

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 444
3133599

BETWEEN	EYLEM KAYA Applicant
AND	THE VICE CHANCELLOR UNIVERSITY OF AUCKLAND Respondent

Member of Authority:	Marija Urlich
Representatives:	Paul Blair, advocate for the Applicant Rachel Judge and Ronni Cabraal, counsel for the Respondent
Investigation Meeting:	3 August 2021
Submissions and further information received:	3 and 10 August 2021, from the Applicant 3 August and 3 September 2021, from the Respondent
Determination:	8 October 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Since 2011 Eylem Kaya has been employed by the University of Auckland (UoA) on successive employment agreements. On 17 March 2020 Dr Kaya entered a written employment agreement with UoA which described the employment as “permanent part-time employment with variable FTEs” (the current IEA).¹ She says notwithstanding this description the current IEA is in fact a series of non-compliant fixed term employment agreements and that the effect of the non-compliance is that her employment is open ended and of indefinite duration as a lecturer with research,

¹ “FTE” means full time equivalent.

teaching and service responsibilities totalling 1.0FTE. Dr Kaya has lodged this substantive claim with the Authority. In addition she has lodged an interim reinstatement application seeking reinstatement to employment of indefinite duration at the rate of 0.58 FTE because she says it is arguable that when she signed the current IEA she already had employment of indefinite duration at the rate of 0.58 FTE.

[2] UoA does not accept Dr Kaya's claim either substantive or interim. It says Dr Kaya is a permanent employee, the variable FTE rates in the current IEA are tied to the funding for that work and if, at the conclusion of the funding further work or grant funding is not secured Dr Kaya may be made redundant under the terms agreed by the parties.

[3] UoA has raised a preliminary jurisdictional challenge to Dr Kaya's interim reinstatement application. UoA says the Authority does not have jurisdiction to award the interim reinstatement remedy she seeks because:

- she seeks reinstatement to a role she has not previously held and which is contrary to the current terms of her employment with UoA; and
- given this the effect of making the order sought would be to fix new terms and conditions of employment a jurisdiction which the Authority does not have.

[4] By consent this determination deals only with the preliminary issue as to the Authority's jurisdiction to grant interim reinstatement in the terms sought (and not the interim reinstatement application itself or the substantive application). As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all information received.

Relevant law

[5] Section 127 of the Act provides the Authority may order interim reinstatement. In determining an application for interim reinstatement the Authority must apply the

law relating to interim injunctions having regard to the object of the Act.² An order for interim reinstatement may be subject to any condition that the Authority thinks fit.³ Conditions may include reinstatement to the payroll.⁴

[6] In *Cliff v Air New Zealand* the court discussed s 127:⁵

Interim reinstatement in employment pending substantive determination of a personal grievance has, since 2000, been a statutory remedy available to employees. The legislation (s 127(4)) requires the Authority (and the Court on a challenge) to apply the same criteria to such an application as apply to applications for interlocutory injunction and, in particular, to applications for interlocutory injunction in employment that were within the Employment Court's first instance jurisdiction until 2000. Those tests are three:

- first, whether the plaintiffs have an arguable case of unjustified dismissal;
- second, whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the plaintiffs; and
- third, the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage).

...

The Employment Relations Authority appears to have considered that its task was to either direct reinstatement in employment on all terms and conditions or to decline the application in full. That was too narrow a view of its jurisdiction despite the time pressures that may have been on it given the impending Christmas break. The objective of s 127, as are the statutory objectives of all the Employment Relations Act's provisions relating to employment relationship problem solving, is to provide a just solution to the parties' problems in the particular circumstances of each individual case. Section 127 expressly allows reinstatement on conditions. This gives the Authority (and the Court on a challenge) the ability to craft a solution other than to allow or reject in whole an application for reinstatement if the justice of the case may so require.

Background

[7] The following background is based on the information filed by the parties to date which does not include an affidavit from Dr Kaya.

² Employment Relations Act 2000, s 127(4).

³ Employment Relations Act 2000, s 127(5).

⁴ *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59.

⁵ *Cliff v Air New Zealand Ltd* [2005] ERNZ 1.

[8] On 17 March 2020 Dr Kaya and UoA entered new terms of employment under the current IEA which include that Dr Kaya's employment was to commence 18 March 2020 in the position of Research Fellow and was to be a permanent appointment "subject to the University's Continuation Policy, with a continuation review four years after your start date".⁶ The schedule attached to the letter of offer sets out further, relevant terms:

Schedule One

Type of Employment

This is a Permanent Part-Time offer.

Remuneration

As a research Fellow, you are appointed on step 7. Your annual full time salary will be NZ\$99,869. This will be pro-rated for part-time staff. You will be paid fortnightly in arrears by direct credit into your bank account.

Your work hours will vary with the corresponding work schedule below:

1. From 18 March to 30 September 2020, you will be on 24 work hours per week (0.6FTE) with 5 hours each day from Monday to Thursday and 4 hours on Fridays;
2. From 1 October 2020 to 30 September 2022 you will be on 14 hours per week (0.35) with 2.8 hours across weekdays;
3. From 1 October 2021 to 30 September 2024, you will be on 8 hours per week (0.2FTE) with 1.6 hours per day across weekdays.⁷

[9] As stated above this employment agreement is one of a number entered by the parties since 2011. The employment agreement immediately prior to the current IEA was entered by the parties on 29 June 2019 (the June 2019 IEA) for a term 9 July 2019 to 28 February 2020. By letter dated 14 February 2020 Dr Kaya wrote to UoA that the June 2019 IEA was not compliant with s 66 of the Act and the expiry date of 28 February 2020 was not effective.

[10] Subsequent to this letter and following discussion on 17 March 2020 Dr Kaya and UoA entered the current IEA. Dr Kaya was represented by her union throughout this process. It is understood Dr Kaya says she reluctantly signed the IEA having made her reluctance clear and that she was signing because she had been told there was a hiring freeze. On 22 December 2020 Dr Kaya raised a personal grievance and employment relationship problem with UoA which are now before the Authority.

⁶ Letter "Offer of Permanent Employment" 17 March 2020.

⁷ With agreed correction from '30 September 2021' to '30 September 2022'.

[11] By statement of problem lodged in the Authority on 2 March 2021 Dr Kaya set out employment relationship problems for resolution including:

- (i) If her current individual employment agreement is a fixed term agreement as allowed by s 66 of the Act?
- (ii) If the IEA is a genuine permanent part-time employment agreement consistent with the relevant collective employment agreement (the CEA)?⁸
- (iii) If the decrease in hours from 0.35 FTE to 0.6 FTE on 30 September 2020 is a personal grievance for unfair disadvantage?⁹
- (iv) If the provisions of the CEA are a contracting out of s 66 and s 67 of the Act?

[12] On 22 April 2021 Dr Kaya lodged an application in the Authority for interim reinstatement to the position of part-time lecturer at 0.58 FTE step 7 of the CEA.

[13] Dr Kaya says it is arguable that the 17 March employment agreement is in fact a fixed term agreement with three contiguous fixed term employment agreements rolled into one document and that it is arguable it is an invalid fixed term because it is not compliant with s 66 of the Act. Further, she says it is arguable her employment with UoA is in fact a part time lecturer role of indefinite duration at the rate of 0.58 FTE because 0.58 FTE was the FTE rate in place at 28 February 2020 when she challenged the fixed term agreement in place at that time and by operation of s 66 and in particular s 66(2)(b), those terms prevail.¹⁰ Dr Kaya says the remaining tests relevant to interim injunction (balance of convenience and overall justice) weigh in her favour.

[14] UoA says Dr Kaya's employment agreement is for permanent part-time employment and not fixed employment, that the decrease in contractual rate within that agreement is not an unjustified disadvantaged because it occurred in accordance with the terms of the employment agreement which is binding on Dr Kaya and that the employment agreement is lawful.

⁸ Academic Staff Collective Employment Agreement

⁹ FTE means 'full time equivalent'.

¹⁰ In support of the 0.58 FTE Dr Kaya relies on cl 2 of the 27 June 2019 offer of fixed term employment.

[15] With respect to the preliminary jurisdictional issue UoA says the Authority does not have jurisdiction to grant the application for interim reinstatement as sought:

- Dr Kaya has not previously held the role to which she seeks interim reinstatement and the Authority cannot fix new terms and conditions;
- Reinstatement under s 123(1)(a) is to the former position or one no less advantageous;
- Reinstatement under s 127 provides the Authority may order interim reinstatement pending hearing of the personal grievance;
- Reinstatement can only be to the terms and conditions of employment prior to the disadvantage if employment is ongoing: *Creedy v Commissioner of Police* [2011] NZEmpC 104.
- Dr Kaya was not employed on 0.58 FTE prior to the alleged unjustified disadvantage; and
- Granting the interim relief sought would amount to fixing new terms and conditions of employment and be inconsistent with s 127 and s 161(2)(b) of the Act.

[16] UoA says further Dr Kaya seeking interim reinstatement to a role different to that to which she seeks permanent reinstatement is outside the Authority jurisdiction because any interim reinstatement is a measure pending the hearing of the personal grievance.

Discussion

[17] The challenge to jurisdiction brought before the interim injunction is heard is premature. This is because the tests applicable in an interim reinstatement setting have not yet been applied by the Authority having considered all the evidence and submissions the parties intend to make in support of their respective positions. In such a setting the first test is arguable case following which, if Dr Kaya is able to overcome that threshold, the Authority would exercise the very broad discretion conferred on it by s 127 of the Act in assessing the balance of convenience and overall justice to, if appropriate, “craft a just solution”. The Authority’s investigation of the application is not yet at that point and it is too soon to consider the issues of on what, if any, terms Dr

Kaya may be reinstated on an interim basis pending the substantive investigation of her employment relationship problem.

[18] In exercising the s 127 discretion the Authority must do so in a principled and reasonable way and within jurisdiction. It is wholly accepted the Authority cannot fix terms and conditions of employment. This is expressly excluded by the Act. The Authority is yet to see Dr Kaya's evidence as to why she seeks reinstatement to a different position at the interim stage to the substantive. These issues are likely to be relevant factors to weigh in the claim Dr Kaya has brought before the Authority for consideration on an interim basis. However, as stated above the investigation of this employment relationship problem is not yet at the point where such a consideration can be made.

Outcome

[19] The challenge to jurisdiction is unsuccessful.

[20] The Authority will be in contact regarding the next steps in this proceeding.

Costs

[21] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority