

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 356
3027832

BETWEEN PAUL LANGMAN
 Applicant

A N D BIRKENHEAD COLLEGE
 BOARD OF TRUSTEES
 Respondent

Member of Authority: Rachel Larmer

Representatives: Dzintra King, Counsel for Applicant
 Richard Harrison, Counsel for Respondent

Investigation Meeting: 23 July 2018 at Auckland

Submissions Received: 18 September 2018 from Applicant
 02 October 2018 from Respondent
 08 October 2018 from Applicant

Date of Determination: 15 November 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Langman claimed he had been unjustifiably disadvantaged, unjustifiably dismissed and that the Birkenhead College Board of Trustees (the Board of Trustees) had breached his employment agreement.

[2] The Board of Trustees denied Mr Langman's claims and said that its actions regarding Mr Langman's employment, and the ending of his employment, were justified.

Mr Langman's employment

[3] Mr Langman was employed in a full-time teaching position at Birkenhead College as a Technology Teacher from 31 January 2017 until 08 December 2017. The Board of Trustees believed Mr Langman had been employed for a valid fixed term engagement.

Fixed term engagement

[4] Mr Langman said he was told during his job interview that the position was a fixed term engagement. However Mr Langman said that Birkenhead College's Principal, Mr Waller, did not tell him (Mr Langman) the reasons for the fixed term, or the date his employment would end, when the verbal offer of employment was made by telephone.

[5] Mr Waller disputed that. He said he told Mr Langman the reasons for the fixed term, namely to enable a review of the needs of the Technology Department to be conducted during 2017. A renew was necessary due to the unexpected departure of a permanent teacher from the department, and the duration of the engagement, namely for the 2017 school year only.

[6] Mr Waller's evidence about that has been preferred because Mr Langman told the Authority that when he accepted the verbal offer of employment he was just glad to have a job and had hoped he would be asked to stay on. That answer indicated Mr Langman knew his employment was of limited duration, and that he would not necessarily be employed past the 2017 school year.

[7] Mr Langman also did not say or do anything in response to seeing the vacant position advertised in July 2017 that indicated he believed he had already been appointed to a permanent teaching position. Mr Langman also acknowledged to the Authority that he knew all permanent positions had to be advertised and that he had been approached for his fixed term role, which had not been advertised, because he had previously undertaken casual work at the College.

[8] Mr Langman accepted Mr Waller's verbal offer of employment when it was made to him on the telephone. The written appointment letter, provided after Mr Langman had accepted the verbal offer of employment and had already started work, stated that his employment would end on 08 December 2017.

[9] Section 66 of the Employment Relations Act (the Act) set out the limited and prescriptive circumstances in which an employer could employ an employee for a fixed term engagement only, that resulted in the employee's employment ending, by mutual agreement, on a specified date/period, event or project.

[10] The ending of a fixed term engagement, provided the employer had met all of the requirements of s66 of the Act, was not a dismissal because the employment ended by operation of the expiry of the fixed term and not because of a dismissal by the employer.

[11] The s66 requirements for fixed term employment are to be interpreted strictly because they represent a limit on an employee's ability to pursue a dismissal grievance related to the ending of their employment.

[12] Clause 3.2.3 of the Secondary Teachers' Collective Agreement (the STCA) expressly incorporated some of the requirements of s66 into the terms and conditions of Mr Langman's employment. Section 66(3)(c) and s66(4)-(6) of the Act were the parts of s66 that were not expressly incorporated into the STCA.

Non-compliance with s66 of the Act

[13] The Board of Trustees acknowledged from the outset that the fixed term appointment letter it gave Mr Langman on 01 February 2017 was not compliant with s66 of the Act.

[14] While the appointment letter stated that Mr Langman's employment would end on 08 December 2017, the reasons for it ending on that date or in that way were not recorded.

[15] Although Mr Langman was verbally advised that the reason for his fixed term engagement was to give the new Principal sufficient time to undertake an assessment of the needs of the Technology Department, that reason was not recorded in writing.

[16] That omission breached s66(4) of the Act and clause 3.2.2(i) of the STCA which required the reasons for the employment ending to be recorded in writing.

[17] The Board of Trustees therefore cannot rely on s66 of the Act to protect it from an unjustified dismissal personal grievance claim by Mr Langman because it failed to comply with all of the requirements of s66 of the Act.

Reasons for fixed term engagement

[18] The Board of Trustees said it had a genuine reason, based on reasonable grounds, for engaging Mr Langman on a fixed term basis during 2017. Mr Langman did not accept that.

[19] Mr Waller was a new Principal, having commenced his position at Birkenhead College on 07 November 2016. Mr Waller told the Authority that there was not sufficient time in advance of the 2017 school year for him to properly assess the staffing needs of the Technology Department, which had just unexpectedly received a resignation from the engineering teacher who had left Auckland.

[20] Mr Waller said that the Board of Trustees decided to appoint a fixed term teacher to cover classes in 2017 within the Technology Department while the College reviewed its options, student rolls, and course possibilities within the Technology Department during the course of 2017.

[21] Mr Waller explained that he was aware that new digital technologies were coming and that the College needed to develop those in order to progress its technology curriculum. He therefore anticipated changes were likely but Mr Waller explained that he was not in a position to be able to make decisions about those likely changes, in terms of which subjects would be taught, and what teaching requirements were needed, being so new to the College.

[22] Mr Waller therefore needed time to undertake a thorough review of what would best serve the College and its students from 2018 onwards.

[23] Mr Waller explained that it was intended that a review of the needs of the Technology Department would continue throughout the course of the year, with decisions being made about the curriculum and how the Technology Department could best be developed, which would in turn dictate the College's staffing requirements within the Technology Department for 2018.

[24] Mr Waller told the Authority that when he offered Mr Langman the fixed term engagement for 2017 he (Mr Waller) explained that the reason for the fixed term was to cover the engineering classes for 2017, which required a new teacher due to the departure of the engineering teacher who had left at the end of 2016.

Review of the Technology Department

[25] Mr Langman said he was not involved in, so did not have any input into, the review of the Technology Department's needs from 2018 onwards. The review was undertaken solely by Mr Waller.

[26] In the course of reviewing the Technology Department's needs, Mr Waller identified that in order to develop and grow the department's curriculum its graphics capability had to be developed. That involved bringing in more design capacity as well as offering electronics and robotics, in addition to the engineering pathway already offered by the department.

[27] Mr Waller told the Authority that these proposed changes to the Technology Department's offering were developments that had been recently noted by ERO as curriculum changes that the College needed to make within its Technology Department.

State Sector Act 1988

[28] The State Sector Act 1988 (SSA) requires appointments to permanent teaching positions to be based on merit after the permanent position had been appropriately advertised. This is to ensure that public sector appointments are made openly and on merit.¹

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

[30] Clause 3.2.2 of the STCA required permanent full time positions to be advertised in the Education Gazette 14 days before the closing date for applications.

Advertisement of permanent position

[31] On 27 July 2017 the permanent Technology Teacher position at Birkenhead College was advertised in the Education Gazette, with a closing date for expressions of interest of 30 August 2017.

[32] Mr Langman applied for the permanent position but was unsuccessful. On 15 September 2017, the same day the successful candidate accepted the position, Mr Langman was advised that he had been unsuccessful in obtaining the permanent teaching position.

¹ *Principal of Auckland College of Education v Hagg* (1997) ERNZ 116.

[33] Birkenhead College confirmed to Mr Langman that his employment would end at the end of the school year, on 08 December 2017, as per his engagement letter. The new Technology Teacher started work at the beginning of Term 1, 2018.

End date of employment “ineffective”

[34] On 22 September 2017 the New Zealand Post-Primary Teachers Association Incorporated (the PPTA) wrote to Mr Waller.

[35] The PPTA’s letter stated that:

- (a) Mr Langman was not given a reason for his fixed term engagement;
- (b) There was no legitimate reason for making the Technology Teacher position a fixed term appointment for the whole 2017 year, because the actual vacancy should have been advertised when the previous Technology Teacher resigned at the beginning of 2017;
- (c) The fixed term Technology Teacher position had not been advertised in the Education Gazette as required by clause 3.2.2(a)(iv) of the STCA;
- (d) Mr Langman was entitled to consider himself a permanent Technology Teacher because he was not given a reason for the fixed term and when he started work at the beginning of 2017 he was appointed to an actual vacancy.

[36] Mr Waller responded to the PPTA on 18 October 2017 acknowledging that the reason for the fixed term had not been recorded in writing, but that he had discussed it with Mr Langman before he accepted the offer of a fixed term engagement. Mr Waller confirmed that Mr Langman’s employment would be terminating on 08 December 2017.

[37] On 07 November 2017 the PPTA notified Mr Waller that Mr Langman had elected to treat the term ending his employment on 08 December 2017 as ineffective. The PPTA stated that Mr Langman’s employment was therefore permanent and it asked Mr Waller to confirm that.

[38] The PPTA also pointed out that regardless of Mr Langham having accepted a fixed term engagement, that did not remove the requirement on the Board of Trustees to provide written reasons for the fixed term to be both genuine and reasonable.

[39] The PPTA informed Birkenhead College that its notice of termination of Mr Langman's employment was ineffective pursuant to s66(6) of the Act. The PPTA also raised personal grievances for unjustified dismissal and unjustified disadvantage on Mr Langman's behalf and suggested mediation.

Remedies sought

[40] Mr Langman sought:

- (a) a declaration that his employment was permanent and that he "*remains an employee*" of Birkenhead College;
- (b) an order that the Board of Trustees "*comply with [Mr Langman's] ongoing employment.*"
- (c) Distress compensation;
- (d) Reimbursement of lost wages, including reimbursement of the employer's compulsory KiwiSaver contribution up to the date of this determination;
- (e) A penalty be imposed on Birkenhead College under s.133(1)(a) of the Act for breaches of Mr Langman's employment agreement;
- (f) That some or all of any penalty imposed, be paid to Mr Langman personally under s.136(2) of the Act.

Mr Langman's position

[41] In March 2018 Mr Langman secured a position as a Technology Technician working at Rangitoto College. This was a 25 hour per week position from 7:30 a.m. until 12:30 p.m. Monday to Friday. At the time the Authority held its investigation meeting, Mr Langman was on a 90 day trial period.

[42] Mr Langman told the Authority that he wanted to be reinstated to his position at Birkenhead College.

Board of Trustee's position

[43] Mr Langman's notice that he wished to treat the expiry date in his fixed term engagement as ineffective occurred after the permanent appointment process to the Technology Teacher position had been completed.

[44] The Board of Trustees said it could not have appointed Mr Langman to the permanent Technology Teacher position without effectively bypassing the appointments 'on merit' requirements in the SSA.

[45] The Board of Trustees said it had complied with the requirements of s.77F – 77H of the SSA and the provisions in clause 3.2 of the STCA by undertaking an open recruitment process, and appointing on merit, after advertising the permanent Technology Teacher position in the Education Gazette in July 2017.

[46] The Board of Trustees said that the SSA and STCA permanent appointment process had culminated in the successful candidate accepting the permanent Technology Teacher position on 15 September 2017, with a start date of Term 1, 2018.

[47] The Board of Trustees said that if it had not complied with ss77F – 77H of the SSA it would subsequently have been required to have undertaken that 'merit based' appointments process in order to validate any permanent Technology Teacher appointment.

[48] The Board of Trustees said it had appointed the person best suited to the permanent position, in compliance with the SSA and had advertised the permanent position as required by clause 3.2.2 of the STCA.

[49] The Board of Trustees said that its failure to comply with the requirements of s.66(4) of the Act could not validate an appointment that would otherwise have been unlawful and invalid, because it had not undertaken the statutory 'merits based appointment process' required under the SSA.

[50] The Board of Trustees disputed the Authority's power to make the declaration that Mr Langman sought because any such declaration would have conflicted with the SSA. It also stated that it would be inequitable if the Authority ordered that Mr Langman replace a permanent teacher who had been appointed on merit in compliance with the relevant provisions of the SSA and STCA.

[51] The Board of Trustees said that reinstatement was not practicable or reasonable.

[52] The Board of Trustees stated that the time for seeking such a direction was prior to, or at the time of, the appointment process for the permanent position and that the delay that had occurred in this case made any direction regarding Mr Langman's permanent employment and/or reinstatement impracticable and unreasonable.

[53] Birkenhead College received notice from the Ministry of Education in 2018 that it was over its staffing entitlement and therefore required approval from the Ministry to make any permanent appointments.

[54] The Ministry letter pointed out that Birkenhead College may need to manage a staffing reduction in 2019 if the staffing entitlement was not balanced against the actual role.

[55] The Board of Trustees pointed out that there were no other positions available and that the College was currently on notice that it was over-staffed and therefore unable to make permanent appointments without Ministry approval.

[56] It further identified that Mr Langman did not have the scope of qualifications to be able to meet the current curriculum requirements of the Technology Department. The Board of Trustees believed that reinstatement would be unworkable because it had a permanent Technology Teacher in place teaching students, while Mr Langman was engaged in alternative employment.

[57] The Board of Trustees said that there was no prospect of Mr Langman having had permanent employment at the completion of the fixed term engagement, if it had adopted an appointment process that had complied with the SSA and STCA.

Issues

[58] The following issues are to be determined:

- (a) Was Mr Langman unjustifiably disadvantaged in his employment?
- (b) If so what, if any, remedies should be awarded?
- (c) Was Mr Langman dismissed?
- (d) If so, was his dismissal justified?
- (e) If not what, if any, remedies should be awarded?

- (f) Did the Board of Trustees breach Mr Langman's employment agreement?
- (g) If so, should a penalty be imposed on the Board of Trustees for breaching an employment agreement?
- (h) If so, should some or all of any penalty that is imposed be paid to Mr Langman?
- (i) What if any costs should be awarded?

Was Mr Langman unjustifiably disadvantaged in his employment?

[59] Mr Langman's claim that he was unjustifiably disadvantaged by the Board of Trustees because it provided him with an appointment letter that did not meet the requirements of s66 of the Act, is also a key element of his unjustified dismissal claim.

[60] It is therefore not appropriate to address that as a discrete disadvantage grievance to avoid any suggestion of 'double dipping' or duplication of remedies arising from the same facts. Remedies are therefore not appropriate for this disadvantage grievance claim.

[61] In terms of the alleged disadvantage Mr Langman suffered as a result of the Board of Trustees treating him as a fixed term and not permanent employee while he was employed, there was insufficient evidence of Mr Langman having actually suffered any disadvantage. That aspect of his disadvantage grievance therefore does not succeed.

Was Mr Langman dismissed?

[62] The Board of Trustees' failure to comply with s66(4) of the Act meant it was unable to rely on the expiry of Mr Langman's fixed term engagement as having ended his employment.

[63] A dismissal is a sending away that occurs at the employer's initiative. That is what occurred here. Mr Langman wanted to continue his employment and had hoped to be the successful candidate in the external recruitment process for the permanent teaching position within the Technology Department.

[64] Mr Langman's employment ended as a result of a unilateral decision by the Board of Trustees to dismiss him, as per the advice it gave him on 15 September 2017 that his employment would end on 08 December 2017.

[65] Mr Langman's employment therefore ended because he was dismissed by the Board of Trustees.

[66] Mr Langman's argument that he is still a permanent employee, and has remained an employee of the Board of Trustees, since he elected to treat the expiry of his purported fixed term engagement as ineffective, does not succeed.

[67] It is factually incorrect to say that Mr Langman's employment has continued.

[68] Mr Langman's employment was clearly terminated. Both parties acted consistently with Mr Langman's employment having ended. Mr Langman received his final pay and obtained employment elsewhere. He has not done any work for, or been paid by, the Board of Trustees since his employment ended.

[69] It is a fiction to suggest Mr Langman's employment has in fact continued.

[70] It is also legally incorrect to say that Mr Langman's election to treat the expiry date of his fixed term as ineffective meant his employment did not end, or could not have been ended by the Board of Trustees.

[71] The effect of an employee's election in s66(6) of the Act is that an employer, such as the Board of Trustees, that had failed to comply with all of the stringent requirements involved in fixed term engagements was not protected from a dismissal grievance if it ended the employee's employment in circumstances where s66 did not apply.

[72] That is what happened here.

[73] The Board of Trustees could not rely on the expiry of the fixed term as having ended Mr Langman's employment. Instead it was the Board of Trustees' actions in informing Mr Langman that his employment would end on 08 December 2017 and then acting in accordance with that advice, notwithstanding his objections, that ended his employment by way of an actual dismissal.

[74] It is therefore the Board of Trustees' loss of immunity from facing unjustified dismissal proceedings that flows from its breach of s.66 of the Act, rather than Mr Langman's ability to insist the parties had remained in an ongoing the employment relationship, despite him having already been dismissed.

[75] Having discharged its onus of proving on the balance of probabilities that Mr Langman's employment ended because the Board of Trustees dismissed him, the onus passed to the Board of Trustees to justify its dismissal.

Was Mr Langman's dismissal justified?

Justification test

[76] Justification is to be objectively assessed in accordance with the justification test in s.103A of the Act.

[77] The justification test required the Authority to objectively determine whether the Board of Trustees' actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Langman was dismissed.²

[78] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith obligations in s.4(1)A of the Act and each of the four procedural fairness tests in s.103A(3) of the Act. Failure to do so is likely to undermine an employer's ability to to justify a dismissal.

Good faith obligations

[79] Section 4(1A)(c) of the Act required the Board of Trustees to provide Mr Langman with access to information relevant to its decision regarding the continuation of his employment, and an opportunity to comment on that information before it made a final decision regarding his ongoing employment.

[80] While Mr Langman was given an opportunity to apply for the permanent role, he was not given any specific information about the intended new position in advance of his application for it. Mr Langman saw the advertisement in the Education Gazette for the permanent Technology Department teacher role and applied for it himself.

² s.103A(2) of the Act.

[81] The Board of Trustees failed to establish on the balance of probabilities that occurred. Its failure to comply with s4(1A)(c) of the Act undermined its ability to justify Mr Langman's dismissal.

[82] The Board of Trustees proceeded on the basis that Mr Langman's employment would end by the operation of the expiry of his fixed term engagement. That was still its view at the time it gave Mr Langman notice of termination of his employment.

Procedural fairness

[83] The Board of Trustees also failed to discharge its onus of establishing it complied with any of the four procedural fairness tests in s103A(3) of the Act. That was no doubt due to its mistaken belief that Mr Langman's employment would automatically end when his fixed term engagement expired.

[84] These failures fundamentally undermined the Board of Trustees' ability to justify its dismissal of Mr Langman, because it failed to meet any of the statutory minimum procedural fairness standards before it dismissed Mr Langman.

Section 103A(5)

[85] Section 103A(5) of the Act does not preclude the Authority from finding that Mr Langman's dismissal was unjustified solely because of procedural defects. The process defects that occurred were not minor and they did result in Mr Langman being treated unfairly.

Substantive justification

[86] Although the Board of Trustees failed to establish that Mr Langman's dismissal was carried out in a procedurally fair manner, it was able to discharge its onus of establishing that Mr Langman's dismissal was substantively justified.

[87] The Board of Trustees needed to make a permanent appointment to the teaching position within the Technology Department. However it could only do that after complying with its statutory obligations to act independently and to appoint on merit, as prescribed by the SSA. The permanent position also had to be advertised in the Employment Gazette under clause 3.2 of the STCA.

[88] Failure to do so would have made any appointment that contravened the SSA and the STCA invalid should it have been challenged. Such a situation would

potentially have given rise to a scenario whereby the permanent position would still have had to have been advertised and an appointment made on merit in order to recify the invalidity of the appointment.

[89] The Authority was satisfied, from the detailed evidence it heard about the candidates and the recruitment process, that Mr Langman was not the best suited candidate for the permanent position.

[90] That is not in any way to be taken as an adverse comment on or judgment about Mr Langman as a teacher. It is simply a reflection of the objective fact that the experience levels between Mr Langman, as a new teacher, and the successful candidate who had extensive teaching experience, were not at all comparable.

[91] The Authority was satisfied that the best suited candidate was offered, and accepted, the permanent Technology Teacher position.

[92] So even if Mr Langman had elected to treat the expiry date in his offer of employment letter as invalid prior to the appointment of the successful candidate into the permanent position, the Board of Trustees would still have been required to have gone through that external recruitment process before a permanent appointment could be made, regardless of who the successful candidate was.

[93] That exercise would still have resulted in the appointment of the successful candidate and not of Mr Langman, due to the extensive differences in their teaching experience and expertise required in terms of the new subjects that needed to be taught within the Technology Department from 2018 onwards.

[94] The Board of Trustees therefore discharged its onus of proving on the balance of probabilities that its dismissal of Mr Langman was substantively justified, because SSA and clause 3.2 of the STCA meant it could only appoint the best candidate to the permanent teaching position. That is what did in fact occur.

What if any remedy should be awarded to Mr Langman?

Lost remuneration and reinstatement

[95] Having established that Mr Langman's dismissal was substantively justified but carried out in a procedurally unfair manner, he was restricted to an award of distress compensation as a remedy.

[96] The remedies of lost remuneration and reinstatement were not available to Mr Langman because the Authority was satisfied, even if a fair and proper process had been adopted, the Board of Trustees could not have appointed him to the permanent teaching position, because the best suited candidate had to be given the permanent position.

Distress compensation

[97] The Authority recognised that the loss of ongoing employment at Birkenhead College did have a detrimental effect on Mr Langman. It caused him stress and distress and he and his family faced adverse financial consequences.

[98] While it is to Mr Langman's credit that he managed to obtain alternative employment so quickly, the Authority recognised that was at a lower rate and for less hours than his employment at Birkenhead College.

[99] The Authority has also taken into account the adverse effects that Mr Langman said his dismissal from his teaching position with Birkenhead College had on his ability to obtain registration as a teacher.

[100] The Board of Trustees is ordered to pay Mr Langman \$10,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of his procedurally unjustified dismissal.

Did Birkenhead College breach Mr Langman's employment agreement?

[101] The Board of Trustees breached clause 3.2.2(f) of the STCA because it failed to specify in Mr Langman's appointment letter how his employment would end and the reason for it ending in that way.

Should a penalty be imposed on the Board of Trustees for breaching an employment agreement?

[102] This penalty claim involved the same facts as Mr Langman's unjustified dismissal claim. The Authority considered that the harm done by this breach of Mr Langman's employment agreement has already been appropriately addressed by the award of distress compensation to him.

[103] This breach of the employment agreement was inadvertent. The Board of Trustees has also now incurred significant financial consequences as a result of the

Authority's finding that Mr Langman's dismissal was carried out in a procedurally unfair manner.

[104] The Authority was satisfied the Board of Trustees was now aware of its obligations regarding its use of fixed term engagements so further breaches were unlikely.

[105] The Authority does not consider in these circumstances that a discrete penalty under s.133(1)(a) of the Act for a breach of an employment agreement is necessary for punishment or deterrent purposes.

[106] Mr Langman's penalty claim therefore does not succeed.

What if any costs should be awarded?

[107] The parties are encouraged to resolve costs by agreement. However, if that does not occur then Mr Langman has fourteen days within which to file a costs application with the Board of Trustees having fourteen days within which to respond.

[108] Any costs application must provide proof of the actual legal costs and disbursements incurred.

[109] The Authority is likely to adopt its notional daily tariff based approach to assessing costs. This matter involved a three hour investigation meeting so the notional starting point for assessing costs is \$2,250, being \$750 per hour pro rata of \$4,500 notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority