveness of all of the relevant agreements.

[104] The bare reference to staffing needs in Ms Smith's, Ms Parton's and Ms Cassrells' initial letters of appointment is deficient on its own. However Ms Smith's employment was also linked to the Arts in NZ Curriculum contract, and the deficiency is arguably addressed by this. That will be a matter for resolution in mediation if possible.

[105] Ms Cassrells was subsequently employed in what for present purposes I consider were different positions, so that that early deficiency no longer has effect. The initial letter of appointment to an assessment position was also deficient as discussed below, but Ms Cassrells recalled Ms Jamieson's meetings. I consider it likely that, when she commenced her assessment position, she had sufficient information for the purposes of s 66(2)(b).

[106] Whether the deficiency has any effect in Ms Parton's circumstances depends on what other information she had. Her evidence was that she was aware the end of her fixed term agreements coincided with the end of funding for her positions.

[107] Finally, to the extent that the 2000-2001 cea remained in force, the available information was supplemented by the presence of clause 2.3(c)(ii).

[108] Accordingly, subject to any further resolution of Ms Smith's circumstances, I consider these three people received adequate advice for the purposes of s 66(2)(b).

[109] The initial letters of appointment for the five remaining second applicants contained the bare reference to funding, but no indication of why that meant their own positions had a fixed term given that the sector in which they worked was funded by the Ministry anyway, or the basis on which the terms in question had been set. Secondly, clause 2.3(c)(ii) no longer appeared in the applicable cea. On its own, I consider the bare reference to funding arrangements is also inadequate.

[110] By the time that wording began to appear in Ms Smith's, Ms Cassrells' and Parton's letters of appointment, I consider it likely they had enough additional information to give it meaning.

[111] If for some reason the five remaining second applicants had an opportunity to attend Ms Jamieson's presentations, prior to entry into their initial appointments, they would have had sufficient additional information for the purposes of s 66(2)(b). I would also say the same of anyone who had attended the NZEI meetings to which Ms Den Harder referred. However there was no evidence about whether this was the case.

[112] Returning to Ms Jamieson's presentations, the initial appointments of Ms White and Ms McCaulay commenced before the presentations were made. There was nothing to indicate Ms Barrar, Ms Ledger or Mr Mahoney had attended any of these presentations prior to their first appointments. Thus, while I accept that sufficient information was subsequently available to them, the deficiency in the advice given at the time of their initial appointments remained. Section 66(2)(b) was breached in that respect.

### **Was there a failure to engage meaningfully in respect of the s 66 issue**

[113] Some areas of dissatisfaction were aired during the investigation meeting, but nothing in them amounted to a failure to engage meaningfully as alleged. The applicants' submissions did not refer to the matter, so I take it no further.

### **Estoppel**

[114] The university says the applicants are estopped from claiming that the fixed term appointments were in breach of s 66. Its reliance on a decision of the Court of Appeal in **National Westminster Finance New Zealand Limited v National Bank of New Zealand Limited**<sup>8</sup> means I understand it to be raising an estoppel by convention.

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<sup>8</sup> [1966] 1 NZLR 548

[115] The Court of Appeal identified the ‘kernel of the doctrine’ as being that both parties are thinking the same; they both know the other is thinking the same and each expressly or implicitly agrees that the basis of their thinking shall be the basis of the contract. It went on to identify the following elements:

- . the parties have proceeded on the basis of an underlying assumption of fact, law or both of sufficient certainty to be enforceable (“the assumption”);
- . each party has, to the knowledge of the other, expressly or by implication accepted the assumption as being true for the purposes of the transaction;
- . such acceptance was intended to affect their legal relations in the sense that it was intended to govern the legal position between them;
- . the proponent was entitled to act and has, as the other party knew or intended, acted in reliance on the assumption being regarded as true and binding;
- . the proponent would suffer detriment if the other party were allowed to resile or depart from the assumption;
- . in all the circumstances it would be unconscionable to allow the other party to resile or depart from the assumption.

[116] The assumption being relied on appeared to be that the NZEI endorsed or approved the use of fixed term agreements in relation to the TEAM Solutions facilitators by its agreement to the inclusion in the cea of the words of s 66.

[117] The university says further that it will suffer considerable detriment, and it would be unconscionable, to allow the NZEI to depart from the assumption that the use of fixed term agreements was endorsed by it.

[118] There was a lack of clarity in the way the defence was articulated. I would also say there was a degree of inconsistency in the applicants’ approach to whether or not all facilitators’ positions should be treated as the same. In particular some of the second applicants sought to argue that the position of facilitator is a generic one. That approach has not been pursued, but if it was the applicants’ approach during the 2001 and 2003 negotiations then it provides some explanation for the raising of the estoppel.

## A. Background to the negotiations

[119] Mr Dammers' view of relevant aspects of negotiations for renewal of the cea in 2001 was that clause 2.3(c)(ii) of the preceding cea was removed in return for the university's agreement to the inclusion of words reflecting s 66. At the same time, he did not believe anything in the cea was contrary to s 66. Ms Den Harder's view was that s 66 was included in order to give certainty to members regarding their rights, without conceding that any existing terms were in accordance with s 66.

[120] The university produced a 'summary of ACE offer' in respect of the 2001 negotiations. Regarding the inclusion in the cea of the wording of 66, the summary included the comment 'we do not accept this as an avenue for existing fixed term contract people to litigate for permanent positions.'

[121] The NZEI logged a relevant claim in negotiations for the 2003 – 2006 cea under the heading 'job security'. Part of the claim was that the parties determine a staffing policy to recognise the benefits to all of having a significant majority of permanent appointments both in the core TSS contract and other areas of employment. The claim was rejected on the ground that the contracted outputs could be changed on a yearly basis even within the 3 year contract term.

[122] According to a note of its response, the university's view was 'therefore reason for fixed terms contracts continues without alteration.' While that might be the university's view, the door could not be closed to litigation over whether s 66 itself was complied with. Secondly, the university's rejection of the NZEI's attempt to limit the circumstances in which fixed term agreements would be offered amounts to no more than that. On the evidence available to me the associated discussion does not necessarily amount to an acceptance that any reason given for a fixed term in any individual's circumstances was a lawful reason in terms of s 66, or that the NZEI made any assumption to different effect.

[123] The same log of claims sought a payment for all staff on fixed term agreements to be paid an allowance of \$3,000 per annum 'in recognition of the insecure nature of their employment'. That claim was also rejected, for the reasons given at the time. The NZEI says, and I accept, that this claim was simply an attempt

to obtain compensation in circumstances where it had otherwise been unable to persuade the university to agree to the wider position in respect of job security.

[124] In negotiations for the renewal of the cea in 2006 the NZEI logged a claim asking that all fixed term positions be made permanent, except for special project positions or where there was a 'genuine reason based on reasonable grounds.'

[125] This time, the parties entered into detailed discussion about the law relating to fixed term employment agreements, and the NZEI raised its concern about the 'continual rolling over' of fixed term agreements. Mr Dammers sought to explain the university's view of its funding constraints, and tabled a document which briefly summarised aspects of the numbers of hours purchased in the 2003 and 2006 negotiations with the Ministry. That document was criticised, but the university later provided more detailed information.

[126] The outcome of the negotiations was that the December 2004 amendment was added to the clause in the cea which incorporated the wording of s 66. The NZEI withdrew its claim, but indicated that a letter would be sent regarding a proposal for mediation on the matter of fixed term workforce. That process culminated in the present investigation.

## B. Determination

[127] With reference to the outcome of the 2001 negotiations, the university may not have accepted that the door could be opened to existing fixed term staff to litigate for permanent positions. However, whether or not s 66 was incorporated into the cea, the university could not set its face against the possibility of litigation over whether s 66 itself was being complied with.

[128] More importantly as far as the estoppel is concerned, there was no evidence that both parties (rather than only one of them) proceeded on the assumption that the wholesale employment of facilitators on fixed term agreements was permitted under s 66 and that the NZEI accepted this. Nor was there any evidence that each, to the knowledge of the other, accepted the assumption as being true and that the acceptance was intended to govern the legal position between them.

[129] With reference to the outcome of the 2003 negotiations, again, for the purposes of the estoppel, I do not accept that the tests identified in the **National Westminster Finance** case were met on the evidence.

[130] No assumptions attached to the 2006 negotiations. Rather, during 2006 the university became aware that the NZEI sought to challenge its ‘wholesale’ engagement of facilitators on fixed term agreements, with particular reference to whether the second applicants’ appointments complied with s 66.

[131] Overall I believe the ceas permitted fixed term agreements in the sense contemplated by the courts in **Actors Variety etc IUOW v Auckland Theatre Trust Inc.**<sup>9</sup> The mere agreement of the NZEI to the inclusion of the wording of s 66, even in return for the removal of clause 2.3(c)(ii) for example, does not change that.

[132] I do not accept it follows that the NZEI’s agreement to the inclusion of the wording of s 66 was an endorsement or approval of the use of fixed term contracts in relation to all facilitators employed by TEAM Solutions to the extent that the applicants are estopped from bringing proceedings based on alleged breaches of s 66.

[133] In terms of the ‘kernel’ of the estoppel being raised, I do not accept that: both parties were thinking the same regarding the extent of the use of fixed term agreements for facilitators; they both know the other was thinking the same; or that each expressly or implicitly agreed that the basis of their thinking would be the basis of the contract. Their thinking was too different.

[134] Accordingly I find that the applicants are not estopped from pursuing the present claims.

### **Summary of conclusions and remedies**

A. Whether the fixed term arrangements complied with s 66

[135] The university was said to have failed to comply with s 66 by:

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<sup>9</sup> [1989] 1 NZILR 463

- a. not having genuine reasons for the fixed term arrangements, thereby breaching 66(2)(a);
- b. not basing its reasons on reasonable grounds, thereby breaching s 66(2)(b); and
- c. not properly advising the second applicants of the way in which their employment would end, and the reasons for that, thereby failing to comply with s 66(4).

[136] I have found that the university had genuine reasons for the fixed term arrangements. There was sufficient evidence to permit this finding in respect of all of the second applicants' positions. There was no breach of s 66(2)(a).

[137] Ms Smith's and Ms Cassrells' circumstances are referred to mediation. Otherwise, in that the need for the second applicants' positions was constant and ongoing, I was not persuaded there were reasonable grounds for the fixed term appointments of the second applicants. In that respect their appointments breached s 66(2)(a).

[138] On an application of the tests in **Norske Skog**, the initial appointments of Ms White, Ms McAulay, Ms Barrar, Ms Ledger and Mr Mahoney were in breach of s 66(2)(b).

#### B. Whether order for compliance should be made

[139] I do not believe an order for compliance is the appropriate remedy here. The effect of s 66, together with applicable aspects of the decision in **Norske Skog**, is that failure to comply with s 66 gives an employee the ability to elect whether to treat as ineffective a provision terminating fixed term employment.

[140] That election has been made on behalf of Ms Smith, who is referred to mediation.

[141] Otherwise I have found breaches of s 66 in respect of the rest of the second applicants, save that Ms Cassrells is also referred to mediation.

[142] None of this prevents any of the other applicants from seeking to resolve their circumstances in further mediation.

[143] It would be premature to make any order.

C. Personal grievances arising out of failure to engage in meaningful discussions

[144] There was no evidence of failure to engage in meaningful discussions about the alleged ongoing breach of s 66.

D. Personal grievances arising out of redesigning of letters of appointment

[145] There was no breach of good faith in association with the redrafting of the letters of appointment.

E. Estoppel

[146] The applicants are not estopped from pursuing their claims.

**Costs**

[147] Costs are reserved. The parties are invited to agree on the matter. If any party seeks a determination from the Authority there shall be 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the relevant memorandum in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority