

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY AUCKLAND OFFICE**

BETWEEN Glenda Keam
AND The Vice Chancellor, University of Auckland
REPRESENTATIVES Peter Cranney for the Applicant
Phillipa Muir for the Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING Friday 24 March 2006
DATE OF DETERMINATION Wednesday 29 March 2006

DETERMINATION OF THE AUTHORITY

[1] Glenda Keam has been employed in the University of Auckland's School of Music, in a range of teaching roles, from 1996 until 31 December 2005. For the last four years Ms Keam has been employed as a full time lecturer on a series of fixed term employment agreements, the last of which ran from 1 January 2005 until 31 December 2005. In October 2005 Ms Keam was advised that a permanent lecturer position in the School of Music would be created for 2006 and was invited to apply. Ms Keam took advice and wrote to the respondent, the Vice-Chancellor University of Auckland ("the University") asserting her permanent employment status. Ms Keam was duly interviewed for the advertised position, for which she was unsuccessful. Ms Keam remained on the University's payroll until 31 January 2006. Ms Keam seeks interim reinstatement to the position of lecturer in the School of Music pending the outcome of her personal grievance hearing, which is scheduled to be heard on 17 May 2006.

[2] The University opposes Ms Keam's application for interim reinstatement. The University says Ms Keam was employed for a fixed term which ended by operation of the relevant employment agreement. It says further that, in any event, reinstatement is impractical because there is no position to which Ms Keam can be reinstated.

[3] Ms Keam's application was filed in the Authority on 13 February 2006. The parties attended mediation on 27 February 2006. For the purposes of this investigation the parties filed affidavit evidence and presented written and oral submissions.

[4] To determine this application the Authority must consider four factors:

- (i) whether Ms Keam has made out an arguable case;
- (ii) the availability and adequacy of other remedies;
- (iii) where the balance of convenience lies; and
- (iv) the overall justice of the case.

(i) Arguable case

[5] Section 66(4) and (6) of the Employment Relations Act 2000 provides:

"66 Fixed term employment

...

- (4) If an employee and 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.
- ...
- (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 the 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."

[6] Ms Muir submitted that given the consideration of this application falls within the equitable jurisdiction of the Authority it is appropriate that this inquiry be limited to agreements where Ms Keam challenged their validity within their term. I accept this submission. My consideration of arguable case will therefore focus on the last agreement entered by the parties.

[7] The last employment agreement entered between Ms Keam and the University included:

"4. Term

This is a fixed term employment agreement. The term of this agreement shall be from 1 January 2005 until 31 December 2005, unless terminated earlier under the terms of this agreement. This employment agreement is offered for a fixed term to trial a new course of study.[my emphasis]. Nothing contained or implied in this agreement creates a commitment by either party to an ongoing employment relationship beyond the end of the Term of this agreement."

[8] The evidence for the University was that the "trial of a new course of study" refers to the evaluation period of a course which had started in 2004. This course was Music 149, New Zealand Music Studies. The evidence is unclear as to whether this reason was discussed with Ms Keam prior to the agreement being entered by the parties. The affidavits for the University aver that a further reason for the 2005 fixed term was the budgetary constraints on the School of Music and that this reason was well known to Ms Keam. Ms Keam's evidence was that there was no new course of study to trial and that she had been advised over the past four years that the reason for the series of fixed term agreements was that the University did not have sufficient money to fund a permanent lecturer position.

[9] Mr Cranney submits that the University has failed to comply with its obligations under section 66(4)(a) and (b) of the Act, by failing to state in writing the way the agreement will end and the reasons why it will end in that way. He submits that the effect of this failure is to render Ms Keam's employment one of indefinite duration.

[10] Ms Muir submits that genuine reasons, well known to the parties, existed for a fixed term agreement and that the wording of the agreement complies with section 66(4)(a) and (b) by providing both a reason and way for the agreement to end.

[11] Section 66 sets out obligations in a fixed term setting; the reasons for the fixed term must be genuine and agreed with the employee concerned, and the way the employment will end and the reason it will end in that way must be recorded in writing. The consequence of failure to comply with these obligations is employment of indefinite duration, if the employee so elects.

[12] Ms Keam has challenged the adequacy of the written reason for the fixed term in terms of section 66(4)(a) and (b), along with the genuineness of that reason. It is arguable that a course in its second year of operation could not accurately be described as a new course. It is

unclear from the words of the agreement how the employment would end in the circumstances of a trialled course. Furthermore, it is unclear why the trialling of one course would provide a genuine reason for fixed term employment of one year when this course represented a small portion of the work performed by Ms Keam in her role as a lecturer and the University's evidence indicated an appropriate assessment and evaluation period for a new course would be three years. The written reasons do not refer to the budget constraint issue. There is an arguable case that the section 66(4)(a) and (b) obligations have not been met rendering Ms Keam's employment of indefinite duration.

[13] Ms Muir further submits that non-compliance with section 66 cannot render Ms Keam's employment of indefinite duration because sections 77G and 77H of the State Sector Act 1988 require that all appointments to permanent positions in the public sector be made on merit. An apparent conflict exists. It is arguable that in enacting section 66 of the Employment Relations Act 2000 and its 2004 amendments without express exemption to the public sector, that Parliament intended, where conflict between the provisions in question arose, that those earlier enactments would be read down in favour of the later.

[14] In relation to section 4(1A)(c) and whether an arguable case has been made out that the University has breached good faith obligations to Ms Keam to provide her with information and a chance to comment on information which may have an adverse impact on her continued employment. As Mr Cranney conceded this is an unsettled area of the law. Ms Muir submits this section cannot apply to this fact situation because this is a fixed term agreement and in such circumstances there was no genuine expectation of continued employment. Having found that an arguable case has been made out that Ms Keam's employment is of indefinite duration by operation of law it follows that an arguable case exists that section 4(1A)(c) would apply to such circumstances.

(ii) Damages adequate remedy?

[15] Ms Keam's area of expertise is New Zealand music and her PhD is to be conferred in May 2006. Since her employment with the University ended Ms Keam has not been able to find work in a similar field. She has averred that her reputation and ongoing areas of research are linked to her position within the School of Music.

[16] The proximity of dates to the substantive hearing and the disruption Ms Keam's reinstatement will cause the School of Music, and to the legitimate interests of third parties such as teachers and students, as averred by the University's witnesses, are also factors to be weighed.

[17] Teaching represents 40% of a lecturer's duties. The Easter break presents a two week teaching hiatus and falls between now and the substantive hearing dates. The appointee to the permanent position, to which Ms Keam was unsuccessful, is not due to take up her appointment until July 2006 when the second semester commences.

[18] Weighing all the factors it seems to me that in the event Ms Keam is successful in her substantive application damages cannot adequately compensate her for the dislocation from the institution which she has averred is important to the establishment and continuation of her reputation and research.

(iii) Balance of convenience?

[19] Ms Keam has averred that she is the main income earner in her household and supports her elderly father, husband and son. Since her last salary payment from the University she has not been able to find work in a similar field and has taken a temporary clerical assignment to support her family. Ms Keam avers that she does not receive an equivalent salary in this position and has had to borrow money to cover the shortfall in meeting her family's weekly outgoings.

[20] Though five of the seven courses Ms Keam taught last year are no longer taught, I do not

understand from the evidence that Ms Keam is unable to teach courses on the current curriculum. I note also that Ms Keam would have been offered the permanent position had the preferred candidate declined the offer. I take from that that the interviewing panel was confident she could teach this year's curriculum.

[21] In light of the parties respective resources, the professional issues facing Ms Keam if she remains outside the institution and the likelihood that the substantive matter will be determined by the time the new appointee is due to commence, the balance of convenience is tipped in favour of Ms Keam.

(iv) Overall justice?

[22] A key issue on this case is the conflict between the effect of section 66 to render employment of an indefinite duration in some circumstances and the State Sector Act obligations for public sector employer to make merit based appointments. Ms Keam first asserted her employment status as permanent in October 2005. It would not be in the interests of justice to allow an arguable failure to comply with section 66 obligations defeat this application when this dispute was live between the parties prior to the expiry of Ms Keam's employment agreement.

[23] The University says reinstatement is impractical because no position exists for Ms Keam; five of the seven courses she taught last year have gone from the curriculum and her permanent reinstatement is likely to create a redundancy situation. I have received no evidence that Ms Keam's position was tied to particular courses. The likelihood of permanent reinstatement and the possibility of a redundancy situation resulting is an important factor to be weighed. As stated above, this dispute has been live between the parties for some time. It must be assumed that steps have been taken mindful of this dispute and the possible consequences.

[24] I am of the view that the overall justice of the case favours Ms Keam.

Orders

[25] The University is ordered to reinstate Ms Keam to her employment as lecturer in the School of Music pending the determination by the Authority of Ms Keam's employment relationship problem or further order of the Authority.

[26] In relation to the teaching component of Ms Keam's position I am confident that the parties will be able to agree what teaching duties Ms Keam resumes. If agreement cannot be reached then the University is entitled to determine how reinstatement to the teaching function will occur, be that by actual teaching, garden leave or a mixture of both.

[27] I record that Ms Keam is bound by the undertaking as to damages she has given.

[28] Costs are reserved.

Marija Urlich
Member, Employment Relations Authority