

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Saint Kentigern Teachers Association (Applicant)

AND Saint Kentigern Trust Board (Respondent)

REPRESENTATIVES Simon Mitchell, Counsel for Applicant
Richard Harrison, Counsel for Respondent

MEMBER OF AUTHORITY Alastair Dumbleton

INVESTIGATION MEETING 3 May 2005

DATE OF DETERMINATION 6 May 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The dispute referred to the Authority is about the lawfulness of certain employment arrangements that have been made from time to time between an employer, the Saint Kentigern College Trust Board, and teachers who are employed at the College and who are members of the Saint Kentigern Teachers Association.

[2] The Association is a registered union and has negotiated with the Board a collective employment agreement covering its members and their teaching work.

[3] The Board and the Association have not been able to resolve the dispute in mediation undertaken by them.

[4] The dispute is about whether the Employment Relations Act 2000 and also the collective agreement, have been breached by the employment arrangements in question. Under those arrangements, for a fixed term teachers are engaged in management positions and are paid for that particular work. The engagement and the work are additional to the core teaching which is carried out under an employment agreement that does not have a fixed term.

[5] The Association contends that the engagement is under a separate employment agreement and that the fixed term attached to that agreement infringes s.66 of the Act. Under that provision fixed term employment is permitted but only where the employer has "genuine reasons based on reasonable grounds" for stipulating that the employment will end at the close of a specified period.

[6] The employer College Board contends that the arrangements have not been made under a fixed term employment agreement and are therefore not subject to s.66 of the Act at all. The Board contends that so far as this case is concerned the only employment entered into is of permanent

duration under the collective agreement. Further it contends that the arrangements are the subject of an express term of that collective agreement.

[7] Alternatively the Board contends that if it has entered into fixed term employment it had genuine reasons based on reasonable grounds for doing so. This is disputed by the Association which argues that the positions made the subject of fixed term employment continue in existence upon expiry of the fixed term and there is nothing in respect of the positions themselves that could justify the fixed term.

[8] The Association acknowledges that the arrangements in question do provide its members with an opportunity for career advancement by acquiring new skills. It submits however that notwithstanding the benefits offered by the arrangements, they are not legally permitted and the Board is required to desist from entering into them.

Mr Cowie's letter from the Head

[9] The arrangements in question in this case are well illustrated by the letter dated 9 October 2002 written by the Executive Head of the College, Mr Warren Peat, to a teacher, Mr Malcolm Cowie. Similar letters have been written to other teachers over the last few years since 1997 if not earlier. When the letter was written Mr Cowie was already permanently employed on the staff of the College, and he remains so.

[10] In the letter Mr Peat offered Mr Cowie the position of Head of a particular College House. The position was expressed to be for a "fixed term" of three years after which it was to be re-advertised. Mr Cowie was advised that he should have no expectation of continuation in the position after three years, although he was also advised that he could re-apply for it when it was re-advertised.

[11] The letter also advised Mr Cowie that the allowance for the position offered was two "management units". Under the parties' collective agreement currently in force, a management unit is something that may be "awarded" by the Head to teachers "who undertake specific management tasks". A single unit currently has a value of \$3,300 a year and multiple units can be awarded. Mr Cowie was also advised of a requirement for him to teach a certain number of periods in a 10 day cycle. This apparently reflects an adjustment in his teaching duties necessary to accommodate the management duties required of the Head of House position offered to him.

[12] Finally in the letter Mr Cowie was requested to confirm in writing his "acceptance" of Mr Peats "offer".

[13] Mr Cowie accepted and commenced the Head of House position as offered while also continuing his teaching duties, although at a reduced level. Although the three year term of it has now expired the parties have agreed to suspend re-advertising and making a further appointment to the position, until the dispute before the Authority has been resolved.

Intention to create an employment agreement?

[14] From the terminology used in it, the letter appears to evidence an intention by the College to enter into contractual relations with Mr Cowie in respect of his employment as Head of House. A position is offered which he is invited to accept and to receive remuneration or reward for in return for the performance of its duties. The position is expressed to be a distinct one separate from the teaching position. This is the plain meaning of the first sentence of the letter, "In addition to your tenured teaching position, I ...offer you the position of Head of Hamilton House...." It seems

unlikely that the word “position” has been used with two different meanings in the same sentence.

[15] One position plus one position mathematically equals two positions of employment in respect of Mr Cowie and the College, with one of those positions expressed to be for a fixed term.

The collective agreement

[16] I find that the arrangements detailed in the letter to Mr Cowie at the time it was written were available under the Collective Agreement. At clause 8.4 of the remuneration section the following term of employment for teachers such as Mr Cowie is provided;

At the discretion of the Headmaster, management unit(s) (M units) at the State rate may be awarded to teachers who undertake specific management tasks. Multiple or part units may be awarded where appropriate.

[17] I find that a breach of the collective agreement would occur if the Board and any teacher belonging to the Association were to enter into an individual employment agreement in respect of the work and remuneration covered by clause 8.4. Such an agreement would breach the coverage provisions of clause 1.2 of the collective agreement. Arguably such an individual agreement in tandem with the collective would also be superfluous, ineffective and unenforceable, as the collective agreement had already provided the legal foundation.

[18] I conclude that Mr Peat could not have intended to enter into a tandem individual employment agreement in relation to the Head of House management tasks undertaken by Mr Cowie, although the words of his letter might have been better chosen to avoid giving any impression that that was his intention.

[19] Earlier letters including some written by a previous Head show that although “offer”, “acceptance”, “remuneration” and “position” were used in respect of the Head of House role, these words were simply consistent with a formal process of selection by an employer of an employee who is to undertake additional duties in return for higher pay. The formalities are extended to the recording of the arrangements in writing but without making them the subject of a separate contract.

[20] Although in one case (F5 Dean) a job description was provided it was expressed to be additional to the generic job description of a teacher at the College.

[21] I conclude that Mr Cowie has only one contractual position of employment, being that of a teacher at the College. However in the course of performing that he has undertaken additional duties or responsibilities for which he is paid over and above his salary for core teaching work. This is an arrangement provided for by the collective agreement which covers and binds him. The employment agreement is not for a fixed term and therefore s.66 of the Act has no application.

[22] However the additional responsibilities are for a finite period, or fixed term. Clause 8.4 of the collective agreement is silent as to whether such arrangements may be for a fixed term, but it would seem a reasonable inference that they can be, so as to suit the requirements of the “specific” management task. A term permitting this can probably be implied into the agreement.

Variation of collective agreement

[23] The Board and the Association are also able to vary the collective agreement, but whether it is necessary for them to do so in this case is a matter I would need to investigate further with the parties before giving any final determination.

Genuine reasons based on reasonable grounds?

[24] Although it becomes academic in view of my conclusion, I do not consider this requirement in relation to lawful fixed term employment would have been met in this case if the arrangements had fallen under s.66 of the Act. While potentially there is wide scope under the Act for what may constitute “genuine reasons based on reasonable grounds,” it seems that these reasons and grounds will most likely spring from the inherent nature of the position itself rather than from external factors such as enabling the benefits of the position to be experienced more widely and frequently than may occur when one person is permanently appointed to it.

[25] There is nothing about the Head of House position in itself that raises the need or desirability for it to be fixed term. There is no dispute however that the Board genuinely would like to help as many teachers as possible to advance their careers by providing an opportunity for them to gain experience in performing management functions.

Determination

[26] I conclude that s.66 of the Act has no application in the circumstances, as Mr Cowie’s one and only employment agreement is not for a fixed term but provides him with permanent tenure. A breach of the collective agreement would have occurred if the arrangements in question should have been made the subject of a variation of the agreement to be consented to by the Association. I note that no remedy has been sought for the contended breach. However I reserve the right to the parties to present further argument on this point if they wish.

A Dumbleton
Member of Employment Relations Authority