

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 229/09
5143040**

BETWEEN TASITUMUA GEORGE MASINA
Applicant

AND TUKAKI WAITITI as the Commissioner
of Te Kura Kaupapa Maori o Kokiri o Te
Rahuitanga o Otara
Respondent

Member of Authority: Leon Robinson

Representatives: Joanne Watson, Counsel for Applicant
Paul Robertson, Counsel for Respondent

Investigation Meeting: 12 & 13 February 2009

Submissions Received: 1 March 2009
16 March 2009
22 March 2009

Determination: 14 July 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Tasitumua George Masina (“Mr Masina”) was dismissed as Principal of Te Kura Kaupapa Maori o Kokiri o Te Rahuitanga o Otara (“the Kura”). He says that dismissal is unjustifiable and asks to be reinstated. He also claims reimbursement, compensation and penalties. In the alternative, he claims damages for breach of contract. The Board of the Kura has been replaced by a statutory commissioner the respondent Mr Tukaki Waititi (“the Commissioner”). The Commissioner denies Mr Masina’s claims and says that he justifiably terminated Mr Masina’s employment because the employment became frustrated as a matter of law, as a consequence of the New Zealand Teachers Council’s (“the Teachers Council”) refusal to grant Mr Masina a limited authority to teach (“LAT”).

[2] The parties were unable to resolve the differences between them by mediation.

The facts

[3] Mr Masina had been employed as the principal of the Kura from August 2004. The terms of the employment are set out in an individual employment signed on 13 August 2004.

[4] The Commissioner was appointed by notice dated 4 February 2008.

[5] By the *Education (Registration of Te Kura Kaupapa of Maori teachers) Regulations 2004*, kura kaupapa teachers without formal qualifications were required to attain suitable qualifications by 1 January 2006. Mr Masina does not have an approved teacher education qualification but was granted consecutive LATs by the Teachers Council for the period between 1 January 2006 and 7 February 2008. Since 8 February 2008, he has had no authority to teach.

[6] A previous commissioner dismissed Mr Masina on 10 December 2007. Mr Masina raised a personal grievance in respect of that dismissal.

[7] The previous commissioner appointed Mrs Esther Hunt ("Mrs Hunt") as principal for a fixed term, by letter dated 22 January 2008. That letter specified Mrs Hunt's fixed term position would terminate if:-

a. the employment court authority or any other legal proceedings finds in favour of the previous dismissed principal and reinstates him as the principal, or

b. a permanent principal is appointed and commences his/her duties after the Board of Trustees has completed a process to appointing a permanent principal.

[8] Mr Masina's claim that his dismissal was unjustifiable proceeded to mediation. In settlement of that personal grievance, the parties entered into a mediated settlement dated 17 March 2008 ("the mediated settlement"). The terms of that mediated settlement included Mr Masina's reinstatement and his employment was deemed continuous from the date of dismissal on 10 December 2007. The mediated settlement included these material terms:-

11. *The Commissioner agrees to reinstate the applicant to the role of principal effective 10 December 2007 on the basis his employment has been continuous.*

12. *The applicant will forthwith apply for a LAT. The Commissioner will sign the application, but will not answer questions 15(b) and 15 (c) [bullet points]. The Commissioner will provide a letter to the Teachers Council in the form outlined in appendix A.*

16. *The applicant will advise by 18 April 2008 whether he has been granted a LAT. In the event a LAT is not obtained by that date, the parties will meet to discuss options.*

[9] Mr Masina duly made application to the Teachers Council for a further LAT.

[10] By letter dated 10 April 2008, the Commissioner wrote to the Teachers Council providing information requested by the Teachers Council and stated:-

*My predecessor appointed Mrs Esther Hunt, registration number [XXX], as acting principal of Te KKM o Piripono in Mr Masina's absence. **She can continue as acting principal until such time as the outcome of Mr Masina's LAT application is determined** or a suitably qualified person is appointed. ...*

This situation has placed me in a legal and ethical dilemma. Because the reinstatement did not automatically extend Mr Masina's tenure as principal, placing him in that role before a LAT was granted would involve an act of re-employment that I cannot legally do. If Mr Masina was granted a LAT, I would be replacing a qualified and registered teacher with a person who does not have a practicing certificate. Trying to resolve my dilemma amidst conflicting legal advice has been most unhelpful.

(emphasis added)

[11] By letter dated 16 April 2008 the Teachers Council wrote to the Commissioner, not Mr Masina, and materially advised:-

A LAT is considered, and issued for a teaching position, when a registered teacher is not available. It is then only offered to another suitable person for a specific role, for a specific position, in a specific school/kura, for a specific time period while a registered suitable teacher is found.

It is clear from your material that a LAT is not required for the position of Tumuaki at TKKM o Piripono te Kura Whakatou ki Otara, as you have a registered teacher available and acting in this position now. You have said this

person is Mrs Esther Hunt, registration number 186103. She has a current practising certificate expiring 31/05/2010.

Therefore the LAT for Mr Masina has been declined.

I note that Mr Masina is undertaking an initial teacher education qualification. When he successfully completes this and graduates he will be able to apply for a teaching position and could be employed permanently, if the employing authority wishes to do so.

[12] Mr Masina was not aware of the Teachers Council advice until 20 April 2008.

[13] Mrs Hunt was offered further fixed term employment commencing on 5 May 2008 by letter of the same date which materially stated:-

The fixed term will expire if;

a. legal proceedings in the District Court or before an Employment Authority find in favour of the principal and overturns the Teachers Council decision, or

b. after advertising and following the correct appointment procedures a permanent principal is appointed to the position

[14] By facsimile letter dated 3 June 2008 the Commissioner's lawyers wrote to Mr Masina's lawyers requiring Mr Masina to attend a meeting "to hear from Mr Masina/yourself about any proposals/strategies to get around the refusal of the Teachers Council to grant a Limited Authority to Teach. If there is no proposal acceptable to the commissioner, then he will have to consider whether Mr Masina can remain as an employee".

[15] On 11 June 2008 a meeting between the parties was held pursuant to clause 16 of the mediated settlement and as requested in the letter dated 3 June 2008.

[16] By facsimile letter dated 16 June 2008 the Commissioner's lawyers wrote again to Mr Masina's lawyers. They advised the Commissioner had reached a preliminary view and enclosed minutes taken of the meeting on 11 June 2008. The letter also enclosed a draft dismissal letter dated 20 June 2008. Mr Masina was invited to make any further comments or submissions by 4pm on 18 June 2008. It was stated that the Commissioner's intention was to make his final decision on 20 June 2008.

[17] Mr Masina's lawyers wrote two letters dated 16 and 18 June 2008. The lawyers advised their view the Commissioner was invoking a process other than that agreed in the mediated settlement. Both letters stated that Mr Masina would refer the matter to the Employment Relations Authority. There were no other submissions or comments made.

[18] By letter dated 23 June 2008 the Commissioner wrote to Mr Masina terminating his employment as from 4 July 2008. The letter materially stated:-

9. Based on the advice that I have received, I believe that it is unlawful for me to continue to employ you without a LAT. I agreed to your reinstatement as principal on the basis that you would immediately apply for a LAT, but unfortunately your application for a LAT has been declined. There has been no challenge to the decision of the Teachers' Council through the courts, and I have no assurance that the Teachers' Council will change its mind because of the representations made to the Teachers' Council by yourself and your solicitor. In summary, I have no assurance that a LAT will ever be granted.

10. I am a commissioner appointed by the Secretary of Education, and I cannot employ you as a principal when it is unlawful to do so. My decision now is that you cannot continue as a principal when you do not have a LAT, and when there is no evidence that you will obtain a LAT in the near future. For these reasons I, very reluctantly, have come to the conclusion that your contract of employment has come to an end. Your last day as the principal will be Friday 4 July 2008.

11. I offer you a formal farewell at the school at a time and date that would suit you.

The merits

The substantive decision

[19] I first deal with the substantive decision to terminate. Mr Masina says the Commissioner's decision to terminate his employment is unjustifiable. The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[20] The Commissioner dismissed Mr Masina because he considered it would be unlawful to continue to employ Mr Masina without a LAT. That belief is based on section 120B(2) of the *Education Act 1989* which provides:-

120B Restrictions on continued employment of teachers

(2) No employer shall continue to employ in any teaching position any person who holds neither a practising certificate nor an authorisation, if that person is not under the general supervision of a person who holds a practising certificate.

[21] Sub-section 137(2) of the *Education Act 1989* makes it an offence to employ a person not authorised to teach:-

(2) Every person commits an offence, and is liable on summary conviction to a fine not exceeding \$5,000, who appoints any person to a position, or continues to employ any person in a position, knowing that the appointment or employment is contrary to section 120A or section 120B.

[22] It is undeniable that Mr Masina does not hold a LAT. I decline to embark on an assessment of Mr Masina's case for a LAT. That would be wholly inappropriate. It is not for this Authority to comment on the correctness or otherwise of the Teachers Council decision refusing Mr Masina a LAT. The Teachers Council's decision stands as it is.

[23] Mr Masina had the right to appeal the Teachers Council's refusal to grant him a LAT if he considered it was the wrong decision. I suspect he could have also sought a judicial review of the decision if he considered the way in which it was made was wrong. Mr Masina did neither of those things. There is no doubt he considers the decision was wrong. In that situation he was obliged to challenge it. But he did not. This determination is not the mechanism to challenge the Teachers Council's decision.

[24] Mr Masina does not hold recognised qualifications to teach. I find that it would be unlawful for the Commissioner to continue to employ Mr Masina. I do not consider such a situation to amount to a frustration of contract. Rather, I consider that Mr Masina's ineligibility to teach rendered him incapable of performance and that

ineligibility went to the heart of the contract, relieving the Commissioner of his continued performance. I consequently find that the Commissioner's decision in this regard was substantively correct and proper.

[25] Mr Masina says that his lack of qualification did not preclude his reinstatement as part of the mediated settlement, and that it should not preclude his continued employment either. I accept that his reinstatement was conditional upon his being granted a LAT by the Teachers Council.

How the employer acted

[26] I turn now to deal with procedural considerations.

[27] Mr Masina claims the Commissioner breached the mediated settlement in a number of ways and most importantly, by providing information to the Teachers Council that was not only outside of the agreed communications but which were actually detrimental to Mr Masina and consequently instrumental in the refusal of a LAT for him. Mr Masina's argument is that if the Commissioner had carried out what he had agreed to do, Mr Masina would have been granted a LAT.

[28] The Commissioner's counsel concedes that the Commissioner cannot rely on the absence of a LAT if he directly contributed to the failure to obtain a LAT. That is a very responsible concession and I agree with it. That is the issue I now deal with. The Commissioner says there is no evidence of such a contribution by him.

[29] Mr Masina criticises the Commissioner's responses in the application for LAT dated 5 March 2008. Firstly he says that the Commissioner wrongly indicated that his employment was temporary and for a specific contract term from 8 January 2008 to 7 January 2009. The Commissioner also wrote in his letter to the Teachers Council of 10 April 2008 that *"I told Mr Masina that, whilst he has been continuously employed as principal of Te KKM o Piripono, since 2006 his tenure of the position has been through fixed term contracts and not as a permanent appointee. If granted a LAT, he could only be employed as principal on a fixed term contract for the period stated on that LAT"*.

[30] Secondly, Mr Masina says that the Commissioner wrongly wrote in that same letter *"Mr predecessor appointed Mrs Esther Hunt ... as acting principal ... in Masina's absence. She can continue as acting principal until such time as Mr Masina's LAT application is determined or a suitably qualified person is appointed"*.

[31] Mr Masina also says the Commissioner improperly advised *"During the mediation process, I agreed to sign Mr Masina's application. To the application form I attached a letter in which I expressed doubts about Mr Masina's ability to function to the standards of a principal. I still have those doubts"*.

[32] Mr Masina says these communications to the Teachers Council went far further than the agreed statement which formed part of the mediated settlement. I understand Mr Masina to say that these statements were misrepresentations in that they were inaccurate and unfair and had a detrimental effect on his application for a LAT causing it to be declined.

[33] The Teachers Council explained the reason why it declined Mr Masina's application for a LAT in its advice of 16 April 2008 as follows:-

"It is clear from your material that a LAT is not required for the position of Tumuaki at TTKM o Piripono te Kura Whakatau ki Otara, as you have a registered teacher available and in the acting position now. You have said that this person is Esther Hunt, registration ... She has a current practicing certificate expiry 31/05/2010."

[34] I agree that Mr Masina was not employed on a fixed term basis. That advice to the Teachers Council was wrong. It was corrected subsequently, but on 23 June 2008.

[35] The advice about Mrs Hunt could have better emphasised Mr Masina's position as the incumbent principal albeit wholly conditional on his entitlement to a LAT. Mr Masina's employment had been deemed continuous and he was the principal, subject to being granted a LAT. Mrs Hunt was not "available" for a position that the parties agreed between them was Mr Masina's. The situation was not presented that way to the Teachers Council.

[36] I reach the position where I agree that the Teachers Council was misinformed by the Commissioner because of inaccuracies. I also accept it was unfair to express doubts about Mr Masina's abilities without putting such concerns to him first. But I am unable to say that these matters were of any consequence in the Teachers Council's decision.

[37] It seems clear to me that the Teachers Council would have made the same decision to refuse him a LAT whether or not Mrs Hunt was the principal. It is my view that so long as Mrs Hunt was employed at the Kura and was registered, that would have been sufficient for the Teachers Council's purposes. In my view, the Teachers Council would have made the very same decision.

[38] I consider Mr Masina's eligibility to teach and thereby to remain employed as principal has been precarious for many years now, from at least 2004. Mr Masina has been on notice that his continued licence to teach was tenuous. He has long been aware that he was required to obtain the appropriate qualifications. By letter dated 7 April 2006 the Teachers Council made the situation explicitly clear to him when it wrote:-

If any further application for a Limited Authority to Teach is made by you, it is unlikely to be granted unless accompanied by evidence showing;

*that the school has taken active steps to attempt to recruit a person who is a registered teacher to the school; **and***

*that after a rigorous attempt to fill the position with a registered teacher, the basis for claiming that you, although not a registered teacher, are the best person suited to the position; **and***

that you have taken active steps in the form of commencing an appropriate course of training in teaching towards gaining full registration.

(original emphasis)

[39] Again in the LAT granted to him dated 28 August 2007 this was stated:-

The Council will only consider applications for LATs when there is evidence provided that a registered teacher could not be found for the position.

[40] I conclude that Mr Masina essentially finds himself in the present position entirely as a result of his failure to become qualified and registered. It has always been in his power to do so. He has failed to do so. It was within his power to avoid the situation he now finds himself in. He never had the luxury of taking for granted that he would continue to be granted successive LATs by the Teachers Council. He was aware that the day would come when the Teachers Council would not give him further licence. That day came on 16 April 2008.

The determination

[41] For the immediately foregoing reasons, I find that the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. **I therefore find that Mr Masina does not have a personal grievance for unjustifiable dismissal. There will be no formal orders.**

[42] Had I found that Mr Masina was unjustifiably dismissed, I would have declined to award him any remedies on the basis that I would have considered him wholly responsible for the situation that led to his dismissal.

[43] There are other claims raised in submissions but not explicitly pleaded. I do not understand there to be any objection to those claims being raised. I have considered them in any event.

[44] **Mr Masina claims damages for breach of contract. I find that claim does not succeed.** Firstly, Mr Masina is not able to challenge his dismissal in any way other than a statutory personal grievance. As well, I find he does not suffer any loss arising out of any action or breach by the Commissioner because I consider the Teachers Council would have made the very same decision were it not for the matters complained of by Mr Masina.

[45] **I decline to exercise my discretion to make orders for penalties and compliance.** There is no case for either of these actions.

The costs

[46] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Robertson is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Watson is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application or submission lodged outside that timeframe without leave.

[47] I thank both lawyers for their high quality work in this investigation and the assistance they have given the Authority.

Leon Robinson
Member of Employment Relations Authority