

Material background

[4] Ms Nelson applied for a Social Sciences teaching position at WGHS that had been advertised in the latter part of 2016, but she was unsuccessful at that time.

[5] On 16 December 2016 the Head of Department (HOD) of Social Science resigned unexpectedly. This resignation had a number of flow-on effects in terms of WGHS's staffing requirements, both long and short term for the Social Sciences Department for 2017.

[6] WGHS needed cover quickly so it offered Ms Nelson a fixed term engagement. It did not advertise the position it offered Ms Nelson because it was, at that time, a temporary role.

[7] On 21 January 2017 the Board of Trustees offered Ms Nelson her first fixed term engagement for Term 1, 2017. This offer was made by then Acting Principal, Ms Julie Saikkonen, because the new Principal, Ms Jane Stanley, had not commenced in her Principal role until the beginning of Term 2, 2017.

[8] On 27 January 2017 Ms Shona McRae was appointed Acting HOD of the Social Science Department and Ms Clare Moorhead was appointed Acting Teacher in Charge (TIC) of History for Term 1, 2017.

[9] On 02 June 2017 Ms McRae was offered the permanent HOD position, which she commenced on 24 July 2017. As HOD, Ms McRae then made decisions about staffing needs and curriculum offerings for the 2018 year and beyond.

Ms Nelson's fixed term engagements

[10] Ms Nelson is a secondary school teacher. In 2017 she was a provisionally certified first year teacher. Ms Nelson was initially offered a full time teaching fixed term engagement for Term 1, 2017 with WGHS.

[11] Ms Nelson's letter of appointment dated 17 January 2017 stated her employment was from 28 January to 13 April 2017 and that her employment was covered by the Secondary Teachers' Collective Agreement (the STCA).

[12] The January appointment letter stated that the reason for the fixed term was “*due to the unexpected resignation of the HOD of the Social Science department. We will reassess the status of the position towards the end of the term.*”

[13] Ms Nelson received a second appointment letter from the then Acting Principal, Moira Mallarkey, dated 21 March 2017, that stated:

Letter of offer – extension of fixed term position

Further to our letter of offer dated 17 January 2017, the Westlake Girls High School Board of Trustees is pleased to extend your fixed term position of a basic scale teacher until the end of Term 2, 2017. This offer supersedes any previous negotiations, communications and commitments whether written or oral. [...]

[14] Ms Nelson accepted that offer on 22 March.

[15] Ms Nelson received a third appointment letter from the Principal, Ms Stanley, dated 09 June 2017, that stated:

Letter of offer – extension of fixed term position

Further to our letter of offer dated 21 March 2017, the Westlake Girls High School Board of Trustees is pleased to extend your fixed term position of a basic scale teacher until the end of Term 4, 2017. This offer supersedes any previous negotiations, communications and commitments whether written or oral. [...]

[16] Ms Nelson accepted that offer on 13 June.

[17] The third ‘extension’ of Ms Nelson’s fixed term engagement meant that her employment was due to end on 08 December 2017, being the end of Term 4, 2017.

[18] Ms Nelson told the Authority that the June appointment letter just showed up in her pigeon hole at work. No explanation was given and Ms Nelson did not get a heads up that she would be offered another extension, but she was happy to accept it as she wanted to remain teaching at WGHS.

Permanent positions

[19] After the new Principal, Ms Stanley began work at the beginning of Term 2, she advertised and appointed to the permanent HOD Social Science position.

[20] Ms McRae, who had been acting in that role, was offered and accepted the permanent HOD Social Sciences position, after an open merits based appointment process.

[21] Once Ms McRae was in the permanent HOD position it was her responsibility to make decisions that affected staffing in the Social Sciences Department.

[22] Ms McRae identified two permanent teaching positions were needed from 2018 onwards and that decision was supported by the new Principal. These staffing decisions resulted in two permanent teaching positions in the Social Sciences Department being advertised on 18 June 2017 by the Board of Trustees in the Education Gazette.

[23] One permanent teaching position became available because the HOD Social Services position had been filled by an internal candidate and the other was to realign staffing in the department after a period of disruption arising from staffing absences for various different reasons, and due to staff resignations.

[24] Ms Nelson applied for a permanent Social Science teacher position on 23 June 2017. She was interviewed, along with four other internal candidates who were also all fixed term employees at WGHS.

[25] Ms Nelson had a number of complaints about the interview process but the Authority was satisfied, after hearing from all of the witnesses who were involved in that process, that it was a fair and proper merit based appointments process.

[26] On 28 June 2017 Ms Nelson was told that she had not been successful in obtaining one of the two permanent teaching positions and that, at that stage, her third fixed term engagement would not be extended past the end of Term 4, 2017.

[27] The permanent appointments within the Social Science team were announced to the Social Science Department on 30 July 2017.

[28] On 01 August 2017 the successful candidates were offered permanent employment, which they accepted.

[29] On 04 August 2017 there was a further meeting with Ms Nelson regarding her unsuccessful application for the two permanent teaching positions.

[30] On 09 August 2017 Ms Nelson was informed that an external candidate had been appointed to a fixed term position within the Social Sciences Department for 2018.

[31] Ms Nelson's hopes of obtaining employment at WGHS in 2018 were therefore dashed at that point and she took legal advice.

Election under s66(6) of the Act

[32] On 07 November 2017 Ms Nelson's representative wrote to Ms Stanley and raised a disadvantage grievance. Ms Nelson's representative also advised Ms Stanley that Ms Nelson had elected to treat the expiry of her fixed term engagement as ineffective, pursuant to s66(6) of the Act, thereby making her a "*permanent employee*".

[33] The Board of Trustees advised Ms Nelson on 16 November 2017 that there were no permanent teaching positions available for her, so her employment would still be ending at the end of Term 4, on 08 December 2017.

[34] That then occurred. Ms Nelson's employment at WGHS ended and she started teaching at a new school in 2018.

[35] Just to be clear, Ms Nelson's employment did not continue despite her election to treat the expiry date of her fixed term engagement being in effective. Her employment was therefore not ongoing, as she claimed.

Reasons for fixed term engagements

[36] The Board of Trustees employed Ms Nelson on a series of fixed term engagements so that it could use, what its witnesses described was, a "*stepped appointment process*."

[37] That process involved the Board of Trustees first appointing into permanent senior positions, then after the successful candidates had started work in their new positions, they assessed overall staffing requirements across the entire department and made decisions about what, if any, permanent and/or fixed term positions were required going forward.

[38] The Board of Trustees was not prepared to make decisions regarding permanent appointments when the Social Sciences Department was in a state of flux, as a result of changes to its overall staffing structure.

[39] Ms Saikkonen told the Authority it would have been poor management practice to do anything other than the stepped appointment process that the Board of Trustees used in this case. The Authority accepted her evidence about that.

[40] Ms Saikkonen told the Authority that she believed that the state of flux regarding the staffing requirements for the Social Science Department had been explained to Ms Nelson.

[41] That included explaining to Ms Nelson that her fixed term engagements would be reviewed towards the end of each engagement because WGHS had considerable uncertainty around the duration for which temporary cover would be required, because that was dependent on other staffing issues that at that point had not been resolved.

[42] The Board of Trustees told the Authority that there were a number of unknowns which could have influenced its staffing arrangements downstream, such as whether appointments into the permanent roles were internal or not and the corresponding vacancies that the internal appointments could have created, depending on who the successful candidates were.

[43] Ms Saikkonen explained that because WGHS' staffing needs situation remained in a state of flux towards the end of Term 1, 2017 that resulted in Ms Nelson being offered an "*extension*" of her fixed term through until the end of Term 2, 2017.

[44] The Board of Trustees said that the reason for the fixed term had not changed, because when the first extension was offered no appointment had been made to the HOD Social Sciences position nor was WGHS in a position to make staffing decisions at that time regarding appointments to the permanent positions it needed.

[45] Ms Stanley said that the Board of Trustees offered the third 'extension' to Ms Nelson because there were still a range of staffing issues that needed to be addressed, including the assessment and appointment process for the permanent positions in the Social Sciences Department.

[46] Ms Stanley said Ms Nelson was offered an extension to the end of the school year to provide students with continuity and to ensure Ms Nelson could complete "*advice and guidance*" for her first year of teaching.

Ms Nelson's claims

[47] Ms Nelson claimed that:

- (a) None of her fixed term engagements met the requirements of s.66 of the Employment Relations Act 2000 (“the Act”);
- (b) None of her fixed term engagements met the requirements of clause 3.2.3 of the STCA;
- (c) She was unjustifiably disadvantaged in her employment because she was given a series of fixed term engagements that did not comply with s66 of the Act or clause 3.2.3 of the STCA;
- (d) She was unjustifiably dismissed on 08 December 2017;
- (e) The Board of Trustees breached s66 of the Act;
- (f) The Board of Trustees breached clause 3.2.3 of the STCA;
- (g) A penalty should be imposed on the Board of Trustees for breaching her employment agreement;
- (h) Some or all of any penalty that may be imposed should be paid to her instead of the Crown;
- (i) Her employment was permanent;
- (j) She has remained an employee of the Board of Trustees, and sought a declaration from the Authority to that effect.

[48] The Board of Trustees said the original fixed term engagement, commenced on 28 January 2017, did meet the requirements of s.66 of the Act.

[49] It further stated that the first s66 compliant fixed term engagement was subject to extensions on 21 March and 09 June 2017, on the same terms and conditions as the original fixed term engagement, so the requirements of s66 had also been met for those engagements.

[50] The Board of Trustees said that in accordance with its obligations under the STCA it advertised the two permanent positions in the Education Gazette and that pursuant to the requirements of ss77F – 77H of the State Sector Act 1988 (the SSA) it made merit based appointments of the two most suitably qualified candidates to the permanent positions, after an open recruitment process.

Issues

[51] The following issues are to be determined:

- (a) Was Ms Nelson unjustifiably disadvantaged in her employment?
- (b) If so what, if any, remedies should be awarded?
- (c) Was Ms Nelson dismissed?
- (d) If so, was her dismissal justified?
- (e) If not what, if any, remedies should be awarded?
- (f) Did the Board of Trustees breach Ms Nelson'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 Ms Nelson?
- (i) What, if any, costs should be awarded?

Was Ms Nelson unjustifiably disadvantaged in her employment?

[52] Ms Nelson claimed she was unjustifiably disadvantaged by the Board of Trustees because it gave her a series of fixed term engagements that did not comply with s66 of the Act or clause 3.2.3 of the STCA.

[53] Ms Nelson said she was disadvantaged because:

- (a) The fixed term engagements generated insecurity of employment; and
- (b) She was unable to access STCA terms and conditions that were only available to permanent staff.

[54] Ms Nelson was offered and accepted what both parties thought, at the time of each engagement, was fixed term employment. The Authority therefore does not accept that she was disadvantaged by insecurity of employment in those circumstances.

[55] There was also no evidence from Ms Nelson that she had actually wanted or needed to access any of the terms or conditions that applied to permanent employees only. The Authority is therefore not satisfied she was actually disadvantaged.

[56] Even if Ms Nelson had been unjustifiably disadvantaged, her grievances related to the same set of facts that gave rise to her dismissal grievance. It would not have been appropriate to award her duplicated remedies for disadvantage and dismissal grievances that relied on the same facts.

[57] Ms Nelson's disadvantage grievance claims do not succeed.

Was Ms Nelson dismissed?

[58] A dismissal is a sending away that occurs at an employer's initiative. The ending of a fixed term engagement, that met the requirements of s.66 of the Act, is not a dismissal because the employment ends by operation of the expiry fixed term.

[59] Section 66 of the Act sets out limited and prescriptive circumstances in which an employer can rely on the expiry of a fixed term as ending the employment relationship, without that amounting to a dismissal in law.

[60] Failure to meet all of the requirements of s66 meant an employer could not rely on the expiry of the fixed term to end the employment, if the employee had elected to treat the expiry term as "*ineffective*".¹

[61] The Authority was satisfied that the Board of Trustees had genuine reasons, based on reasonable grounds, for using the first fixed term engagement when it employed Ms Nelson.

[62] However the Board of Trustees' reasons were not fully or accurately recorded in the first appointment letter. That breached s66(4) of the Act because Ms Nelson was not properly advised of the reasons for her employment ending.

[63] Even if the Authority was wrong about that, the second and third appointment letters did not record the reasons for Ms Nelson's employment ending, so they also breached s66(4) of the Act.

¹ Section 66(6) of the Act.

[64] The express reference in the second and third appointment letters to the fact that they superceded any previous negotiations, communications or commitments, whether written or oral, meant that the terms recorded in the first appointment letter did not apply to Ms Nelson's subsequent engagements.

[65] The practical effect of recording a further offer of employment in this way meant that it was a stand-alone offer of employment which superseded all/any previous offers of employment. To hold otherwise would have rendered those clear and plain words null and void.

[66] While it would have been open to the Board of Trustees to have entered into a variation of the first fixed term engagement by substituting a different expiry date for the fixed term, it did not do so.

[67] The Authority is required to interpret the contractual arrangement that the parties did in fact enter into, not what they may have thought they were entering into, or what they may have wished they had entered into.

[68] The second and third fixed term engagements did not meet the requirements of the Act because they did not record the reasons for the fixed term nature of Ms Nelson's engagement or the way in which her employment would end or the reasons for it ending in that way.

[69] Ms Nelson was therefore entitled under s66(6) of the Act to elect to treat the expiry date in her third appointment letter as ineffective, and she did so.

Effect of s66(6) election

[70] That election did not make Ms Nelson a permanent employee, as she has stated. It just mean that the Board of Trustees was not protected from unjustified dismissal proceedings for its decision to unilaterally end her employment on 08 December 2017.

[71] The failure by the Board of Trustees to meet all of the prescriptive requirements in s.66 of the Act meant it actually dismissed Ms Nelson when it ended her employment on 08 December 2017, contrary to her stated wish to remain in permanent employment.

[72] That was a unilateral termination of the employment relationship by the Board of Trustees, so it was a dismissal, because Ms Nelson was sent away at her employer's sole initiative.

[73] Ms Nelson established on the balance of probabilities that her employment ended because she was dismissed. It did not end by operation of the expiry of a valid fixed term engagement.

[74] The onus then passed to the Board of Trustees to justify her dismissal.

Was Ms Nelson's dismissal justified?

Justification test

[75] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This required the Authority to objectively assess 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 it dismissed Ms Nelson.²

[76] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith obligations in s.4(1A) of the Act and each of the four procedural fairness tests set out in s.103A(3) of the Act.

[77] Failure to do so was likely to fundamentally undermine an employer's ability to justify its dismissal and/or other actions.

Good faith obligations

[78] Section 4(1A)(c) of the Act required the Board of Trustees to provide Ms Nelson with access to information relevant to its decision about her ongoing employment and an opportunity to respond to that information before she was dismissed.

[79] That did not occur.

[80] While Ms Nelson was aware that two permanent roles were being advertised, and she did apply for those, that occurred on the basis that she was a fixed term

² s.103A(2) of the Act.

employee, rather than a permanent employee whose ongoing employment was in jeopardy.

[81] That breached s.4(1A)(c) of the Act and was unfair to Ms Nelson.

Procedural fairness tests

[82] The Board of Trustees also failed to discharge its onus of establishing it complied with any of the four procedural fairness tests in s.103A(3) of the Act.

[83] That was no doubt due to its mistaken belief that Ms Nelson's employment would automatically end when her third fixed term engagement expired on 08 December 2017.

[84] However these failures fundamentally undermined the Board of Trustees' ability to establish that its dismissal of Ms Nelson was carried out in a procedurally fair manner, because it failed to meet any of the statutory minimum procedural fairness standards before it dismissed her.

[85] The breaches occurred because the Board of Trustees believed it was running a merit based open recruitment process in accordance with its obligations under the SSA and STCA, as opposed to believing it was actually (in fact) dismissing one of its employees.

[86] Because Ms Nelson's dismissal was not carried out in a procedurally fair manner, the Authority concluded that it was procedurally unjustified.

Section 103A(5) of the Act

[87] Section 103A(5) of the Act does not preclude the Authority from finding that Ms Nelson's dismissal was unjustified solely because of procedural defects.

[88] The process defects that occurred were not minor and they did result in Ms Nelson being treated unfairly.

Substantive justification

[89] Ms Nelson identified a number of issues she had with the recruitment process and in particular with the assessment of her skills and expertise and/or willingness to

undertake different teaching obligations that were required in the Social Sciences Department going forward as a result of an assessment of the school's needs for 2018.

[90] The Authority does not uphold these criticisms. The recruitment process was done fairly and reasonably and the Authority was satisfied merit based appointments were made, as required by ss77H-77G of the SSA.

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

[92] The Authority was satisfied that a fair and proper process would still have resulted in Ms Nelson's dismissal, because the SSA required it to make merit based appointments into permanent teaching positions.

[93] Ms Nelson had been engaged as a temporary (fixed term) employee so the position she filled had not been advertised. Her appointment therefore had not meet the requirements for permanent employment as required under the STCA or the SSA.

[94] Once the Board of Trustees identified it needed two permanent teaching positions in 2018, it had to advertise those permanent positions in accordance with clause 3.2.2 of the STCA the s77H of the SSA. It then had to appoint on merit, in accordance with s77G of the SSA.

[95] That is what occurred.

[96] The permanent positions were advertised and merit appointments were made.

[97] Ms Nelson had a fair opportunity to fully engage in the external recruitment process. However a fair and reasonable, and objectively justifiable, decision was made that there were better qualified and more experienced candidates than Ms Nelson.

[98] That is not an adverse reflection on Ms Nelson's skills as a teacher but it simply reflected the reality that because she was a first year teacher, other candidates understandably had much greater experience and proven expertise than she did.

[99] Ms Nelson was still in her first year of teaching, while other more experienced candidates were not.

[100] The difficulty that the Board of Trustees faced is that even if it had wanted to automatically make Ms Nelson a permanent employee, as she wanted, it could not have done so without breaching the SSA and the STCA.

[101] Automatically appointing Ms Nelson to a permanent position in such circumstances would have resulted in an invalid appointment, that could, in accordance with public and/or employment law, have been challenged. That outcome was obviously not in anyone's best interests.

[102] 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 rectify the invalidity of an appointment that contravened the SSA and STCA.

[103] This situation meant that although there were clearly serious defects in terms of the Board of Trustees' failure to comply with all of the requirements of s.66 of the Act, those defects could not in these circumstances have lawfully resulted in Ms Nelson automatically becoming a permanent teacher from 2018 onward.

[104] So even if Ms Nelson had elected to treat the expiry date in her third fixed term engagement appointment letter as ineffective before the two successful candidates were offered and accepted the permanent positions,³ that would and could not have resulted in Ms Nelson automatically becoming a permanent employee.

[105] Ms Nelson could/would still have been legally required to have undergone an open merits based recruitment process, and given her limited teaching experience, the other successful candidates would still have had to have been appointed over Ms Nelson.

[106] The Board of Trustees therefore discharged its onus of proving on the balance of probabilities that, in all of the circumstances, its dismissal of Ms Nelson was substantively justified.

Outcome

[107] Although the Board of Trustees' dismissal of Ms Nelson was substantively justified, it was carried out in a procedurally unfair manner.

³ Which did not in fact occur.

What if any remedies should be awarded?*Lost remuneration and reinstatement*

[108] Given that Ms Nelson's dismissal was substantively justified she was not entitled to lost remuneration or reinstatement. Her remedy was therefore restricted to distress compensation.

Distress compensation

[109] Although Ms Nelson was employed during 2018 on a fixed term engagement with another school, she still gave evidence regarding the distress she suffered as a result of her procedurally unjustified dismissal. Her clear preference was to have remained working at WGHS.

[110] The Board of Trustees is ordered to pay Ms Nelson \$10,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she suffered as a result of her unjustified dismissal.

Did the Board of Trustees breach Ms Nelson's employment agreement?

[111] The Board of Trustees breached clause 3.2.2(f) of the STCA because it failed to specify in Ms Nelson's fixed term appointment letters how her employment would end and the reasons for it ending in that way.

Should a penalty be imposed on the Board of Trustees for breaching Ms Nelson's employment agreement?

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

[113] This was an inadvertent breach. The Board of Trustees incurred significant financial consequences as a result of the Authority's finding that Ms Nelson's dismissal was carried out in a procedurally unfair manner.

[114] 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.

[115] 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, deterrent purposes or overall public interest purposes.

[116] The Authority declines to exercise its discretion to impose a penalty on the Board of Trustees, so Ms Nelson's penalty claim does not succeed.

What if any costs should be awarded?

[117] The parties are encouraged to resolve costs by agreement.

[118] However, if that is not possible then Ms Nelson has fourteen days from the date of this determination within which to file a costs application. Proof of actual costs and disbursements incurred will be required in support of any costs application.

[119] The Board of Trustees then has fourteen days from the service of Ms Nelson's costs submissions within which to respond.

[120] The Authority is likely to adopt its usual notional daily tariff based approach to costs, on a pro rata basis to reflect the actual time involved in this investigation meeting.

[121] The parties are therefore invited to identify any factors which they say should result in the notional daily tariff being adjusted to reflect the particular circumstances of this case.

Rachel Larmer
Member of the Employment Relations Authority