

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURĀU ROHE**

[2019] NZERA 198  
3046934

BETWEEN                      FIONA DE L'ISLE  
   Applicant  
  
AND                                BOARD OF TRUSTEES  
   GLAMORGAN SCHOOL  
   Respondent

Member of Authority:        Jenni-Maree Trotman  
  
Representatives:              Janette Andrews, for the Applicant  
   Gretchen Stone, for the Respondent  
  
Investigation Meeting:        20 March 2019  
  
Submissions [and further    20 & 21 March 2019 from the Applicant  
Information] Received:       20 March 2019 from the Respondent  
  
Date of Determination:       4 April 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Glamorgan School (the School) is situated in the East Coast Bays on Auckland's North Shore. Fiona de L'Isle has been employed as a teacher aide at the School since February 2010, providing support to students with special learning needs.

[2] Ms de L'Isle alleges that fixed term employment agreements that she entered into with the School since commencing her employment are invalid in that they do not comply with the requirements of s 66 of the Employment Relations Act 2000 (the Act). She seeks a determination that all of her "employment with the Respondent's school is permanent".

[3] The School denies the fixed term agreements are invalid. It maintains that it has genuine reasons, based on reasonable grounds, for Ms de L'Isle's fixed term appointments, which are articulated in its various letters of appointment. In the event that the Authority finds otherwise, it relies on s 77(H) of the State Sector Act 1988 arguing that this section prohibits the Authority from making a determination pursuant to s 66(6) that all of Ms de L'Isle's employment is permanent.

[4] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **The issues**

[5] The issues requiring investigation and determination are:

- a. Do the fixed term agreements entered into between Ms de L'Isle and the School comply with the requirements of s 66 of the Act?
- b. If not, does s 77(H) of the State Sector Act 1988 prohibit the Authority from making a determination pursuant to s 66(6) that all of Ms de L'Isle's employment is permanent?

### **Relevant background facts**

[6] Ms de L'Isle was initially employed by Glamorgan School in February 2010 under a fixed term agreement. The terms of her employment at that time, and subsequently, have been contained in signed letters of offer and the Support Staff in Schools' Collective Agreement (the CA).

[7] The material terms of the CA are set out at clauses 2.3.1 to 2.3.3 of the CA in force for the period 16 June 2017 to 15 June 2019. These terms are the same as earlier versions of the CA applicable during Ms de L'Isle's employment. They provide:

#### 2.3.1 Full-time

A full-time employee is an employee who is employed for 37.5 or 40 hours per week.

#### 2.3.2 Part-time

A part-time employee is an employee who is regularly employed for less than the full-time hours as specified in clause 2.3.1.

### 2.3.3 Fixed term appointment

- (a) An employee and an employer may agree that the employment of the employee will end:
  - i. at the close of a specified date or period; or
  - ii. on the occurrence of a specified event; or
  - iii. at the conclusion of a specified project.
- (b) Before an employee and employer agree that the employment of the employee will end in a way specified in (a) above, the employer must:
  - i. have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
  - ii. 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.
- (c) following reasons are not genuine reasons for the purposes of (b)(i) above:
  - i. to exclude or limit the rights of the employee under the Employment Relations Act 2000;
  - ii. to establish the suitability of the employee for permanent employment.

[8] Between 2011 and 2016 the duration of Ms de L'Isle's employment was fixed by the School for the school year. From 2017 it has been fixed for a school term.

[9] In addition to her fixed term hours, from 28 January 2015 Ms de L'Isle has been employed on a permanent basis for 9 hours per week in accordance with clause 2.3.2 of the CA.

### **Issue One: Do the fixed term agreements comply with the requirements of s 66 of the Act?**

#### *The law*

[10] Pursuant to s 66(1) of the Act an employee and employer may agree that the employment of the employee will end at the close of a specified date or period, or on the occurrence of a specified event, or at the conclusion of a specified project. However, before an agreement is valid, the employer must have "genuine reasons based on reasonable grounds for specifying that the employment of the employee is to

end in that way” and must “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.”<sup>1</sup>

[11] Section 66 of the Act goes on to provide:

- (4) If an employee and an employer agree that the employment of the employee will end in 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 ending the employment in that way.
- (5) Failure to comply with subsection (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.

### **Section 66(1) of the Act**

[12] There is no dispute that each of the offers of fixed term employment made to Ms de L’Isle from 2010 have complied with s 66(1). They each specified the fixed term hours being offered and the start and finish date of employment. In addition, they set out the reason for Ms de L’Isle’s employment being for a fixed term, namely based on student(s) needs and associated sources of funding. For example:

- a. In the letter of offer for the period 08/02/10 to 16/12/10 the letter provided:

The purpose of this appointment is to provide specific teacher aide assistance to [student’s name withheld]. The hours allocated for teacher aide assistance is determined through funding by an external agency and is dependant on [student’s name withheld] attending Glamorgan School. Should [student’s name withheld] leave Glamorgan before the end of the contract please note that the hours will cease.

- b. In the letter of offer for the period 03/02/11 to 16/12/11 the letter provided:

The purpose of this appointment is to provide specific teacher aide assistance to children who have English as a second language. This

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<sup>1</sup> Section 66(2)(a) and(b).

position is funded by the ESOL Grant and is dependant on the School receiving this grant to fund the position and is therefore fixed term.

In addition, you will work 2 hours a week in Terms 1 and 4 to provide assistance to [student's name withheld] for Waterwise. These hours are ORRS funded and tagged to [student's name withheld] and will cease should [student's name withheld] leave Glamorgan School or if the funding should cease.

- c. In the letters of offer for the periods 02/02/12 to 18/12/12, 04/02/13 to 18/12/13, 04/02/14 to 18/12/14 and 05/02/16 to 16/12/16 the letters provided:

The purpose of this appointment is to provide specific teacher aide assistance to children who have English as a second language. This position is funded by the ESOL Grant and is dependant on the School receiving this grant to fund the position and is therefore fixed term.

- d. In the letter of offer for the period 02/02/15 to 17/12/15 the letter repeated the reason set out at (c) above and further stated that in addition to the permanent 9 hours of work each week that Ms de L'Isle was contracted to provide, it also offered an additional 1 hour. It stated that:

The reason that 1 hour of the position is for a fixed term and not permanent is because the Board of Trustees has approved funding for a specified period and ongoing funding from the Board cannot be guaranteed in future years. The funding for the 1 hour position will end on 17 December 2015 at which time the fixed term proportion of your employment will cease. The board will provide you with notice period as set out in the Support Staff in Schools CA.

- e. In the letter of offer for the period 02/02/17 to 19/12/17 the letter provided:

The purpose of this appointment is to provide 11 hours a week specific teacher aide assistance to children who have English as a second language. 6 hours are funded by the ESOL Grant and is dependant on the School receiving this grant to fund the position and 5 hours are funded by an external agency to provide teacher aide assistance and is therefore fixed term.

- f. In the letters of offer provided each term during 2018 the letters provided:

The reason for these additional hours being of a fixed term nature and not permanent is because the funding received by the board for teacher aide positions comes from a variety of providers both through the Ministry of Education and external sources. This funding is variable and is pooled before the hours of work are then allocated to teacher aide positions in accordance with the needs of the students. The funding pool is constantly reviewed by the board as it can vary at short notice depending on the continuing attendance of students and their ongoing needs. The uncertain nature of this funding pool means that the board cannot

guarantee that these hours can continue if funding is reduced (specified event).

## **Section 66(2)(a) of the Act - Genuine reasons based on reasonable grounds?**

### ***The parties' submissions***

[13] The focus of the dispute between the parties concerns s 66(2)(a) and Clause 2.3.3(b) of the CA, namely whether Glamorgan School had genuine reasons, based on reasonable grounds, for specifying fixed terms of employment.

[14] What is “genuine” in the context of s 66(2) was considered by the Court in *Canterbury Westland Free Kindergarten Assn v New Zealand Educational Institute*.<sup>2</sup> In that case Chief Judge Goddard, as he then was, defined “genuine” as a “sincerely held” belief.

[15] The School submits that the reasons articulated for Ms de L’Isle’s fixed terms of employment are genuine and are based on reasonable grounds. It points to the variable nature of its funding for teacher aide support and the changing needs of the students that the funding is required to accommodate. It also points to the general requirement set by the Ministry of Education that it operate within budget for each financial year.

[16] Ms de L’Isle does not accept that funding is unpredictable or uncertain. She submits that there is a high degree of predictability of school funding. She says that the school role has remained reasonably stable during the period of her employment with an upswing in the last few years. She submits there is no reason to expect the number of special needs children requiring help to stop or funding to change.

### ***Analysis***

[17] In order to assess the genuineness of the fixed terms of employment I have considered the sources of the School’s funding, the variable nature of its funding, the role Ms de L’Isle’s undertakes, as well as the CA in order to ascertain whether it contains a mechanism for addressing a reduction in hours due to a loss of funding. I have also considered case law referred to me by the parties.

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<sup>2</sup> [2004] 1 ERNZ 547.

*Limited source of funding*

[18] It is clear from my analysis that the School has very limited funding to pay for the staff that it employs. Unlike a business, the School is not able to “tout for business” to supplement its income. Its income is limited to the following sources:

- a. The Ministry provides funding based on the School’s roll numbers. This provides the School with a certain number of full time teacher equivalents (FTTE) salaries that are paid directly by the Ministry.
- b. The Ministry provides an Operations Grant that covers other aspects of the School’s costs such as heating, lights, water, vandalism, information and communication technology, relieving teachers, property maintenance, insurance and special education. The Operations Grant includes a Special Education Grant (SEG Grant) for children who have special education needs but do not meet the criteria for individualised support grants.
- c. The School receives variable funding from various other sources and funding pools, for example, English as a Second Language (ESOL) grant, Ongoing Resourcing Scheme (ORS) grants for high needs students, Resource Teachers of Learning and Behaviour, Ministry of Education Special Education Language Learning initiative and In Class Support. It is these sources and pools of funding that fund Ms de L’Isle’s employment.
- d. Additional funding also comes from School fundraising initiatives. These fundraised amounts are provided to the Board of Trustees to fund any deficits in the School’s budget, for example arising from the need to provide additional support to students who are in need.

[19] The School must manage its finances to ensure that it has adequate funding to meet its day-to-day needs and in planning for the future. Financial management is deemed crucial by the Ministry of Education. The introduction to the Ministry’s Financial Information for Schools (FISH) handbook states:

Financial management is crucial to the health of a school in order to provide adequate funding for day-to-day needs and in planning for the future. Any system of school administration must keep the needs of students in mind, support the learning and teaching at the school, and enable the board to realise its strategic goals and objectives. A lapse in financial management – or deliberate fraud – diverts the attention of staff and trustees and may cause

a reduction in the funds available for curriculum delivery. Problems with a school's financial governance and management almost always impact the education being provided to student

### *Variable nature of funding*

[20] The receipt of funding by the School, the level of that funding, and the timing of funding regularly fluctuates due to a number of factors. Relevant to the present case are the following factors:

#### *School roll numbers*

- a. The amount received under the Operations Grant and the SEG Grant is based on a calculation taken from school roll numbers in July of the current year. This means that if a school's roll decreases so does the funding for the following year.
- b. The SEG funding currently provides around 23 hours of teacher aide support per week across the whole of the School's 500 plus pupils. However, as it is linked to the Operations Grant, it is dependent on role numbers, meaning the allocated hours can fluctuate up and down. For example, in 2018 the School received 30 hours per week of SEG funding as its 2017 roll had been higher and triggered increased operation grant funding and staffing for 2018. In 2019 it dropped to 23 hours per week.

#### *The level of a student's need and the child remaining at the school*

- c. Funding can be reduced or stopped if a student no longer meets the eligibility criteria, or becomes ineligible after a review of the student's learning needs, or leaves the School.
- d. The School's special needs co-ordinator provided evidence during the Authority's investigation of just one of the situations that the School has had to cope with in terms of changes to funding and the changing nature of a child's needs. In that case:
  - i. The child spent one year at the school but needed significant help. The child came to the School with no Ministry funding. In the first term he was allocated 2.5 hours per week of SEG time. By term 2 his behavioural issues had worsened. SEG time increased to 5 hours

(from the school's total budget of 23 hours) plus an interim response fund was provided for a further 2 hours. Later that term behaviour funding was increased by the Ministry to 7.5 hours which was still insufficient meaning the interim response fund was needed for a further 7.5 hours. Funding later increased to a total of 20 hours.

- ii. Following assessment in term 3 the Ministry agreed to increase its funding for one term to 17.5 hours. Another 5 hours was made up from Board Funding and the SEG grant. Two teacher aides were utilised at this point. In term 4 the behaviour funding was reassessed and decreased by the Ministry to 10 hours. The School Board was required to fund the remaining 10 hours of time as it was unable to utilise the SEG grant (23 hours) due to the needs of other children in the school. The following year, in term 2, the child moved schools. Ten hours of behaviour funding from the Ministry went with him.
- e. ESOL funding is variable according to the number of students with English as a second language at the School and also whether the student continues to qualify based on language abilities or the timeframe that the funding is provided for.

#### *Timing of payments*

- f. There is often a delay between receipt of funding and provision of services to the child. In the intervening period the School needs to find the funding elsewhere. This is where the Board normally steps in and funds a child's needs from its retained funds.

#### *Remuneration difference*

- g. The hours available for teacher aide support varies depending on the rate of pay the teacher aide is entitled to. Teacher aide hours are funded by the Ministry at a notional rate. The actual rate the School has to pay the teacher aide is often higher, taking into account qualifications and experience. Therefore, even though there are a number of hours given by the Ministry for a child it is at the notional rate. If the teacher aide is on a higher pay scale then the funding does not change but the number of hours

support for the child decreases. In the present case Ms de L'Isle's hourly rate is higher than the funding the School receives.

*The Applicant's role is variable*

[21] Ms de L'Isle's hours of work, and the type of work that she has undertaken, has varied over the years to take into account students' needs and funding fluctuations.

[22] For the last two years, her fixed employment hours have been spent assisting 5 children with special needs. It is clear from the evidence presented that there is no certainty that funding for these children will continue:

- a. Two of these children are funded by a Ministry of Education Special Education Language Initiative grant. The funding is linked to the particular child. If the child's needs change, or the Ministry considers the support provided is not achieving the desired outcome, or the child leaves the school, the funding will decrease or stop.
- b. Three of these children are funded by SEG Funding. Of the 23 SEG hours allocated to the school each week, these are allocated firstly to those students whom a specialist has directed assistance be provided. One of the children Ms de L'Isle assists is currently under a specialist instruction. This may be stopped at any time as the duration is dependent on the specialist's instructions. The funding for the other 2 children may also change depending on the children's needs and the needs of other children that the SEG funding must also be applied to.

[23] I pause here to note that while Ms de L'Isle's skills are at a level that she could be utilised elsewhere in the School if funding is removed or changed, there is no certainty that this work will be funded. Those children that can be funded are. They have teacher aides assigned to assist them. The remaining students who require assistance are generally those that do not meet the thresholds set by the Ministry of Education and therefore any assistance must be funded by the School, generally from Board funds. These funds are not unlimited. They are subject to the local communities fundraising attempts and payment of voluntary parent contributions.

*Insufficient mechanisms in the CA*

[24] The CA does not provide sufficient mechanisms for addressing a reduction in hours due to a loss of funding if Ms de L'Isle were made permanent.

[25] Clause 2.6 of the CA provides that employees' hours must be fixed for a minimum of 12 months. This period can only be shortened where the parties agree. If they don't agree, and the school needs to reduce hours, then its only recourse is under Clause 10.2.

[26] Clause 10.2 enables the School to address a surplus of staffing. However, where a reasonable offer of employment is not able to be made by the School, then the employee will be entitled to redundancy pay of 6 weeks' pay for the first year of service and 2 weeks' pay for every subsequent year or part thereof to a maximum of 30 weeks' pay in total.

[27] I understand redundancy compensation is not funded. This means that any funds used to pay such costs must come from Board funds. These funds are not a certain part of the School's revenue stream for reasons outlined earlier in this determination.

*Case law distinguishable*

[28] For completeness I record that I did consider the determination of *New Zealand Educational Institute Inc v Board of Trustees - Red Beach School* but found this case distinguishable from the present in a number of material ways.<sup>3</sup>

[29] In the *Red Beach case* the Authority found that, while the reasons for entering into the fixed term agreements with the teacher aides were genuine, they were not reasonable. That was 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 be treated as permanent staff because they would be transferred from attending the needs of one Ongoing Resourcing Scheme (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 determination was:

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<sup>3</sup> ERA Auckland, Determination Number AA 437/05.

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

[30] In the present case, Glamorgan School does not have a waiting list of children available to replace those children that leave, nor does it operate a special unit for special needs children within its school. Unless it is informed by a parent or day-care that a child is coming to its school with special needs it has no way of knowing what resources will be needed from one term to the next.

### ***Findings on Issue One***

[31] I am satisfied that the School has established that it had genuine reasons for employing Ms de L'Isle on a fixed term basis. I am also satisfied that an impartial observer would conclude that the School's decision was a reasonable one in all of the circumstances taking into account its limited funding, the variable nature of that funding, the need for flexibility to accommodate the changing needs of its students, and the importance of it remaining able to sustain payment for its day-to-day needs.

[32] I find the fixed term agreements entered into between Ms de L'Isle and the School are lawful and comply with the requirements of s 66 of the Act and clause 2.3.3 of the Support Staff in Schools' Collective Agreement.

### **Issue Two: Section 77H of the State Sector Act 1988**

[33] On the basis of the finding that I have made on the first issue it is unnecessary for me to consider whether s 77H of the State Sector Act 1988 prohibits the Authority from making a determination pursuant to s 66(6) that all of Ms de L'Isle's employment is permanent.

### **Costs**

[34] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[35] If they are not able to do so and an Authority determination on costs is needed the School may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms de L'Isle will then have 14 days to lodge and serve any reply memorandum.

[36] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[37] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>4</sup>

### **Outcome**

[38] The overall outcome is:

- a. The fixed term agreements entered into between Fiona de L'Isle and Glamorgan School are lawful and comply with the requirements of s 66 of the Act and clause 2.3.3 of the Support Staff in Schools' Collective Agreement.
- b. Costs are reserved.

Jenni-Maree Trotman  
Member of the Employment Relations Authority

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<sup>4</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].