

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 48
5358900

BETWEEN ALAN GETHEN & ORS
 Applicants

AND THE BOARD OF TRUSTEES
 OF KERIKERI HIGH
 SCHOOL
 Respondent

Member of Authority: James Crichton

Representatives: David Martin, Counsel for Applicants
 Gretchen Stone, Counsel for Respondent

Investigation Meeting: 14 December 2011 at Kerikeri

Determination: 7 February 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants (the applicants) are all employed by the respondent (the High School) as teacher aides. The applicants dispute the right of the High School to employ them on a fixed term basis.

[2] The High School says that the fixed term engagements are lawfully for genuine reasons based on reasonable grounds pursuant to s.66 of the Employment Relations Act 2000.

[3] The factual position is that each of the five applicants has been employed at the High School in the role of teacher aide and that each of the applicants has been employed on more than one fixed term engagement. Indeed, the evidence is that two of the applicants had been employed on more than five successive fixed term engagements.

[4] The High School considers it is entitled to continue the employment of the applicants on this succession of fixed term engagements because of the uncertainty of funding for the applicants' positions. The applicants, for their part, say that the fixed term engagements relied upon by the High School do not comply with s.66 of the Employment Relations Act 2000 and in consequence, the applicants seek a determination that the High School cannot rely on the fixed term engagements to end the employment of any of the applicants and they seek orders restraining the High School from relying on any of the fixed term engagements for the purposes of bringing the employment of an applicant to an end.

Issues

[5] It will be convenient if the Authority considers the various aspects of the legal test, one at a time. To facilitate the analysis on that basis, the Authority will first identify the relevant law and then consider each aspect of the tests required against the factual matrix in this case.

What is the relevant law?

[6] The entitlement or otherwise for the High School to employ the applicants on a fixed term basis is set out both in statute and in the relevant collective employment agreement.

[7] For the avoidance of doubt, the statutory provision is s.66 of the Employment Relations Act 2000 (the Act). The relevant provision in the collective employment agreement is s.2.3.3 of the Support Staff in Schools Collective Employment Agreement (the Agreement). It is common ground that the requirements of the Act and the Agreement are materially the same. For the purposes of the Authority's analysis, reference will be primarily to the provisions in the Act.

[8] At subsection (1) of s.66 of the Act, there is a statement of the base principle allowing employer and employee to "*agree*" that the employment will end either at the close of a specified date or period or on the occurrence of a particular event or at the conclusion of a specified project.

[9] But that general statement of principle can only be relied upon by an employer if there are "*genuine reasons based on reasonable grounds*" for requiring a fixed

term engagement and the employer has advised the employee of “*when or how*” the employment will end and the reasons for that termination.

[10] Subsection (3) of the section then sets out three examples of reasons which would not be genuine for the purposes of subsection (2)(a) above.

[11] Subsections (4), (5) and (6) of s.66 are the newest parts of the section, becoming effective law from 1 December 2004. Subsection (4) requires that where there is an agreement between the parties about the way the employment is to end, the employment agreement must state in writing the way the employment is to end and the reasons.

[12] Subsection (5) provides that a failure to comply with subsection (4) does not affect the validity of the employment agreement between the parties for any other purpose, but subsection (6) emphasises that if there has been a failure to comply with subsection (4), the employer cannot rely on any term agreed under subsection (1) if the employee elects at any time to treat the term as ineffective. This last subsection is highly relevant to the present proceedings in that the applicants claim that they have exercised their option under subsection (6)(a) by making the election contemplated in that provision “*to treat that term [that is the fixed term] as ineffective*”. Of course, as will be evident from the foregoing commentary, the applicants may only make that election if the employer (in this case the High School) is found to have not complied with subsection (4). It is a fundamental claim of the applicants that the High School has not complied with the requirements of subsection (4) of s.66, a claim which the High School vigorously resists.

Is there an agreement for a fixed term engagement?

[13] Section 66(1) of the Act provides the fundamental principle that parties to an employment relationship may agree for the employment to be fixed term. However, the term must be expressed to end either at the close of a specified date or period, or the occurrence of a specific event, or the conclusion of a specified project.

[14] It follows then that there are two elements that have to be satisfied in order for subsection (1) of s.66 to be ticked off. First there must be agreement between the parties for a fixed term engagement and secondly there must be a clear expression of when and how that engagement will conclude.

[15] As to the first point, it is common ground that there are employment agreements between the High School and the applicants, that those agreements are fixed term engagements and on a straightforward analysis of the practical realities, the High School has offered an engagement on that basis and the applicants have taken those engagements up, either in the current term of their employment or previously.

[16] As to the second part of subsection (1), the High School maintains that each fixed term engagement was expressed to conclude either at the end of the school year or at the end of a school term. Sometimes, the relevant letter identified a particular date, but more commonly, the end date was identified in a generic way as the end of the school term or the end of the school year.

[17] The Authority is satisfied that, by the High School offering terms of engagement with a fixed term and the applicants accepting engagement on that basis, the basic requirements are made out.

[18] A typical example of the High School's offer of employment is one dated 21 September 2010 under the hand of the Principal of the High School and addressed to Ms Sholay Sunnex. It is, so far as it is relevant, in the following terms:

I am writing to notify you of the dates of your employment in the Learning Enrichment Department for term 4, 2010.

The term will begin on Monday 11 October and your last day of work as a support aide at Kerikeri High School for 2010 is the 8th December 2010.

At this stage we are unable to offer any hours for 2011, as funding has not been allocated.

[19] By her conduct accepting that tendered position, Ms Sunnex is, the Authority is satisfied, accepting fixed term engagement in principle, in terms of s.66(1).

Did the High School have genuine reasons based on reasonable grounds?

[20] Section 66(2)(a) provides that before parties to an employment relationship can agree to a fixed term employment, the employer must have genuine reasons based on reasonable grounds. In the present case, the High School says it has just that.

[21] The test can conveniently be broken down into two aspects. The first of those aspects, of course, is whether, in truth, the High School has genuine reasons for employing the applicants on a fixed term basis. In *Canterbury Westland Free*

Kindergarten Assn v. New Zealand Educational Institute [2004] 1 ERNZ 547, Chief Judge Goddard defined “*genuine*” as “*sincerely held*” and went on to indicate that s.66 situations should be confined to discrete projects of limited duration which could, as it were, be boxed off from the usual situation of ongoing employment.

[22] It follows then that the High School must have a sincerely held belief that it is necessary for it to adopt the fixed term engagement. Clearly, this is a subjective rather than an objective test.

[23] What are the High School’s genuine reasons then? Fundamental to the High School’s genuine reasons is the issue of money. The evidence the Authority heard, principally from the testimony of the High School’s Principal, was that there were two financial aspects which impacted on the school and thus on its desire to have fixed term engagements only for this particular group of employees.

[24] The first of those financial imperatives is that the work performed by teacher aides in a general sense and by the applicants in particular in the present case, is principally work supporting students with special needs. In practical terms, when such a student presents, they effectively attract funding that is specific to them and which follows them wherever they go in the school system, for as long as they need it.

[25] As a matter of practice, a school such as the High School in the present case must apply to the Ministry for special funding when students with special needs present. The High School has little control over when such students will present save only for the expectation that students who are already being educated by the High School will, in all probability, continue to be educated by the High School as they move up the school’s year levels. However, this expectation of progression through the school system is not automatic and one of the benefits that the Authority derived from hearing the evidence of the parties was that, certainly from the High School’s perspective, there was a tendency for students with high educational needs to move from school to school more frequently than would be the case with those students’ peers who did not have special needs.

[26] Be that as it may, when a student with high needs presents, the High School must make a funding application to the Ministry of Education for student-specific funding from a scheme known as the Ongoing Resourcing Scheme, known in the

education sector as ORS funding. The ACC system also funds students in the same way when learning or behavioural difficulties are a function of an accident.

[27] In either case, the funding attaches to the student and not to the school. If the student moves, then so does the funding move. It follows that the ORS funding is not funding which the school can manage in the same way that it manages its ordinary operations grant. The operations grant is a lump sum which schools obtain from the Ministry of Education for the general operation (except salaries) of the school. How the school spends the operations grant is, to some extent anyway, a matter for the school itself and there is a measure of flexibility about how that is undertaken. However, it would be wrong to categorise the operations grant as simply a pot of money that the school could do with as it wished; there are the usual bills that have to be met in the operation of any institution and the school is no exception to that.

[28] However, there is a great distinction which needs to be made between the operations grant and ORS funding because whereas the operations grant is money which the school and in particular its principal and the board of trustees have some control over and some ability to prioritise expenditure, ORS funding is absolutely not in that category. ORS funding attaches to the student and not to the school and as the Authority has already remarked, moves with the student if the student moves from school to school.

[29] The purpose of the ORS funding is, amongst other things, to “*provide specialist assistance to meet students’ special education needs*” to quote from the Ministry of Education’s website on the point. ORS funding is used for a variety of purposes to support the education of the student with special needs, but the principal expenditure is for what the Ministry of Education’s website refers to as expenditure on “*para professionals*”, that is to say, teacher aides such as the applicants in the present proceedings.

[30] So the first problem for the school with ORS funding is that it only has that funding when it has the student and if the student moves, the funding moves with the student and does not remain with the school. So in order to cope with that exigency, the High School employs the applicants on a fixed term engagement because of the uncertainty about how long the funding will last. While there was some argument about whether the Authority could appropriately be influenced by what happened in other high schools and primary schools around the country, the Authority is satisfied

it can take judicial notice of the evidence before it that the approach taken by this high school in the employment of the applicants is a commonplace in relation to teacher aides who work with ORS funded students. That is to say, there is nothing unique or out of the ordinary about the arrangements that the High School has made for the employment of the applicants in the present matter.

[31] In addition to having to cope with the possible complete loss of funding because the student moves away from the school, the High School must also cope with funding fluctuations which have more to do with the Ministry's own budgeting activities than they do with the needs of the students. The evidence the Authority heard was first that the High School faced fluctuating ORS funding dependent on the amount of money in total that the Ministry of Education was able to allocate to that particular part of its funding model. In addition, the amount the High School received was also dependent, to some extent, on the amount allocated to the Northland region as a whole. So if there were more special needs students across the Northland region in a particular year than there had been in the previous year for example, it might be expected that the funding made available to the High School for the employment of the applicants, even where there was a defined need, might be less than it had been in previous years. That is the effect of the evidence that the Authority heard from the High School's witnesses and that evidence is accepted by the Authority at face value.

[32] It follows then that under the ORS funding model, each affected student will be funded for a particular sum for each year of that student's education, but the High School's evidence is clear that the amount funded each year will vary for reasons that have precious little to do with the education of the student and have more to do with the pressure on the Ministry's budget to fund applications elsewhere. However, it is probably fair to say that the principal movement of the total ORS funding pool for the High School is determined by the number of students who are enrolled and who have special needs. For instance, Mrs Forgie, the Principal of the High School, told the Authority in her evidence that the total ORS funding available to the High School in 2010 was \$125,362.28 but for the year 2011, the amount was only \$99,649.76. The amount paid by the Ministry to the High School is determined by the Ministry's assessment of the needs of the student and presumably by the Ministry's assessment of other calls on its budget. In the particular example that the Authority has just referred to, the number of students with ORS funding in the High School in 2010 was 11 and this dropped to 8 for the 2011 year.

[33] Based on the foregoing analysis, the Authority is satisfied that the High School has genuine reasons for employing the applicants on a fixed term basis.

[34] The next part of the question is whether those genuine reasons are based on reasonable grounds. The issue of reasonableness, unlike that of genuineness, is objective rather than subjective. Not surprisingly, the case law on the point tends to turn on its own facts.

[35] The High School relies principally on financial propositions to base its “*reasonable grounds*” test. Before considering those, it is perhaps useful for the Authority to state that its considered view is that an employer meets the “*reasonable grounds*” test by coming to a decision which an impartial observer could assess as reasonable. Analogous to the new test for justification in the statute, the Authority considers that there might be more than one reasonable decision that an employer could arrive at in these circumstances; the test will be whether an impartial observer can conclude that the employer’s decision was a reasonable one in all the circumstances.

[36] The High School refers to the fact that the school is not funded to make redundancy compensation payments to teacher aides, nor is the funding which enables the High School to pay for teacher aides a certain part of its revenue stream, nor are the hours required in any school term or school year known from one period to the next, and so on.

[37] It seems to the Authority axiomatic that in the present case the High School has reasonable grounds for employing teacher aides on a fixed term engagement. The prevailing uncertainty of the requirements for the specialised and important work of teacher aides is different year on year and sometimes even term on term. The funding stream which allows the High School to pay for teacher aides is not a part of the school’s revenue in the ordinary sense, attaching as it does to the ORS funded student and not to the school. When the student leaves the school, the ORS system requires that funding cease immediately and any overpayment must be refunded. As if this is not enough to meet the “*reasonable grounds*” test, it is also appropriate for the Authority to take judicial notice of the fact that this system of employment is the norm in schools across the country for this class of employee working with ORS funded students. The Authority is satisfied that the “*reasonable grounds*” test is met.

[38] However, the Authority should refer to one of its earlier decisions, *New Zealand Educational Institute v. Board of Trustees of Red Beach School*, AA437/05, which is relied upon by the applicants. In the *Red Beach School* decision, the Authority found that while the reasons for entering into fixed term agreements with teacher aides were genuine, they were not reasonable. This is because the Authority was persuaded that roll stability at Red Beach School in the unit dedicated to students with special needs, was stable. Indeed, there was a waiting list for students to enter the area. On that basis, the Authority reasoned that teacher aides could, in effect, be treated as permanent staff because they would be able to be transferred from attending to the needs of one ORS funded student to attending to the needs of another, if there was movement in the ORS funded student numbers. The key sentence in the Authority's decision in *Red Beach School* is as follows:

New children coming into the unit require teacher aide assistance in similar ways to former students.

[39] In effect, the Authority is reasoning that because the demand for teacher aides is steady, there is no requirement on a school to marry the funding available to the work.

[40] In the instant case, though, even if the Authority's reasoning in *Red Beach School* were to be accepted, *Red Beach School* can be distinguished because the High School does not have a stable roll of special needs students and a waiting list. What the High School has is a dramatically fluctuating landscape which, in the Authority's opinion, would be unreasonable to expect the High School to seek to manage by way of open ended employment agreements.

[41] There are other difficulties with applying *Red Beach School's* reasoning to the present case. The first and most important is that Red Beach is a primary school and the present case involves a high school. The needs of students in primary schools are different from the needs of children in the secondary area and that difference is magnified with students with special needs. Furthermore, Red Beach is a primary school in a metropolitan area so the dynamics are quite different from a singleton high school in a relatively remote rural area. Most fundamental of all, if one were to apply the *Red Beach School* reasoning to the present case, it would require the High School to effectively reassign staff to new students and the High School would have to make the assumption that the requirements of the new students were the same as the

requirements of the old and indeed the funding matrix for the replacement students was the same as for the old. In the Authority's opinion, none of those assumptions are in any way reasonable.

Were the employees properly advised?

[42] Section 66(2)(b) and s.66(4), taken together, require the employer to advise the affected employee when or how the employment will end and the reasons for it and since the amendments to the statute on 1 December 2004, that advice must be in writing in the employee's employment agreement.

[43] All of the applicants deny that they were given proper advice about when the fixed terms would actually end for the period up till the year 2010 in any event, and as to why the fixed terms would end.

[44] It is true that in the giving of their evidence, those of the applicants who actually gave evidence before the Authority all indicated a lack of familiarity with the school's funding arrangements (and particularly the funding arrangements for their roles) and all claimed to be uncertain about the end date. But this evidence seems difficult to square with the important and valuable work that these folk do within the school system and with the self-evident experience that all of the applicants have had in working for the High School. It is axiomatic that everybody who works in the school system understands the term-by-term approach to student learning and has a grip of the term dates. Accordingly, when a letter offers fixed term employment for a school year or for a school term, it seems to the Authority to fly in the face of reality for experienced teacher aide practitioners to claim that they do not know what is being proposed.

[45] Of course, there are a variety of different ways in which the High School has expressed the offer over the many years that are in dispute between the parties. One quite random example from a letter written by the Principal to Ms Lorraine O'Brien on 11 December 2009 offers Ms O'Brien work from 27 January 2010 "*until December 2010*". The letter is at pains to set out the various reasons for matters being uncertain and includes a qualification that the hours might terminate earlier or even increase depending on the demand. Earlier letters tended to be less fulsome but still specified the hours that were available and the fact that those hours were available during term time. The Authority is not persuaded that employees in the

school system do not understand how the term system works and are unable to discern when it starts and finishes. The Authority is not satisfied that the High School must include the actual dates of the term or school year finishing in order to comply with the law. Term dates and school year finishing dates are terms of art and are understood by people working in the education sector and readily discernible by them.

[46] The contention raised by the applicants that they did not understand the funding regime is similarly rejected by the Authority. References, for example, in the earlier letters to “*Special Needs Funding*” are branded as “*simply meaningless*” in the submissions made on behalf of the applicants. To the contrary, the Authority is satisfied that that description of the reason for the fixed term engagement is a proper and sufficient explanation for the nature of the employment. In the leading case of *Norske Skog Tasman Ltd v. Clarke* [2004] 3 NZLR 324 (CA), the judgment of the majority made clear (para.[53]) that generic references such as the complained about term “*due to the special needs funding*” were sufficient for the purposes of communicating why a fixed term engagement was required if the employee knew the missing details.

[47] That is precisely the situation here where it was the evidence of the Principal of the High School that:

As soon as we receive our Funding Notice each year we sit down and discuss it with our current teacher aides and they all know that we need to wait for that to arrive before we can have our meeting.

[48] It follows that the High School’s practice is to sit down and engage with its staff just as soon as the funding parameters become clear. Thus affected staff will have significant background in the circumstances of their employment (from those meetings) before they receive their letters of offer.

[49] One of the applicants, Ms Spake, certainly understood the funding aspects because she wrote to the Principal by letter dated 16 August 2011 and said, amongst other things:

I am aware that Logan’s funding will result in reduced funding which is likely to cause changes in teacher aide hours.

[50] The Authority would be surprised if Ms Spake’s clear understanding of the position was not shared by others of the applicants.

[51] In the end, the Authority's view is that the applicants have not proved their case on this or indeed any other point. The Authority prefers the views expressed by the Principal when, in her brief of evidence, she said on this particular matter:

... in my opinion all of the applicants (and indeed all of our teacher aides ...) understand that the ORS funded students receive specific funding, which then dictates what hours we can offer to employ them. I do know that none of the applicants have sought to query the meaning of the fixed term appointment letter (which is not complex) and it is surprising to me that five people would each be unable to understand a letter, but none of them would seek to have it clarified with either myself or with the head of department.

[52] That, to the Authority, seems an admirable summary of the realities of this situation.

Determination

[53] The Authority has not been persuaded that the High School is in breach of the law in employing the applicants from time to time on fixed term engagements. It follows that the application made by the applicants has not succeeded.

Costs

[54] Costs are reserved.

James Crichton
Member of the Employment Relations Authority