

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 446
3149086

BETWEEN	RENEE JONES Applicant
AND	NGA RANGITAHĪ TOA CREATIVE ARTS INITIATIVE TRUST First Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Kam Bailey, advocate for the Applicant Shelley Kopu, counsel for the Respondent
Investigation Meeting:	23 August 2022
Submissions and/or further evidence	31 August and 6 September 2022 from the Applicant 31 August 2022 from the Respondent
Determination:	7 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Renee Jones, claims that she was unjustifiably dismissed by the Respondent, Nga Rangitahi Toa Creative Arts Initiative Trust (the Trust).

[2] The Trust denies that it unjustifiably dismissed Ms Jones, and claims that her employment was justifiably terminated in accordance with a fixed term provision in her employment agreement.

The Authority's investigation

[3] Ms Jones and Mr Phil Armstrong, her husband, provided written evidence and gave oral evidence at the Investigation Meeting.

[4] The Respondent witnesses, Ms Huia O'Sullivan, Executive Director of the Trust, and Ms Shelby Young, Trustee, provided written evidence and gave oral evidence at the Investigation Meeting.

[5] I also received written submissions from the representatives for the Applicant and for the Respondent.

[6] 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 evidence and submissions received.

Issues

[7] The issue requiring investigation is whether or not Ms Jones was unjustifiably dismissed by the Trust.

Background

[8] The Trust works with vulnerable South Auckland students who have not engaged or had a good experience at school. Ms O'Sullivan said that the Trust uses creative arts and wellbeing programmes to reconnect the students with engagement in higher education and provision of employment opportunities.

[9] Projects undertaken are in the form of noho Wānanga (learning camps), in-school creative education programmes, a flagship theatre project, Manawa Ora, fortnightly youth mentoring sessions and employment internships.

Funding

[10] Ms O'Sullivan said the Trust is assisted by volunteers and was until recently, and during Ms Jones' employment, solely dependent on philanthropic funding. There is a strict criteria for being eligible to apply for funding and then further criteria to ensure the Trust can evidence the capacity, capability and integrity to be the recipients of the funding. From that point, the Trust has to evidence how the funding provided will be applied and align that with each funder's request.

[11] Ms O’Sullivan said that funding is primarily ‘tagged’ that is, allocated to specific costs. The Trust is not permitted to use its discretion to spend the funding outside of the purpose for which it is tagged.

[12] Most tagged funding is provided on an annual basis which required an ongoing need to apply for funding.

[13] There is also ‘untagged’ funding which is provided through One Percent Collective. One Percent Collective encourages people to gift one percent their income to charity. The Trust is one of One Percent Collective’s 16 partner charities. People who register with One Percent Collective may elect to either donate their entire one percent to the Trust, or split it between the Trust and other partner charities, or have One Percent Collective split the donation amongst their partner charities.

[14] The One Percent Collective donations are paid quarterly and require the funding and its usage to be allocated within three to six months of it being received. As with the tagged funding, the focus is on the creative industries and associated projects.

[15] Ms O’Sullivan said during Covid-19 and associated lockdowns all of the funding received was very specific to a Covid-19 response and required a quick turnaround in focus.

The Trust Team Structure

[16] At the time of Ms Jones’ employment the Trust had two employees, Ms O’Sullivan and one other, a Youth Development Practitioner. Both were employed on a 12 month fixed term employment agreement.

[17] Between November 2019 and February 2020 Ms O’Sullivan said there had been no dedicated administrator because most of the funding was granted through the creative industries and generally required to be allocated to payment for teachers or project facilitators.

[18] The administrative work was therefore being undertaken on a voluntary basis and the Trust was failing to keep up with the audit timetable requirements and the administration functions. These were falling behind schedule, which impacted on funding applications and programme delivery.

[19] She said the One Percent Collective funding was sufficient to meet the cost of a part-time administrator for one year. There was no guarantee that the Trust would receive funding which allowed it to continue the role beyond one year, but there was confidence that one year would be sufficient to enable the Trust to meet the objectives of the role, which were to prepare for the audits and set in order the administrative functions.

[20] Ms Jones applied for the role which was advertised, and was interviewed by Ms O'Sullivan on 13 February 2020. She was offered the part-time position of Operations Manager on 14 February 2020 on a one year fixed term agreement basis.

[21] Ms O'Sullivan said she discussed in the interview Ms Jones' understanding of bi-cultural practice and Te Tiriti o Waitangi, in addition to the nature of the role as being fixed-term.

[22] Ms Jones confirmed in the Investigation Meeting that she had read and understood the Employment Agreement. Ms O'Sullivan said, and Ms Jones confirmed, that she did not raise any issue about the term of the Employment Agreement, but said she thought that if there was no funding for the role in the future, she would be told.

The Employment Agreement

[23] Ms Jones commenced working for the Trust on 24 February 2020 and was provided with an individual employment agreement which she and Ms O'Sullivan signed on 24 February 2020 (the Employment Agreement). Ms Jones also initialled each page. The relevant terms of the Employment Agreement stated:

3.1 This agreement shall come into force on 24th February 2020 and shall continue in force until it is terminated. The parties agree that the Employee shall commence employment on 24th February 2020, with employment under this agreement coming to an end on 19th February 2021 due to funding for the role ceasing on the date.

10. CONFIDENTIALITY

10.1 The Employee acknowledges that they have an overarching duty to the Employer to have regard to the confidential information and to act responsibly in the access and disclosure of such confidential information or knowledge that could materially harm the Employer.

10.2 The Employee further acknowledges that the confidential information is solely and exclusively the property of the Employer and will not divulge any such confidential information during, or after the term of employment except:

- (a) In the proper course of her duties with the Employer; or
- (b) As permitted by the Employer; or
- (c) As required by law.

26. UNSATISFACTORY PERFORMANCE

Where the Employer considers the Employee's performance to be unsatisfactory, notice of termination may be given, provided that the employer:

- (a) has discussed the unsatisfactory nature of the performance with the Employee on at least two occasions not less than one month apart; and
- (b) Has given the Employee two written warnings setting out the unsatisfactory nature of the performance and specifying the required performance improvements;

And the Employee has given a reasonable opportunity to improve performance.

Performance Review

[24] Ms O'Sullivan said she and Mr Jones had a six monthly workplan meeting to discuss the systems which underpin performance.

[25] On or about November 2020 she had started to experience some concern with Ms Jones not performing the administration aspects of her role. In addition she did not consider that Ms Jones was showing the required commitment to Te Tiriti o Waitangi and incorporating those aspects into her work by evidencing the knowledge and/or commitment through karakia and waitata.

[26] Ms Jones said she received an email from Ms O'Sullivan on 4 December 2020 asking to meet to review after the staff hui on 7 December 2020. The email stated:

It has come to the attention of myself and the board that there are a number of ongoing issues regarding performance and job descriptions that need to be discussed, resolved and progressed.

[27] Ms Jones said the email was somewhat of a shock to her because she was not aware of any concerns, especially not of any ongoing concerns. She had raised this aspect with Ms O'Sullivan at the meeting on 7 December 2020.

[28] Ms O'Sullivan apologised to Ms Jones, and had explained that what she had meant by 'ongoing' was that she had noted the issues giving rise to the concerns on more than one occasion.

[29] Ms O’Sullivan said she had spoken to the other fixed-term employee, the Youth Development Practitioner, shortly before her meeting with Ms Jones on 7 December 2020 and reminded him that his employment was coming to an end in March 2020.

Meeting 7 December 2020

[30] During the meeting held on 7 December 2020, Ms O’Sullivan said she also reminded Ms Jones that her employment would be ending on 19 February 2021. She said Ms Jones was not surprised and did not say anything in response.

[31] Ms Jones said Ms O’Sullivan outlined her performance concerns when they met on 7 December 2020. During the meeting Ms O’Sullivan said: “at this stage, we are unlikely to renew your contract”. Ms Jones said there was no mention of her employment ending due to a lack of funding on the date stated in the Employment Agreement.

[32] Ms Jones said as a consequence of the performance review, aligned with Ms O’Sullivan’s statement, she was left with the impression that if she met the specified performance goals, then there would be a discussion about whether her contract would be renewed.

[33] In addition, the fact that the performance issues were being raised so close in proximity to the end date of the fixed term date in the Employment Agreement strengthened her belief that her employment would be ongoing.

[34] Ms O’Sullivan said the meeting on 7 December 2020 was intended to be informal in nature and held with the purpose of letting Ms Jones know that some things were ‘slipping’ in order that she could address them. Ms O’Sullivan said the performance issues and the ending of Ms Jones’ fixed term employment agreement were two separate matters in her view.

[35] In regard to the proximity of the performance review to the end date of the fixed-term agreement, Ms O’Sullivan said in accordance with the ethos of the Trust she considered that it was appropriate to raise the performance issues with Ms Jones in order that they could be addressed and improved upon before she left the Trust. In addition, the creative industry area in which the Trust operated was collaborative and

collegial, and if Ms Jones asked for a reference, she wanted the Trust to be able to recommend her.

[36] Ms O'Sullivan issued Ms Jones with a verbal warning during the meeting which was confirmed in an email dated 7 December 2020 which stated:

... As this is our first hui, this is to formalise that this is a verbal warning for performance issues as stated for the issues above. If no improvement has been seen at review time, I will be following through with a written warning process.

As outlined in your contract you have a month to resolve the above and am happy to work with you on a plan this week, so you are at 100% of your job description.

[37] Ms Jones said she considered that the verbal warning indicated a formal process had commenced, and that being the case, she told Ms O'Sullivan that she wanted a support person to be present at the next meeting.

[38] Ms Young said that Ms O'Sullivan had spoken to herself and the Board Chair on or about the 7 December, told them she had discussed performance concerns with Ms Jones, and the discussion had not gone as well as she had hoped with Ms Jones appearing to be upset.

[39] Due to Ms Jones wanting a support person at the follow up meeting, Ms O'Sullivan felt she also needed some support and Ms Young said she agreed to provide it.

Meeting 11 December 2020

[40] The meeting held on 11 December 2020 was attended by Ms O'Sullivan, Ms Young, and Ms Jones, who was accompanied by her husband, Mr Armstrong.

[41] Ms Jones said each point raised by Ms O'Sullivan in her email of 7 December 2020 had been discussed as had what she could do to improve.

[42] Ms Jones said she considered the meeting had not been about seeking genuine solutions, and she gained the impression from what Ms Young said that the Trust Board's focus was on supporting Ms O'Sullivan. She had felt that any suggestions she made about the way the situation was being handled would not be listened to by Ms Young or Ms O'Sullivan.

[43] On the basis that she could not see any funding coming to an end from the accounts, she thought her employment would continue after the end date of 19 February 2021, especially as the performance issues had been raised with an improvement sought which indicated to her that the employment would be ongoing.

[44] Ms O'Sullivan said that Ms Jones disputed that there were issues with her performance, but despite that they worked through some steps they could take together to improve her performance.

[45] Ms Jones said that she had been open to meeting the Trust's expectations, and she sent a list of solutions to the issues raised with implementation dates to Ms O'Sullivan in an email dated 16 December 2020.

[46] Ms O'Sullivan said she was satisfied with the content and noticed that after the meeting on 11 December 2020 there was a marked improvement in Ms Jones' performance. There were no further discussions with Ms Jones about her performance.

19 February 2021 and Termination

[47] Ms O'Sullivan said that on 6 February 2021 she was urgently admitted to hospital. As a result, she was unable to attend to any Trust matters, but she was aware that Ms Jones' employment was coming to an end and it concerned her that Ms Jones left on 17 February 2021, the Trust would not be able to manaaki (farewell) her properly.

[48] Accordingly on 19 February 2021 she emailed Ms Jones stating:

This has crept up extremely quickly and additionally with me being on sick leave and wanted to touch base with you.

As you are aware, as per the terms of your fixed employment agreement, your employment effectively with us ends today, 19th of February 2021.

I'm mindful that with the term coming to a close you may have made prior arrangements for other employment opportunities and don't want to encroach on this for you. So please advise me if this is the case.

With my current situation, I would like to extend this out for another week, so we are able to complete a proper handover and celebrate your time with us, and acknowledging your contribution to the Ngā Rangatahi Toa kaupapa. Alternatively, if you are wanting to finalise everything today, please let me know so I can arrange the return of all Ngā Rangatahi Toa ...

[49] Ms Jones' elected to stay for the additional week, at the end of which her employment with the Trust ceased.

Was Ms Jones unjustifiably dismissed by the Trust?

[50] Ms Jones was dismissed by the Trust on the basis that her fixed term employment with the Trust had reached an end on the date indicated in the Employment Agreement.

[51] Section 66 of the Act sets out the requirements for fixed term employment and provides that:

66 Fixed term employment

(1) An employee and an employer may agree that the employment of the employee will end—

- (a) at the close of a specified date or period; or
- (b) on the occurrence of a specified event; or
- (c) at the conclusion of a specified project.

(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—

- (a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
- (b) 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.

(3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):

- (a) to exclude or limit the rights of the employee under this Act;
- (b) to establish the suitability of the employee for permanent employment;
- (c) to exclude or limit the rights of an employee under the Holidays Act 2003.

(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.

Was there a genuine reason on reasonable grounds for the fixed term?

[52] The Trust is a charitable organisation working with vulnerable young people in South Auckland. It is funded by philanthropic donations. It has to justify how the funding it receives is allocated. Some of the funding is tagged to specific costs and projects, some is untagged from the One Percent Collective and allocated by the Trust.

[53] The focus of the projects carried out by the Trust for the young people with whom it is concerned are within the creative industry and Ms O’Sullivan’s evidence was that the donating bodies expect it to be spent in that area.

[54] Between November 2019 and February 2020 the Trust did not have sufficient funding to justify an administrator role, and the administration tasks had been handled voluntarily. However this had resulted in those tasks losing momentum and the audits falling behind schedule, this was the reason for Ms Jones’ appointment.

[55] The Trust’s evidence was that it had sufficient funding to support Ms Jones’ role for a year, but there was no guarantee of funding after that point.

[56] As stated in *Morgan v Tranzit Coachlines Wairarapa Limited*:

When assessing whether a fixed-term agreement has been entered into for genuine reasons based on reasonable grounds, it will be relevant to consider whether the stated reasons were sincerely held (at the time the agreement was entered into) and whether they were for proper purposes.¹

[57] In *Morgan*, there had been a history of fixed term employment agreements being renewed over a period of 18 years. The Court did not accept that there were reasonable grounds in that situation because it found that there was not a reasonable basis for the uncertainty given the history of contract renewal.

¹ *Morgan v Tranzit Coachlines Wairarapa Limited* [2019] NZEmpC 66 at [27]

[58] In the circumstances of this case however I find that there was a reasonable basis for uncertainty. Whilst there had been sufficient funding to sustain Ms Jones' position for one year, there was no guarantee that funding would continue after that point given the nature and focus of the funding provided.

[59] I find it significant that the only two other employees, one of whom was the Executive Director, were both on fixed-term contracts due to the uncertainty of what funding would be received and in what quantum. Significantly some of it was tagged, and could only be used for a designated purpose.

[60] While the One Percent funding was untagged, its focus was also upon the creative industry and working with young people in that area. Moreover the donations themselves were split between the Trust and 16 other charities, and the focus and therefore amount of each one percent donation varied and was unpredictable.

[61] I find there were genuine reasons based on reasonable grounds for the fixed term nature of Ms Jones' employment.

Was Ms Jones advised of when or how her employment would end and the reasons for her employment ending that way?

[62] The Employment Agreement provided at clause 3.1 both the date the employment would end (19 February 2021) , and the reason for it doing so (due to funding for the role ceasing on that date).

[63] Ms Jones had both initialled the page with clause 3.1 on it and signed the Employment Agreement. She had been advised of her right to take independent advice on the terms of it. Ms Jones confirmed that she had read and understood the clause, and had not asked any questions about it.

[64] The Employment Agreement was signed on the date Ms Jones commenced working with the Trust. I find that on the basis that Ms Jones confirmed when questioned at the Investigation Meeting that she had understood the terms of the Employment Agreement, and in particular had read and understood the fixed term nature of it, the timing of its provision to her did not disadvantage her.

[65] Ms Jones' evidence was that she did not accept there was a lack of funding and consequently no genuine reason for her employment ceasing on 19 February 2021. This

is on the basis that she was not provided with detailed information regarding the funding for her role.

[66] According to s 66 of the Act, the employer is required to have ‘genuine reasons on reasonable grounds’. There is no requirement in s 66 to disclose those reasons in detail as set out by the Court in *New Zealand Qualifications Authority v Hickey*:

I do not agree that detailed disclosure of the sort argued for is required. Section 66(1)(a)–(c) of the Act provides three circumstances in which a fixed term employment agreement may end. They can be relied on where the employer satisfies s 66(2)(a) and (b); that is, to have genuine reasons based on reasonable grounds for specifying that the employment is to end in one of the ways stipulated by s 66(1). The conjunction linking s 66(2)(a) and (b) requires the existence of that genuine reason and advice to the employee of when or how the employment will end when the agreement is entered into. It does not require the reasons for the existence of the fixed term to be incorporated into the employment agreement in any more detail.²

[67] In this case, I have found that the Trust had genuine reasons on reasonable grounds for the fixed term nature of the employment. Ms Jones was also advised of the date the employment would end. She was aware of these matters at the time she entered into the Employment Agreement.

[68] I find there was no onus on the Trust to explain to Ms Jones in detail the basis of the funding for her role.

[69] Ms Jones had an expectation that she would be informed of when her employment would be ending. Apart from the fact that the date is set out in the Employment Agreement, Ms O’Sullivan’s evidence was that she had reminded Ms Jones of the ending of her employment on 19 February 2021 during the meeting on 7 December 2020, although I accept that Ms Jones denies this.

[70] I find that there was no requirement on the Trust to remind Ms Jones of the date her employment would be ending: it was set out in clause 3.1 of the Employment Agreement.

² *New Zealand Qualifications Authority v Hickey* [2022] NZEmpC 76 at [61]

[71] Ms Jones' evidence was that the performance review in December 2020 led her to believe that her contract would be renewed due to the proximity of it to 19 February 2021.

[72] I observe that an employer knowing an employee's employment with it would be ending within a few months, might have decided not to raise any performance issues.

[73] The evidence of Ms O'Sullivan was that the raising of the performance issues was in accordance with the ethos of the Trust.

[74] The parties to an employment relationship have a duty of good faith towards each other. Pursuant to s 4(1A)(b) of the Act the parties are required to be 'active and constructive in establishing and maintaining a productive employment relationship'. They are also to be "responsive and communicative".

[75] I find that it was incumbent on the Trust, acting as a fair and reasonable employer, to inform Ms Jones of any performance shortcomings, and to give her an opportunity to rectify them.

[76] Ms Jones did rectify the issues identified by the Trust, and this would, as observed by Ms O'Sullivan, enable the Trust to provide her with a more positive reference upon the employment termination.

[77] There is no evidence that the Trust informed Ms Jones that an improvement in her performance would result in the continuance of her employment. This was an assumption she formed, and she did not raise this with Ms O'Sullivan or Ms Young at the meeting on 11 December 2020, and nor did her husband who was present at the meeting.

[78] There is no reference to her employment continuing after 19 February 2021 in any written communications to Ms Jones.

[79] I find no evidence that the Trust provided Ms Jones with an expectation that her employment would continue after 19 February 2021, other than on the one week basis due to Ms O'Sullivan's absence and her wish to farewell Ms Jones appropriately. Unfortunately Ms Jones formed an assumption that it would do so, but I have found no firm foundation for her having done so.

[80] I determine that Ms Jones was not unjustifiably dismissed by the Trust, but justifiably dismissed in accordance with a valid fixed term agreement.

Costs

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

[82] If they are not able to do so and an Authority determination on costs is needed the Respondent 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 the Applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[83] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[84] 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 required an upward or downward adjustment of that tariff.³

Eleanor Robinson
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].