

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 243  
3069455

BETWEEN	BENJAMIN EDA Applicant
AND	AORERE COLLEGE BOARD OF TRUSTEES Respondent

Member of Authority:	Vicki Campbell
Representatives:	Applicant in person Richard Harrison, counsel for Respondent
Investigation Meeting:	10 December 2019
Submissions Received:	10 February 2020 from Respondent
Additional information received:	18 December 2019, 11 February, 9 and 31 March and 6 April 2020 from Applicant 13 December 2019 and 16 June 2020 from Respondent
Determination:	23 June 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Aorere College Board of Trustees has breached section 66 of the Employment Relations Act 2000.**
- B. Mr Eda has raised personal grievances within the statutory 90-day period.**
- C. Mr Eda has established a personal grievance in relation to the failure by the College to provide his statutory entitlement to**

**breaks during Term three of 2019. Aorere College Board of Trustees is ordered to pay to Mr Eda the sum of \$3,000 under s 123(1)(c)(i) within 28 days of the date of this determination.**

**D. Costs are reserved.**

**Employment relationship problem**

[1] Mr Eda has been employed by Aorere College Board of Trustees (the College) since 9 August 2017. The College is a co-educational secondary school catering for students from years 9 to 13. It is located in Papatoetoe in South Auckland and has a roll of approximately 1600 students and 150 staff, both teaching and non-teaching. The College is composed of primarily Pacifica and Maori students.

[2] Mr Eda worked for the College for various fixed term periods. The terms of his employment were set out in a letters of engagement incorporating the terms of the New Zealand Secondary Teachers Collective Agreement (the collective agreement) between the Secretary for Education and the New Zealand Post Primary Teachers' Association (PPTA).

[3] Mr Eda lodged a statement of problem with the Authority on 1 August 2019. This was followed by an amended statement of problem lodged on 1 September 2019. I have discerned from the statements of problem that Mr Eda claims:

- a) The College breached the Employment Relations Act 2000 (the Act) in relation to his fixed term agreements and its failure to provide him with breaks;
- b) One or more conditions of his employment were affected to his disadvantage as a result of not being offered a permanent position between 2017 and 2019 and when the College breached the terms of the collective agreement.

[4] In its statement in reply the College denied all of Mr Eda's claims and denied the Authority had jurisdiction to investigate and determine Mr Eda's alleged personal grievance claims on the grounds that he failed to raise aspects of these claims within the statutory 90-day period required by s 114 of the Act. The college does not consent to Mr Eda raising his personal grievances outside the 90-day period.

### **Mr Eda's second set of proceedings**

[5] Since the investigation of Mr Eda's claims he lodged a new statement of problem with the Authority on 14 February 2020 which has not yet been set down for investigation and determination.

[6] Mr Eda asked that his second set of proceedings be dealt with in conjunction with these proceedings however, that was not possible because his first set of proceedings had already been the subject of an investigation meeting and the Covid-19 situation has prevented a new investigation meeting from being convened within the foreseeable future.

[7] Further, on reviewing the statement of problem lodged in relation to Mr Eda's second set of proceedings there appears to be considerable overlap with the matters dealt with in this determination. Given that, I considered it more efficient to complete this determination as it is likely to address a number of Mr Eda's claims which may result in a reduced number of issues needing resolution in the second set of proceedings.

### **Issues**

[8] In order to resolve Mr Eda's application I must determine the following issues:

- a) Did the College breach the Employment Relations Act 2000 (the Act)?
- b) Did Mr Eda raise any or all of his personal grievances within the statutory 90-day period?
- c) If the answer to b) is yes were one or more conditions of Mr Eda's employment affected to his disadvantage by the unjustifiable actions of the College and if so what if any remedies should be awarded?

[9] As permitted by s 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 as a result. While I have not referred to all the submissions and evidence received from the parties in this determination I have carefully considered everything I have received.

## **Breaches of the Act**

Mr Eda claims the fixed term employment agreements he entered into in 2017, 2018 and 2019 were not compliant with s 66 of the Act. He also claims the College breached the Act when it failed to provide him with the minimum statutory breaks.

### ***Fixed term agreements***

[10] Section 66 of the Act allows employers and employees to agree that the employment of an employee will end at the close of a specified date. Before they agree the employer must have genuine reasons based on reasonable grounds for specifying the employment will end in that way and set out in the employment agreement when the employment relationship will end and the reasons for it ending in that way.

[11] If the employment agreement does not contain the reasons for the fixed term agreement, the employee may elect to treat the fixed term as ineffective.

[12] When assessing whether a fixed term agreement has been entered into for genuine reasons based on reasonable grounds I must consider whether the stated reasons were sincerely held at the time the agreement was entered into and whether they were for proper purposes. The Act prohibits the use of fixed term agreements for the purpose of establishing the suitability of an employee for permanent employment.

[13] Before the commencement of each fixed term appointment the proposed terms and conditions of Mr Eda's employment were set out in letters of appointment which expressly incorporated the terms of the collective agreement.

[14] The collective agreement expressly allows for fixed term agreements. Clauses 3.2.2(i) and 3.2.3 mirror the requirements of s 66 the Act, using identical language to specify the requirements of fixed term agreements.

[15] Clause 3.2.2(i) of the collective agreement requires the letter of appointment to include the reason why the fixed term agreement will end on the specified date.

### ***First fixed term agreement - 2017***

[16] The first fixed term agreement was for the position of Science Teacher. It specified a start and finish date of 9 August and 8 December 2017 respectively.

[17] The College did not set out in its letter of appointment the reason for the ending of the fixed term agreement. Instead, on 11 October 2017 Mr Eda was given written

notice that his employment would end on 8 December. Mr Eda was advised that his employment was ending because the position of Science Teacher held by him was becoming permanent for 2018.

[18] Mr Eda did not raise any issues with respect to the ending of this fixed term agreement and did not elect to treat the term as ineffective. In the first term of the 2018 school year Mr Eda relieved at various schools including Papakura High School.

[19] While the letter of appointment stated that Mr Eda's employment would end on 8 December 2017, the reasons for it ending were not recorded. This is a breach of the requirements of s 66 of the Act and the terms of the collective agreement.

*Second fixed term agreement - 2018*

[20] Mr Eda was offered a second fixed term agreement on 27 April 2018 to teach Science/Social Science and to provide general relief. The start and end dates specified in the letter of appointment were for the second term starting on 30 April and ending on 13 July 2018.

[21] The reason for the fixed term as set out in the letter of offer is to respond to an overstaffing situation. Mr Eda signed the letter of offer on 30 April 2018 accepting the offer.

[22] As with the previous offer the letter confirmed that the terms of Mr Eda's employment would be those set out in the collective agreement.

[23] Prior to the expiry of the fixed term Mr Eda was approached by the Principal and offered a further fixed term to take him through to the end of the school year.

*Third fixed term agreement - 2018*

[24] Mr Eda was offered and accepted a third fixed term agreement on 18 June 2018. This offer had the effect of extending Mr Eda's previous fixed term until the end of the school year with an end date of 7 December 2018.

[25] The reason specified for the fixed term nature of the agreement was the same as the reason set out in the April 2018 letter. That is, that the fixed term was necessary to address an overstaffing situation at the College.

[26] On 28 August 2018 Mr Eda was given written notification that his fixed term agreement would end on 7 December and that no fixed term position was available for him in 2019.

[27] Mr Eda was upset at not having his employment made permanent or receiving an offer of further work. He wrote to the Principal, Mr Pierce, in November setting out his concerns. The Principal, in response, advised Mr Eda there were no positions available in 2019 other than relieving positions which would be open to him if he was available.

[28] As with the first fixed term agreement while the letter of appointment stated that Mr Eda's employment would end on a particular date it did not set out the reasons for it ending in that way.

[29] This is a breach of the requirements of s 66 of the Act. Mr Eda raised concerns with the ending of the fixed term and an agreement. The parties attended mediation and agreement was reached to resolve the issue. The resolution of Mr Eda's concerns included an agreement that he would work under the terms of a fixed term agreement for whole of the 2019 school year.

#### *Fourth fixed term agreement*

[30] After raising his concerns in November 2018 Mr Eda attended mediation with the College in December. As a result of mediation Mr Eda was offered and accepted a new fixed term agreement for the 2019 school year undertaking general relief teaching at all levels (years 9-13) with the possibility of teaching some timetabled classes in his specialist areas as the need arose throughout the year.

[31] The agreement to offer Mr Eda the fourth fixed term agreement for 2019 arose directly out the mediation in December 2018. I have accepted Mr Pierce's evidence that there was no actual position available for Mr Eda in 2019 but one was created in order to resolve Mr Eda's problems and to enable him to continue his search for permanent employment.

[32] The reason for the fixed term agreement was stated to be due to the fact that the college was operating over the Ministry of Education staffing entitlements. There is no statement as to the reasons why the fixed term agreement was to end in December 2019. This was a breach of s 66 of the Act.

[33] Mr Eda argued that his employment should not end in December 2019 and I have taken that to be an election under s 66(6) of the Act to treat the term of the fixed term agreement as ineffective.

[34] However, Mr Eda's election had little effect. This is because on 17 October 2019 the College notified Mr Eda and four other teachers employed on fixed term agreements that the College was looking to restructure relief teaching arrangements at the College. In its letter the College advised Mr Eda it was embarking on a consultation process to discuss its proposal to review the arrangements for engaging relief teachers. The letter identified that currently this was done by entering into fixed term agreements. The College wanted to review whether those arrangements were consistent with the terms of the collective agreement.

[35] The letter set out the consequences of the review may result in the College returning to the use of a pool of relief teachers. The difference between the two arrangements was that for those on fixed term agreements there was certainty around hours, access to leave on pay and guaranteed income for the duration of the fixed term. Utilising a relief pool would mean the College would engage teachers on an as and when required basis.

[36] The effect on Mr Eda if the proposal was implemented was that the use of fixed term arrangements would be disestablished with no possibility of continued employment in 2020 except by way of the casual pool of relief teachers.

[37] Mr Eda was invited to provide his feedback on the proposal and to attend a meeting for that purpose.

[38] The College received feedback from a number of staff affected by the proposal and on 1 November 2019 advised the directly affected employees that the College had decided to proceed with the proposal for the College to return to a casual relief pool. Mr Eda was advised that his employment would end on 6 December 2019.

[39] Mr Eda told me at the investigation meeting that he did not take the opportunity to provide feedback on the proposal because he believed he was going to be appointed to a permanent position.

[40] In his second set of proceedings Mr Eda challenges the ending of his employment and accordingly it will be dealt with when those proceedings have been investigated by the Authority.

### *Statutory breaks*

[41] Mr Eda claims that each Wednesday throughout 2019 he had five periods plus the form class plus two duties. He says he was only able to take breaks amounting to a total time of 15 minutes for the entire day.

[42] Part 6D of the Act deals with rest and meal breaks. It was amended on 6 May 2019. Prior to 6 May 2019 rest and meal breaks were dealt with in s 69ZD of the Act which required an employer to provide an employee with rest and meal breaks that provided an employee with a reasonable opportunity, during the employee's work period, for rest, refreshment and attention to personal matters and were appropriate for the duration of the employees work period.

[43] After 6 May 2019 rest and meal breaks were dealt with in s 69ZE of the Act which provides for rest and meal breaks to be taken in accordance with any agreement reached between the employer and employee. Where there is no agreement to provisions of ss 69ZE(3) to 69ZE(7) of the Act apply.

[44] The collective agreement does not specify the arrangements as to rest and meal breaks. This means the provisions of the Act will apply. The effect of ss 69ZE(3) to 69ZE(7) means Mr Eda was entitled to two rest breaks. The first to be taken halfway between the start of work and the meal break and the second to be taken halfway between the meal break and the finish of work each day. The meal break was to be taken in the middle of the work period.

[45] Mr Eda says he was unable to take proper breaks every Wednesday due to being rostered on duties over his break periods. I have been provided with a copy of the staff roster for term three. The Wednesday roster shows Mr Eda was rostered to look after the fields during the morning break between 10.40 am and 11.10 am and the Technology room during his afternoon break between 2 pm and 2.20 pm.

[46] Mr Eda says he was rostered to teach five periods each Wednesday in addition to the break roster and teaching a mentoring class. He told me this means he was only able to take a break between 1.40 pm and 2.00 pm.

[47] I am satisfied that the evidence supports Mr Eda's claim that for the third term of 2019 he was unable to take his entitlement to breaks and he has established the College breached part 9A of the Act.

### ***Conclusion***

[48] I find the fixed term employment agreements entered into by Mr Eda failed to meet the requirements of s 66 of the Act. The reasons for each fixed term agreement were not fully recorded in the letters of offer so Mr Eda has not been properly advised of the reasons for his employment ending.

[49] Mr Eda has also established a breach of Part 6D of the Act in relation to breaks during the third term of the 2019 school year.

[50] Mr Eda has not claimed penalties in respect of the breaches of the Act and accordingly none have been imposed.

[51] However Mr Eda claims the Part 9D breaches of the Act resulted in one or more conditions of his employment being affected to his disadvantage and I have addressed remedies under that heading.

### **Did Mr Eda raise personal grievances within 90-days**

[52] Mr Eda claims one or more conditions of his employment were affected to his disadvantage in 2017, 2018 and 2019 when the College failed to:

- a) failed to offer him a permanent job;
- b) failed provide him with the same terms and conditions of employment as other teachers in 2019;
- c) increased his workload and failed to provide him with the required breaks during 2019.

[53] The College says Mr Eda has failed to raise his personal grievances within the 90-day statutory period and therefore the Authority has no jurisdiction to investigate and determine his claims,

[54] Section 114 subsections (1) and (2) of the Act deal with the timeframe for the raising of personal grievances in the following terms:

#### **114 Raising personal grievance**

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[55] Section 114(2) makes it clear that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[56] What s 114(2) requires is that there should be a sufficient specification of the employee's concerns as to enable the employer to be able to address that grievance. To do so, the employer must know what to do.<sup>1</sup> There is no formality involved in notifying a grievance to an employer.<sup>2</sup>

[57] It is not enough to simply say the employee considers they have a personal grievance. In order to properly raise a personal grievance the employee needs to have conveyed to the employer enough information, so that the employer is in a position where it is able to respond on the merits of the alleged grievance, with a view to resolving it at an early stage.<sup>3</sup>

#### ***Raising personal grievances***

[58] On 24 May 2019 Mr Eda raised concerns with the deputy Principal about being passed over for a permanent role with the College. He then raised employment relationship problems with the College by letter on 22 June 2019. In his letter Mr Eda claimed he was unjustifiably dismissed in December 2018 and requested appointment to a permanent position.

[59] On 5 August 2019 Mr Eda wrote to the College referring to the personal grievance he raised on 22 June and claiming he was unjustifiably dismissed in

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<sup>1</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

<sup>2</sup> *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323.

<sup>3</sup> Above n 1.

December 2017 as well as December 2018. His concerns centred on the legitimacy of the fixed term agreements he had entered into with the College.

[60] While his letters in June and August did not raise any specific problems relating to his terms and conditions of employment, his workload or breaks, by September 2019 the College was aware these were issues Mr Eda wanted to have addressed.

[61] Mr Eda had joined the PPTA in 2018 and an organiser from the union raised issues about Mr Eda's hours and offered to meet to discuss how Mr Eda's hours would be managed for the remainder of the year.

[62] Mr Eda along with his PPTA representative attended a meeting with the College on 11 September 2019. That same day Mr Pierce wrote to Mr Eda confirming the agreed outcomes reached at the meeting:

- a) Mr Eda would not be used for relief purposes in 30 minute academic mentoring periods;
- b) Mr Eda would be allocated a maximum of four teaching periods on Wednesdays; and
- c) Other than the above, Mr Eda would be required to be available to relieve any classes as required during the timetabled, student contact based College working week.

[63] On 12 September the PPTA representative advised Mr Pierce that Mr Eda had changed his mind about the agreements reached the previous day. The PPTA notified Mr Pierce that it had advised Mr Eda it was withdrawing as his representative because the issues he was having with the fixed term positions arose before he was a member.

### ***Conclusion***

[64] For the reasons that follow I am satisfied Mr Eda did not raise a personal grievance relating to the ending of the 2017 fixed term agreement until 2019. This was outside the statutory 90-day period.

[65] There was a significant time lapse between December 2017 when the fixed term agreement ended and April 2018 when the second fixed term agreement was offered to him. Mr Eda had time during that period to consider his options and raise a personal

grievance if he was unhappy with the way the employment relationship had ended in December 2017. He did not.

[66] Mr Eda has not applied for leave to raise his grievance outside the 90-day period and I am not satisfied exceptional circumstances exist such that leave would be granted. Accordingly the Authority has no jurisdiction to investigate and determine a personal grievance arising from the ending of the 2017 fixed term agreement.

[67] Mr Eda raised employment relationship problems in 2018 relating to the ending of his 2018 fixed term agreement. The parties attended mediation and resolved the matter by agreement. Mr Eda told me in his evidence that he thought it better to take the offer so that he would be in a position to apply for a permanent role.

[68] I am satisfied the agreement reached in mediation in December 2018 resolved all matters between the parties in respect of the ending of the 2018 fixed term agreement. Accordingly the Authority has no jurisdiction to investigate and determine a personal grievance arising from the ending of the 2018 fixed term agreement.

[69] As a result of Mr Eda's dissatisfaction over the ending of the 2018 fixed term agreement the College was aware that Mr Eda was dissatisfied with the fixed term nature of his employment and was seeking a permanent position. This was the primary reason why the College offered to employ Mr Eda on a fixed term agreement for the 2019 school year.

[70] On a number of occasions throughout 2019 Mr Eda disputed the appointments of other teachers in circumstances where he had been an unsuccessful applicant. In addition he raised concerns about his non-contact versus contact teaching hours as he believed the College was acting in breach of the collective agreement. Mr Eda also raised concerns in September 2019 regarding the lack of breaks.

[71] Taking into account the totality of Mr Eda's communications to the College throughout 2019 I am satisfied Mr Eda conveyed to the College enough information so that the College was in a position where it was able to respond on the merits of the alleged grievances, with a view to resolving them at an early stage.

[72] I find Mr Eda has raised personal grievances relating to failures by the College to appoint him to a permanent role in 2019 and in relation to the terms and conditions of his employment in respect of workload and breaks.

[73] Accordingly, the Authority has jurisdiction to investigate and determine these claims.

### **Unjustified disadvantage**

[74] I have found Mr Eda raised personal grievances that one or more conditions of his employment were affected to his disadvantage by the unjustified actions of the College relating to his period of employment in 2019.

[75] Mr Eda bears the onus of establishing on the balance of probabilities that he was disadvantaged in his employment. If Mr Eda establishes one or more conditions of his employment were affected to his disadvantage the burden moves to the College to establish on the balance of probabilities that the disadvantage Mr Eda suffered was justified.

[76] The justification test in s 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether the College's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

### ***Failure to offer a permanent role***

[77] The fixed term agreement entered into by the parties in January 2019 was the result of the agreement reached at mediation in December 2018. Mr Pierce told me, and I accept, that he understood the arrangement would allow Mr Eda to continue his search for permanent positions while having the guarantee of full time teaching employment at the College. To assist Mr Eda in his search for full time employment Mr Pierce provided him with a written reference.

[78] Despite Mr Eda applying for a number of permanent teaching roles he was unsuccessful.

*Statutory and contractual obligations for appointments*

[79] Appointments to a permanent position within the College are regulated. Appointments can only be made after the College complies with its statutory obligations set out in the State Sector Act 1988 (SSA). The SSA requires appointments to permanent teaching positions to be based on merit after the permanent position has been appropriately advertised.

[80] Sections 77G and 77H of the SSA requires the best candidate for a position to be appointed and for permanent vacancies to be advertised in a manner that enables suitably qualified candidates to apply. Acting, temporary, casual, or relieving roles do not need to be advertised.

[81] Clause 3 of the collective agreement mirrors the statutory requirements and stipulates that permanent full time positions are to be advertised in the Education Gazette 14 days before the closing date for applications. When deciding on the best person to be appointed, clause 3.2.1 of the collective agreement requires the College to take into account the experience, qualifications and abilities relevant to the position and such other relevant matters as it determines.

[82] During 2019 Mr Eda unsuccessfully applied for six different teaching roles at the College including:

- a) August 2019      Science Teacher
  
- b) September 2019      Fixed Term Science Teacher to cover a maternity  
leave vacancy  
Digital Technologies Teacher
  
- b) October 2019      English Teacher  
Fixed term trainee Teacher of Science  
Learning Support Co-ordinator

[83] In relation to Mr Eda's applications for the fixed term Science Teacher roles, I am satisfied Mr Eda was already subject to a fixed term agreement and appointment into either of the fixed term roles would not have achieved his objective of a permanent full time appointment.

[84] In relation to Mr Eda's applications for the permanent positions the College has provided me with explanations as to why Mr Eda was not successful in those applications:

- a) Science Teacher – the successful applicant had recent teaching experience in a culturally responsive setting which demonstrated a desire to teach in a diverse, multi-cultural school. The subjects taught by the successful applicant included STEM, Biology, Chemistry and Junior Science. For 11 years prior to this the successful applicant taught Mathematics, Junior Science and Chemistry in Fiji and New Zealand.
- b) Digital Technologies Teacher – the successful applicant had eight years teaching experience in Fiji, within the Secondary School sector teaching Digital Technology and Computer Studies. The applicant had successfully completed a Post Graduate Certificate in Digital and Collaborative studies in 2017/2018.
- c) English Teacher – this position was never subject to an appointment as the position was considered surplus to the requirements of the school.
- d) Learning Support Co-ordinator – The successful applicant was a fluent Samoan speaker with considerable experience in middle school “learning support” programs. The successful applicant had held roles as an ACE Syndicate Leader for eight years and a Deputy Principal for three years. The applicant had a total teaching experience of 20 years and was TESOL qualified.

In addition the successful candidate had been a fully qualified and practicing “learning support” practitioner for over 20 years and had been employed at a range of multi-cultural schools with high needs’ students. The applicants’ qualifications included testing, education assessments, particularly in Years 9 to 11 and liaison with appropriate external providers, RTB familiarity, and was BLENZ and ESSOL qualified. The successful candidate was proficient and qualified in S.P.A.C. process for students from Year 11 to 13 and holds a qualification in Special Needs’ Resource Teaching from Auckland University.

[85] In each case, Mr Pierce says he met his statutory and contractual obligations to appoint the best person for the role.

[86] I have accepted Mr Pierce's evidence that Mr Eda did not have the equivalent experience and/or qualifications when compared to those who were successful in their applications. The College was entitled to take into account the ethnic composition of the school and look positively on candidates with experience and empathy towards Pacifica and Maori communities and students and those candidates who presented ideas for engagement with them.

[87] From the many documents Mr Eda has submitted to the Authority I have discerned that his underlying complaint is that he was not appointed in circumstances where more recent graduates or those he thought had less experience and qualifications were appointed ahead of him.

[88] I am satisfied Mr Pierce was entitled to take into account factors other than experience and qualifications and he did so. This included circumstances where candidates interviewed better than Mr Eda or were able to display an empathy and interest in the position and the School's students that placed them ahead of Mr Eda.

[89] Mr Eda suffered a disadvantage as a result of not being appointed to a permanent role because his employment was of limited duration. However, taking all of the evidence into account I find the actions by the College in appointing people to permanent positions ahead of Mr Eda were actions an employer acting fairly and reasonably could take. Accordingly, Mr Eda's application for remedies is declined.

***Breach of the collective agreement in relation to workload***

[90] Mr Eda claims the College breached the terms of the collective agreement when the College failed to timetable non-contact teaching hours.

[91] In reaching conclusions on those matters I have applied the principles of contractual interpretation from case law.<sup>4</sup> This required me to establish, objectively, the meaning the parties intended the words in the employment agreements to bear. I

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<sup>4</sup> *Vector Gas v Bay of Plenty Energy* [201] NZSC 5; and *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149.

have done this by assessing what a reasonable and properly informed third party would consider the words to mean.

[92] Being properly informed means the third party will have knowledge of the context in which the parties agreed the terms, so knowledge of the facts and circumstances that would be operating in the parties' minds. An objective assessment does not involve analysing what the parties say they intended.

[93] I have taken the natural and ordinary meaning of the words as being what the third party would take them to mean, if they are not ambiguous, in light of the contractual context and ensuring the interpretation accords with business common sense.

[94] The contractual context in this case is that the College incorporated the terms of the collective agreement into Mr Eda's fixed term agreement. The College was required to comply with the terms of the collective unless and until they were varied by agreement.

[95] Non-contact time for teachers is dealt with in clause 5.2 of the collective agreement. Non-contact time is based on an individual teachers' timetabled hours comprising a total of 25 hours or a combination of periods of time equivalent to 25 hours per week.

[96] Non-contact time allocations for secondary teachers are an acknowledgement of the importance to quality education of the duties other than classroom teaching duties which teachers are required to undertake while schools are open for instruction. Those additional duties are set out in clause 5.1.1 of the collective agreement and include:

- a) The preparation, evaluation and assessment time that may be generated by those classes and the students within them or by other requirements such as external examination prescriptions or the need to report on the progress of individual students;
- b) The counselling and pastoral needs of students;

- c) The administrative responsibilities of individual teachers either in respect of their curriculum or pastoral responsibilities or in respect of the general administration of the school; and
- d) The responsibilities of individual teachers arising from their appointment to a Community of Schools Teacher role;
- e) The extent to which individual teachers may participate in the extra-curricular programmes of the school.

[97] Under the collective agreement the College is required to provide five timetabled non-contact hours within each school week to each full-time teacher. The non-contact time may be a combination of differing periods of time which total no less than the equivalent of five non-contact hours.

[98] Clause 5.1A requires the College to have a policy on timetabling which should incorporate the non-contact entitlements, class size, reference to duty outside of timetabled hours which impact on timetabling practices and a process providing for circumstances where it is not possible to provide the non-contact time entitlements.

[99] The College has accepted that the non-contact time was not always complied with in Mr Eda's case because the role created for him as a result of the mediated agreement involved full time relief cover.

[100] Mr Eda met with Mr Pierce with the assistance of a PPTA representative on 11 September 2019 where this issues was discussed. The College and the PPTA representative believed Mr Eda's concerns had been resolved by agreement to reduce Mr Eda's teaching time to 23 hours per week. For reasons that are not apparent Mr Eda resiled from these agreements the following day.

[101] The College says the non-contact hours requirement does not apply to relief cover because relief staff do not have the preparation, evaluation and assessment time, nor the administrative, counselling and pastoral responsibilities of permanent staff. A permanent teacher sets the work and relief teachers such as Mr Eda attends the class, but does not have these additional duties.

[102] The College submitted that it is not possible to timetable non-contact hours for Mr Eda because the classes he taught were not permanent classes for him and there were no hours of duty outside the timetabled hours he taught as a relief teacher.

[103] While there is merit in the argument from the College, there was a contractual obligation to provide Mr Eda with non-contact teaching hours. The failure to do so was a breach of the collective agreement.

[104] I am not satisfied this breach led to Mr Eda being disadvantaged. He was not required to undertake the duties which the non-contact hours provisions addressed. I am persuaded by the College's submissions that as a relief teacher Mr Eda attended the classes without the need for any preparation. Accordingly, his application for remedies is declined.

#### ***Failure to provide breaks***

[105] I have found the College breached Part 9 D of the Act during the third term of 2019 when it failed to provide Mr Eda with his statutory breaks. I am satisfied this breach resulted in one or more condition of Mr Eda's employment being affected to his disadvantage.

[106] At the meeting on 11 September 2019 the College agreed to provide Mr Eda with a second break each Wednesday by removing him from the Mentor roster. This provided Mr Eda with a second break of 30 minutes.

[107] While Mr Eda resiled from the agreements he reached with the College I am satisfied the College acted on the agreements anyway and reduced Mr Eda's workload from 12 September 2019.

[108] The College's actions and how it acted between 31 July and 11 September are not those an employer acting fairly and reasonably could take. Mr Eda is successful in his personal grievance and is entitled to a consideration of remedies.

#### **Remedies**

[109] Mr Eda has established a personal grievance in relation to the failure by the College to provide his statutory entitlement to breaks from 31 July to 11 September 2019. In his statement of problem Mr Eda seeks the remedy of compensation for humiliation, loss of dignity and injury to feelings.

[110] There was very little evidence from Mr Eda as to the impact the breach had on him during his employment. Taking all of the circumstances into account I consider an award of \$3,000 to be appropriate. Mr Eda has not contributed to the action giving rise to his personal grievance therefore no reduction will be made.

[111] Aorere College Board of Trustees is ordered to pay to Mr Eda the sum of \$3,000 under s 123(1)(c)(i) within 28 days of the date of this determination.

**Costs**

[112] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the parties shall have seven (7) days from the date of this determination in which to file and serve a memorandum on the matter. They parties shall have a further seven (7) days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[113] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority