

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 127
3019111**

BETWEEN PIRIHI KAMIZONA
 Applicant

AND NORSKE SKOG TASMAN
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Tim Oldfield, Counsel for Applicant
 Kylie Dunn, Counsel for Respondent

Investigation Meeting: 14 February 2018 at Rotorua

Submissions received: 7 & 14 March 2018 from Applicant and from Respondent

Determination: 26 April 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Pirihi Kamizona, claims that he has a personal grievance for unjustifiably discriminated against and/or unjustifiable disadvantage by the Respondent, Norske Skog Tasman Limited (Norske Skog).

[2] Mr Kamizona also claims that there has been a breach of:

- (a) The Collective Agreement by Norske Skog by a failure to select by a consensus in breach of the requirement to follow a standard process; and
- (b) Good faith by Norske Skog.

[3] Norske Skog denies that Mr Kamizona was unjustifiably discriminated or unjustifiably disadvantaged, or that it acted in breach of the Collective Agreement in respect of failing to follow clause 1.

[4] Norske Skog further denies that it acted in breach of good faith.

The issues

[5] The issues for determination are whether or not:

(a) Mr Kamizona was an employee of Norske Skog at the relevant times

If so whether or not:

(b) Mr Kamizona was unlawfully discriminated against by Norske Skog;

(c) Norske Skog breached the Collective Agreement by a failure to follow the standard process set out in clause 13 and/or select by consensus;

(d) There has been a breach of good faith on the part of Norske Skog;

Background facts

[6] Norske Skog operates a paper mill at Kawarau (the Mill). It is part of the Norske Skog group of companies and its main product is newsprint. Mr Kamizona commenced employment with Norske Skog on 13 January 1977 and was employed until 12 June 2015 when his employment was terminated for medical reasons.

[7] Following the termination of his employment Mr Kamizona was employed by Norske Skog from time to time on a series of fixed term engagements during the period 13 July 2015 until December 2016.

[8] Mr Kamizona was, during his full-time employment and thereafter, a member of the Pulp and Paper Workers Union (the Union).

[9] The Authority issued a written determination dated 23 February 2016 [2016] NZERA Auckland 26 ordering Mr Kamizona's reinstatement subject to certain conditions being met. In a later determination dated 23 February 2017 [2017] NZERA 51 Mr Kamizona was declined reinstatement on the basis that the conditions had not been met.

[10] During July 2016 the Union had written to Norske Skog asking that it consider appointing Mr Kamizona to a vacant position. The letter dated 18 July 2016 stated: "*The union would be prepared to waive the normal recruitment procedures and allow Kami to jump the queue so to speak, if he is to be appointed to the Finishing and Dispatch Operator role*".

[11] Norske Skog responded by letter dated 20 July 2016 noting its concerns as to Mr Kamizona's medical fitness to undertake the Finishing and Dispatch Operator role, but stated

that it was prepared to consider a job swap in a role in which Mr Kamizona had medical clearance and selection suitability, noting that two options could be explored: Facility Cleaner and Site Services Cover Person. The letter added:

Finally, given the concerns that Dr Black has expressed regarding Mr Kamizona's health, Norske Skog is only willing to agree to redeploy Mr Kamizona to another role on site if the parties can agree that the long term sick leave provisions of the collective agreement do not apply to Mr Kamizona.

[12] From 13 July 2015 Mr Kamizona was engaged in a number of fixed term engagements covering employees' absences in various positions which he was deemed fit to undertake, including as a Facility Cleaner, and as a Store person.

[13] On 24 February 2017 a permanent Facility Cleaner in the Site Services area of Norske Skog resigned, thereby giving rise to a vacancy for a permanent Facility Cleaner position.

[14] Norske Skog commenced a recruitment process for this role. During the interval between the permanent Facility Cleaner leaving and the successful applicant being appointed, Norske Skog employed Mr Eddie McCauley in a fixed term position to fill the role.

[15] Norske Skog advertised the permanent Facility Cleaner position on 9 March 2017. There were 13 applicants of which four were interviewed. Mr Kamizona was one of those who applied for the position and was selected for interview. The other three selected for interview were Mr McCauley, Ms Wowi Ioane and Ms Kerry Swinton. Ms Ioane and Ms Swinton had not previously been employed by Norske Skog, however, they had both worked on the site as contract cleaners.

[16] There is a current collective agreement between Norske Skog and The Pulp & Paper Industry Council of the Manufacturing & Construction Workers' Union (the Union) effective 12 October 2015 to 11 October 2018 (the Collective Agreement). The Collective Agreement coverage includes Site Services.

[17] Clause 13 of the Collective Agreement states:

13 Recruitment/promotion

13.1 For the recruitment or selection for promotion for a position, a standard process will be followed to select the best "person" for the position.

13.2 This agreement covers an amalgamation of employees from business areas of the Mill. When filling the vacancy, consideration of applications will be given in the following order:

1. The respective workgroup of the vacancy;
2. The domestic workgroup (as per the respective appendix);

3. Other permanent employees of Norske Skog Tasman;
 4. External applications.
- 13.3 ...
- 13.4 A selection panel will comprise of a management representative, a representative from the respective workgroup or in the paper machine a senior operative, an HR representative and a union representative.
- 13.5 Whilst it is the objective of this panel to appoint to the position through consensus, it is recognised the management representative retains the right to appoint to a position.

[18] Other relevant terms of the Collective Agreement:

12 Fixed term employees

- 12.1 Fixed term employees may be employed as and when required.
- 12.2 Fixed term employees will be covered by the terms and conditions provided for in this agreement while so employed excluding:
1. Redundancy compensation;
 2. Medical insurance;
 3. Death and disability insurance;
 4. Company superannuation;
 5. Long term sick leave.
- 12.3 This clause should be read in conjunction with provisions that may be set out in the respective domestic schedule:
1. Emergency response and security – Appendix A
 2. Paper machine and paper day services – Appendix B
 3. Site services – Appendix C.

[19] Appendix C of the Collective Agreement applies to Site Services and states at clause 7:

7. Fixed term employees

- 7.1 Fixed term employees will only be employed following the full utilisation of the Site Services Cover Person (SSCP).
- 7.2 Where it is anticipated that there will be a continuous absence of up to ten (10) days cover will be provided in the following order:
1. The Site Services Cover Position.
 2. Should the Site Services Cover Position not be available then a fixed term employee will be appointed.

7.3 Facility Cleaners

Where it is anticipated that there will be a continuous absence of a period in excess of two (2) days in the first instance the Site Services Cover Person will provide cover. Should the SSCP not be available, then a fixed term employee will be employed.

[20] Appendix C also set out the competencies for a Facility Cleaner as including:

- Company entry level qualifications
- Prior cleaner's knowledge and experience
- Competent in the use of Ramco
- Understanding of synergy reporting system
- Participating in key stakeholder meetings

[21] An optional competency is listed as a National Certificate Health and Safety Level 1.

[22] Mr Oldfield, on behalf of the Union wrote to Norske Skog on 10 March 2017 setting out its view that Mr Kamizona should have been appointed to the fixed term Facility Cleaner role when it became vacant in February 2017 and stating:

... In evidence to the Authority, Gaylene said, "*We did, however, make clear that we were willing to employ Mr Kamizona for roles which did not require driving, or did not present a health and safety issue*".

The union was therefore surprised to find out that a person other than Kami had been appointed as a Facility Cleaner on a fixed term basis".

The union does not consider the company is entitled to appoint a fixed-term employee.

Kami should be appointed to the role. He is qualified to perform the role and he is ready, willing and able to perform the role.

[23] Ms Dunn, on behalf of Norske Skog, responded on 15 March 2017 by email stating:

Norske Skog is not willing to directly appoint Mr Kamizona to the Facility Cleaner role. It has decided to go through a usual recruitment process and appoint the best candidate. Mr Kamizona is welcome to apply for the role. This complies with Norske Skog's obligations under clause 13 of the collective agreement which states:

- For the recruitment of a position a standard process will be followed to select the best person for the position; and
- While there is priority given to some categories of individuals, recently terminated ex-employees do not have a special priority for re-employment on site (unless they have been made redundant).

[24] Mr Phillips said that the Union considered that it had no option but to have Mr Kamizona apply for the Facility Cleaner vacancy, and he had done so.

Interview Process 2017

[25] In accordance with clause 13 of the Collective Agreement a selection panel was formed in respect of the Facility Cleaner position (the Panel). The Panel comprised:

- Mr Tane Phillips, the Union Secretary;
- Mr Steven Brine, at that time Business Performance Manager and covering the Site Service Manager role;
- Ms Maria Kaio, a workgroup representative; and
- Mr Mark Haslam, a HR representative.

[26] Ms Debra Lovett, Administrative Assistant, sat in on the interviews for the purposes of observation.

[27] On 3 April 2017 Mr Kamizona, Mr McCauley and Ms Wowi Ioane were interviewed by the Panel. On 5 April the Panel interviewed Ms Kerry Swinton.

[28] The interviewees were asked a standard set of questions. Mr Kamizona said that his interview had lasted for approximately one hour, and he felt he had been given a full opportunity to answer the questions asked by the Panel.

[29] Mr Haslam said that the Panel members completed a question sheet for each applicant. Mr Phillips said he had awarded each candidate a number against each question, but did not fill in any comments.

[30] Following the last interview there was a short discussion about the merits of the candidates. Mr Brine said he had asked the Panel members for their initial views and said that his preference was Ms Ioane; Ms Kaio and Mr Phillips preferred Mr Kamizona; and Mr Haslam said he had preferred Ms Swinton or Ms Ioane.

[31] Mr Brine said that Mr Phillips had said that the selection had been predetermined and as he (Mr Brine) had already decided whom to appoint, there was no point continuing the discussion, and he had left the meeting. At that point, the meeting had been adjourned.

[32] The Panel met again on 13 April 2017 to discuss the appointment. Mr Phillips said that he had sought legal advice and had attended the meeting as a result of that advice.

[33] Mr Phillips stated that there had been a discussion about the candidates, including the reasons why Mr Brine preferred Ms Ioane as a candidate.

[34] Ms Lovett said that there had been much discussion during the meeting. The scores allocated to each applicant had been compared and each Panel member had expressed their view, stating their preferences for the role and providing their reasons for their choice.

[35] However a consensus could not be reached, and Mr Brine had appointed Ms Ioane to the Facility Cleaner position.

Fixed Term Position

[36] On the day following his interview on 4 April 2017, Mr Kamizona said he was offered a fixed term role to cover the permanent Facility Cleaner vacancy.

[37] Mr Kamizona commenced in the fixed term position covering the Facility Cleaner role on 18 April 2017, and it was terminated in accordance with the agreed term in the fixed term employment agreement on 21 April 2017.

[38] Ms Ioane commenced in the position of permanent Facility Cleaner on 21 April 2017.

Determination

Was Mr Kamizona was an employee of Norske Skog at the relevant times?

[39] Mr Kamizona had been employed by Norske Skog from time to time as a fixed term employee on specific fixed term agreements, the last of which (prior to the fixed term employment which commenced on 18 April 2017 and terminated on 21 April 2017), ended on 21 December 2016.

[40] I find that Mr Kamizona was not an employee of Norske Skog once the fixed term employment expired at the date specified in each fixed term employment agreement.

[41] At the time of his interview for the Facility Cleaner position on 3 April 2017 I find that as the last fixed term agreement ended on 21 December 2016, Mr Kamizona was not an employee of Norske Skog.

[42] Mr Kamizona's evidence is that he was telephoned by Norske Skog and offered fixed term employment on 4 April 2017.

[43] Employees are defined in s 6 (1)(b)(ii) of the Employment Relations Act 2000 (the Act) as including: "*a person intending to work*".

Was Mr Kamizona a person intending to work during the recruitment process?

[44] Mr Mark Haslam's evidence under cross examination confirmed that his usual practice was to telephone Mr Kamizona to ascertain if he would be available to undertake the fixed term employment for the period it was required, and then prepare the fixed term employment agreement when his availability was confirmed.

[45] However Mr Haslam could not confirm whether or not he had telephoned Mr Kamizona on this occasion, and whilst Mr Kamizona stated in his written evidence that he had been offered the fixed term position commencing 18 April 2017 on 4 April 2017, he could not confirm the actual date although he recalled that he was away from his home during April 2017.

[46] The fixed term employment agreement offering Mr Kamizona fixed term employment in the period 18 to 21 April 2017 is dated 4 April 2017 and has been signed by Mr Haslam on 4 April 2017. A file note section indicates that a text exchange had taken place between Mr Haslam and Mr Kamizona, following which Mr Haslam had signed and dated the fixed term employment agreement on 4 April 2017.

[47] Mr Kamizona had signed and dated the fixed term employment agreement on 18 April 2017.

[48] A fixed term offer of employment is made pursuant to s 66 of the Act. Such an agreement must state in writing the way in which the employment will end and the reason for it ending in that way.¹

[49] However failure to comply with s 66(4) does not affect the validity of the fixed term employment agreement between the parties.²

[50] I find that it is probable that Mr Kamizona was telephoned and offered fixed term employment orally by Mr Haslam, and that acceptance was indicated verbally by Mr Kamizona on 4 April 2017, the date Mr Haslam signed and dated the fixed term employment agreement.

[51] I find that at the time Mr Kamizona applied for the Facility Cleaner vacancy and at the date of the interview on 3 April 2017, Mr Kamizona was neither an employee of Norske Skog nor 'a person intending to work' at Norske Skog.

[52] The interviews for the Facility Cleaner position concluded on 5 April, and the decision to appoint Ms Ioane was confirmed on 13 April 2017.

¹ S 66(4)(a) and (b) of the Act

² S 66(5) of the Act

[53] Accordingly although Mr Kamizona did not commence working in the fixed term position until 18 April 2017, I determine with effect from 4 April 2017 he was an employee of Norske Skog. That is, during the recruitment process which commenced on 4 April 2017 and concluded on 13 April 2017 by virtue of his having been ‘a person intending to work’.

Was Mr Kamizona was unlawfully discriminated against by Norske Skog?

[54] I have found that Mr Kamizona was an employee at the time of the recruitment process. By reason of his vision and renal impairments, I find that Mr Kamizona was a disabled person within the definition contained in the Human Rights Act 1993 (HRA) which includes physical disability or impairment and physical illness.³

[55] Section 104 of the Employment Relations Act 2000 (the Act) defines discrimination in employment. It states:

104 Discrimination

(1) For the purposes of section 103(1)(c), an employee is **discriminated against in that employee’s employment** if the employee’s employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or involvement in the activities of a union in terms of section 107,—

(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or

(c) retires that employee, or requires or causes that employee to retire or resign.

(2) For the purposes of this section, **detriment** includes anything that has a detrimental effect on the employee’s employment, job performance, or job satisfaction.

[56] The Facility Cleaner position became vacant after the incumbent resigned on 24 February 2017. Norske Skog commenced a recruitment process to fill the position on a permanent basis, in the interim employing Mr McCauley as a fixed term employee in the role.

³ HRA s 21(1)(h)(i) and (ii)

(a) *Mr Kamizona's fixed term employment*

[57] Mr McCauley was employed as a fixed term employee in the Facility Cleaner position until he was seconded to another department, and Mr Kamizona then worked in the fixed term Facility Cleaner position for the period of 18 to 21 April 2017.

[58] The terms and conditions of employment, conditions of work, and fringe benefits are set out in clause 12.2 of the Collective Agreement which states that:

12.2 Fixed term employees will be covered by the terms and conditions provided for in this Agreement while so employed excluding:

1. Redundancy compensation
2. Medical Insurance
3. Death and Disability Insurance
4. Company Superannuation
5. Long term sick leave

[59] Pursuant to s 104 (1)(a) of the Act I find that Mr Kamizona was offered the same terms and conditions of employment, conditions of work, and fringe benefits as would be offered or afforded to other fixed term employees who were: "*employed in the same or substantially similar circumstances*".

(b) *Mr Kamizona's participation in the early part of the recruitment process*

[60] Mr Kamizona applied for the Facility Cleaner position when it became available. There were 13 applicants for the Facility Cleaner position of which 4 were selected for interview, including Mr Kamizona.

[61] I find that Mr Kamizona was not discriminated against in terms of his disability during the selection for interview process, his application was accepted and he was one of the four applicants selected for interview out of a pool of 13 applicants.

[62] I find that Mr Kamizona was not discriminated against during the interview process, (i) he was offered the same opportunity for promotion or transfer pursuant to s 104 (1)(a) of the Act as Mr McCauley, the other internal applicant for the Facility Cleaner position, (ii) he was asked the same set of standard questions as were asked of all the other applicants, (iii) was provided with an interview of approximately the same length of time, and (iv) he confirmed he had a full opportunity to answer the questions he was asked by the Panel members.

[63] Thereafter the selection of the successful applicant for appointment was carried out in accordance with the Recruitment/Promotion process which is set out in clause 13 of the Collective Agreement, the purpose of which is to select the 'best person' for the role. This was the normal recruitment process as agreed between the Union and Norske Skog.

[64] I examine this issue more fully below. However I note that Mr Kamizona's application was measured against the same criteria as the other applicants who all met the required competencies set out in Appendix C of the Collective Agreement, and his interview was measured against the same standard questions and scoring system which formed the basis for discussion by the panel members in a normal recruitment process.

[65] I find that Mr Kamizona was not disadvantaged or dismissed as a result of his missing out on a fair opportunity for employment.

[66] In terms of s 104(1)(b) of the Act, I find that Mr Kamizona was not discriminated against by being dismissed from the fixed term employment on 21 April 2017.

[67] The fixed term employment agreement dated 4 April 2017 was stated in clause 3.1 as being for a fixed term from 18 April 2017 to 21 April 2017. Mr Kamizona had accepted the fixed term employment on the terms offered.

[68] Fixed term agreements expire by effluxion of time at the end of the term as set out in the fixed term employment agreement.

[69] I find that Mr Kamizona was not discriminated against by Norske Skog by being dismissed from his fixed term employment.

Did Norske Skog breach the Collective Agreement by a failure to follow the standard process contained in clause 13 and/or to select by consensus?

Breach of the Standard Process

a. The 'best person' for the job?

[70] Clause 13.1 of the Collective Agreement states:

For the recruitment or selection for promotion for a position, a standard process will be followed to select the 'best person' for the position.

[71] There is no definition of 'best person' in the Collective Agreement. However the objective was that the Panel would appoint to the position through consensus after the interviews were concluded.

Did Mr Kamizona fall within the first two categories of clause 13,2?

[72] Clause 13 of the Collective Agreement sets out at clause 13.2 that the standard process was to give consideration of applications in the following order: (i) the respective workgroup of the vacancy; (ii) the domestic workgroup; (iii) other permanent employees; and (iv) external applications.

[73] The evidence provided by Mr Brine and confirmed by Mr Phillips was that the standard process involved a 'shoulder tapping' exercise whereby permanent employees would be approached initially to ascertain whether or not he or she wanted to fill the position, and in the event of no existing employee presenting for the position, external candidates would be considered.

[74] At the relevant time, Mr Kamizona was an employee by virtue of the fact that I have found he was a 'person intending to work 'as a fixed term employee. I therefore turn to consider whether or not he fell within the first two categories of clause 13.2.

[75] Clause 12 of the Collective Agreement is relevant to fixed term employees and states at clause 12.1 that fixed term employees: "*may be employed as and when required.*"

[76] Mr Kamizona was offered the fixed term Facility Cleaner position because Mr McCauley, who had been undertaking the fixed term Facility Cleaner position, had been transferred to cover another position in Norske Skog.

[77] The successful candidate for the Facility Cleaner position had been selected but there was a need for the position to be filled to cover the hiatus between the previous incumbent having left Norske Skog and Ms Ioane commencing employment in the role.

[78] Mr Tane agreed when questioned at the Investigation Meeting that this was a situation in which the appointment of a fixed term employee would be practical and appropriate despite the embargo on permanent roles being filled on an ongoing basis by a number of rolling fixed term appointments.

[79] Each of the fixed term employment agreements for the period 13 July 2015 to December 2016, and the fixed term employment agreement provided to Mr Kamizona in April 2017, contained the statement:

The above offer does not constitute an offer of permanent employment with the Company; it is a fixed term position for the period specified only.

[80] Mr Kamizona had signed each fixed term employment agreements below that statement and above the statement which read:

I accept the terms of employment as set out in this letter of offer. I have read and understood these terms and I agree to be bound by them. In particular, I understand that I am to be employed on a fixed term basis and the reason my employment will finish at the end of the fixed term. I acknowledge that I have no expectation of ongoing employment after the expiry of the fixed term. I acknowledge that I have had the opportunity to take independent advice as to the meaning and effect of this agreement.

[81] I find that by so doing Mr Kamizona confirmed his understanding that fixed term employees were not permanent employees, nor was the employment which he accepted permanent employment.

[82] The word 'permanent' is not contained included in the first two categories of employees in clause 13.2. However clause 13.2 3. refers to: "*Other permanent employees of Norske Skog Tasman*".

[83] Examining the words '*other permanent*' objectively, I understand their plain meaning to (i) refer to permanent employees who do not fall within the first two groups; and (ii) by extension to indicate that the first two groups are also permanent employees.

[84] I find that a fixed term employee does not fall within the first two categories but is to be treated as falling within the fourth category and treated as an external applicant. Accordingly I find that Mr Kamizona's application did not fall to be considered within the first three categories of clause 31.2 of the Collective Agreement.

b. Did Mr Kamizona's fixed term employment breach the Collective Agreement in terms of SSCP cover?

[85] I now turn to consider whether or not Mr Kamizona's fixed term employment breached the terms of the Collective Agreement because his appointment arose in a situation in which the Facility Cleaner vacancy could not be covered by the SSCP.

[86] It was accepted that a vacancy due to a hiatus between an employee leaving and another being appointed could be covered by a fixed term employee.

[87] Clause 7.3 of Appendix C of the Collective Agreement states that if there is a continuous absence of a period of more than 2 days, the Site Services Cover Person will provide cover, but in the event that they are not available, a fixed term employees would be appointed.

[88] Clause 4 of Appendix C of the Collective Agreement contains relevant provisions relating to the Site Services Cover Position (SSCP). It sets out in clause 4.8 clause 4 of Appendix C that the SSCP will provide cover in a number of situations including sick leave, short notice leave and other emergencies.

[89] I observe that despite clause 4 of Appendix C, the SSCP could not cover each position in the event that a number of the situations set out in clause 4 occurred at the same time. In such a situation I consider it reasonable to assume that a similar practical approach would apply as appeared to have arisen in the situation in which the SSCP was not available to provide cover, thereby legitimising it.

[90] Moreover I find that Mr Kamizona was offered the fixed term employment agreement to cover the Facility Cleaner vacancy due to Mr McCauley, a fixed term employee, who had been covering that role no longer being able to continue in the fixed term employment.

[91] I do not find that Mr Kamizona's fixed term employment breached the Collective Agreement in terms of SSCP cover.

c. Was the Collective Agreement breached because of a lack of consensus?

[92] The standard process was to be applied to appoint the 'best person' for the position as set out in clause 13.1.

[93] Clause 13.5 stated that the objective of the Panel was to appoint by consensus. Consensus is defined in the Oxford Dictionary online as: "*a general agreement*". In drafting the Collective Agreement it appeared to have been envisioned that whilst the objective was to appoint by means of a general agreement, in the event that a general agreement could not be reached the management representative retained the right to appoint to the position.

[94] The evidence is that there was no consensus reached during the discussion following the final interview on 5 April 2017. After Mr Brine had asked the Panel members for their opinions of the applicants, Mr Phillips and Ms Kaio had expressed their strong preference for Mr Kamizona, and Mr Brine and Mr Haslam had expressed their preferences for Ms Ioane (Mr Brine) and either Ms Ioane or Ms Swinton (Mr Haslam).

[95] Any further discussion at that meeting had been curtailed when Mr Phillips stated his opinion that Mr Brine had predetermined the outcome of the selection process, and left the meeting.

[96] Mr Phillips had attended the second meeting on 13 April 2017; however his evidence was that he attended only on the advice of his legal advisors.

[97] During the meeting on 13 April 2017 Ms Lovett's evidence is that the applicant scores were compared and a good discussion took place concerning the Panel member's reasons for selecting the applicant he or she preferred.

[98] No consensus was reached during the meeting, and Mr Brine, as the management representative, appointed Ms Ioane.

[99] Clause 13.5 of the Collective Agreement required that the Panel appoint by consensus, but in the event that consensus could not be reached: “*the management representative retains the right to appoint to the position*”.

[100] I find that there had been discussion of the applicants’ suitability to be selected for the Facility Cleaner vacancy during the meetings on 5 April and 13 April 2017 as required pursuant to clause 13.5 of the Collective Agreement. No consensus had been reached. In the absence of consensus, the Collective Agreement stated at clause 13.5 that the management representative retained the right to appoint to the position, and Mr Brine had done so.

[101] I find no breach of the Collective Agreement due to a lack of consensus.

[102] I determine that Norske Skog did not breach the Collective Agreement by a failure to follow the standard process contained in clause 13 and/or to select by consensus.

Has there has been a breach of good faith on the part of Norske Skog?

[103] Mr Kamizona whilst not an employee at the commencement of the recruitment process I have found to have become an employee by virtue of being ‘a person intending to work’ during that process.

[104] As confirmed in *Idea Services Ltd (in stat man) v Barker*⁴ the good faith obligations between employee and employer do not continue past the termination of the employment relationship.

[105] Norske Skog were discussing the possibility of a job swap with Mr Kamizona provided he was fit and able to undertake the role with which the job swap was concerned, and gave evidence to that effect during the first investigation meeting in February 2016.

[106] In Ms Turpie’s statement of evidence at the second Authority investigation in February 2017 she stated that: “*we were willing to employ Mr Kamizona for a role which did not require driving, or did not present a health and safety risk.*”

[107] However Mr Kamizona was not an employee at the start of the recruitment process for the Facility Cleaner role and I find that there was no duty of good faith existing at that time.

⁴ *Idea services v Barker* [2012] 1 NZ EmpC 112 at [22]

[108] After the recruitment process commenced but before it concluded I have found that Mr Kamizona was intending to work as a fixed term employee.

[109] In *Hayden v Wellington Free Ambulance Service* Shaw J observed that a fixed term employee is owed a duty of good faith by the employer but: “*that obligation is limited to the employment relationship that they were in rather than the proposed relationship. It follows that no personal grievance can lie under the Act in circumstances where an existing employee unsuccessfully applies for a new position.*”⁵

[110] As Mr Kamizona was in a fixed term relationship and therefore an employee before the recruitment process concluded, I find that Norske Skog had no duty of good faith towards him in relation to the permanent Facility Cleaner role for which he had applied.

[111] I determine that there has been no breach of good faith on the part of Norske Skog.

Costs

[112] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

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

Eleanor Robinson
Member of the Employment Relations Authority

⁵ *Hayden v Wellington Free Ambulance Service* [2002] 1 ERNZ 399 at [30]