

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 255
5394451

BETWEEN DEAN WILLIAMSON
 Applicant

A N D ST GEORGE INSTITUTE OF
 LEARNING
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in Person
 Stephen Bayldon, Director of Studies for Respondent

Investigation Meeting: 19 March 2013, resumed on 5 June 2013

Date of Determination: 17 June 2013

DETERMINATION OF THE AUTHORITY

- A. Mr Williamson was employed by St George Institute of Learning he was not a contractor.**
- B. Mr Williamson was unjustifiably dismissed.**
- C. St George is ordered to pay Mr Williamson the sum of \$1677.24 (nett)lost remuneration and to reimburse Mr Williamson the filing fee of \$71.56.**
- D. Costs are to lie where they fall.**

Employment relationship problem

[1] St George Institute of Learning (“St George”) is a registered language school for international adult students.¹

[2] Mr Dean Williamson is an accredited English teacher². From late July 2011 until early September 2011, Mr Williamson taught English at St George in Auckland.

¹ www.stgeorge.ac.nz

² International Teacher of English for Speakers of Other Languages Training Centre, Auckland, New Zealand

[3] St George and UNITE Union (“the Union”) were parties to a collective agreement, the term of which was from 1 April 2010 to 1 April 2011 (“the Collective”). The Collective applied to employees of St George who were members of the Union. At the time Mr Williamson was teaching at the school, the Collective had expired and negotiations between St George and the Union for a new Collective had stalled. St George employees to whom the Collective applied continued to be employed on individual employment agreements based on the expired Collective.

[4] Mr Williamson says he was appointed by St George to teach English for a fixed term period but he did not know whether he was a contractor or an employee. In mid August 2011, Mr Williamson met with Mr John Minto, an organiser with the Union and was told by Mr Minto that his “*contractor agreement*” with St George was unlawful and he was an employee covered by the terms and conditions contained in the Collective. Mr Williamson also says that during the fixed term period St George requested he stay on and teach permanently.

[5] Mr Williamson says his employment was discontinued on 2 September 2011 by St George and he claims this amounted to an unjustifiable dismissal. Mr Williamson seeks reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings he says he has suffered.

[6] St George says Mr Williamson was contracted by it to provide language teaching services for a short fixed period of time to fulfil a specific need. St George says that for just over 5 weeks between 25 July and 2 September there was an overlap of students. A new group of Korean students sponsored by the Korean Government required teaching services. Because this group arrived before the departure of other groups of students there was a temporary overlap. St George needed a language teacher to assist with the increased workload during that short time. St George believed Mr Williamson was an independent contractor, not an employee.

[7] St George says Mr Williamson agreed to the independent contract on that basis and denies offering Mr Williamson on going permanent work. St George says Mr Minto queried Mr Williamson’s contractor status and following discussions with him it was agreed that Mr Williamson’s employment was to be covered by the terms of the Collective but as a fixed term employee. When the work Mr Williamson was employed to perform finished so did Mr Williamson’s employment. St George denies Mr Williamson’s claim of unjustified dismissal.

Issues

[8] The Authority must determine the following issues:

- (a) Was Mr Williamson an employee or a contractor?
- (b) If Mr Williamson was an employee, was he employed for a fixed term period?
- (c) If Mr Williamson was employed for a fixed term, did St George comply with s.66 of the Employment Relations Act (“the Act”)?
- (d) Was Mr Williamson unjustifiably dismissed?

Issue One

Was Mr Williamson an employee or a contractor?

[9] On 22 July 2011 the parties entered into a written “*Agreement for Services*” (“the Agreement”) commencing on 25 July 2011 and concluding on 2 September 2011. The agreement describes Mr Williamson as a “*contractor*” and St George as “*the client*”.

[10] The agreement also said:

- Mr Williamson will provide educational services to the client as requested (clause 1.1);
- St George will not be liable for travel costs or any other expenses except with prior written agreement (clause 1.4);
- St George will pay the contractor \$30 per contact teaching hour (clause 3.1);
- Disputes are to be resolved between the parties (clause 7);

[11] The agreement also said:

- Payment would be made to the contractor, in arrears each fortnight into a bank account (clause 3.2);

- Sexual and racial harassment are defined in the Employment Relations Act 2000 and in the Human Rights Act 1993 and will not be condoned by St George (clauses 5.1 and 5.2);

[12] Mr Williamson says he signed the agreement because he needed the job and even though he is described in the agreement as a contractor, he did not really think about whether he was a contractor or an employee.

[13] It was following a meeting with John Minto in mid August that Mr Williamson turned his mind to the issue of his employment status and realised he was an employee and not a contractor. In support of his view that he was an employee not a contractor, Mr Williamson says he does not operate his own business, understood he was eligible for entitlements usually available only to employees such as annual and sick leave and was paid an hourly rate from which PAYE was deducted.

[14] Mr Kevin Moncur, then Principal of St George was responsible for negotiating the agreement with Mr Williamson. Mr Moncur says Mr Williamson was offered a contractor role for a specific time from 25 July until 2 September for a specific purpose. Mr Moncur says he was very clear with Mr Williamson that he was a contractor, not an employee and he was to provide services for this short period of time to fulfil a teaching need at the school.

[15] Mr Moncur was not clear with Mr Williamson about the independent contract. Mr Moncur assumed Mr Williamson, who had taught at other language schools, was familiar with contracts for service. Mr Moncur did not explain to Mr Williamson details of the contractual arrangement such as that he was to render GST invoices and was responsible for his own tax because he assumed Mr Williamson already knew about such things.

[16] Section 6 of the Employment Relations Act 2000 (“the Act”) reads in part:

- (2) *In deciding ... whether a person is employed by another person under a contract of service, the ... Authority ... must determine the real nature of the relationship between them.*
- (3) *For the purposes of sub-section (2) the ... Authority –*
 - (a) *must consider all relevant matters, including any matters that indicate the intention of the persons; and*

(b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[17] In *Bryson v. Three Foot Six Limited*³ the Supreme Court said *all relevant matters* include:

- *The written and oral terms of the contract, including terms indicating the party's intentions,*
- *Any divergences from those terms in practice,*
- *The day-to-day implementation of the contract, and*
- *The tests of controlling integration, and whether the contracted person is effectively working on his or her own account (the fundamental test).*

[18] Industry practice can also be relevant. Apart from the description in the agreement that Mr Williamson was *the contractor* and St George was *the client* and that the *contractor will provide educational services to the client*, the agreement makes no reference to the arrangement between the parties being that of principal and independent contractor and not an employment relationship. Nor does the agreement contain provisions such as a restraint of trade which are usual in a contract for service.

[19] However, the agreement contains provisions which in my view are indicative of an employment relationship. The agreement provides that payment of an hourly rate in arrears is made into a bank account each fortnight and that the Employment Relations Act applies. Such provisions would normally be found in an employment agreement.

[20] In practice, Mr Williamson was not required to provide any equipment, pay rent for using any of the facilities at St George or issue GST invoices. Mr Williamson attended work between certain hours as directed, was paid wages fortnightly, and received payslips which referred to PAYE deductions, holiday and sick leave entitlements. Mr Williamson was also asked by Mr Moncur at the start of the arrangement if he was a member of a Kiwisaver scheme.

[21] Despite the label put on the agreement, it is my view the above factors all point to the relationship between Mr Williamson and St George as being one of employer and employee.

Issue Two

If Mr Williamson was an employee, was he employed for a fixed term period?

[22] The nature of language schools in New Zealand is that student numbers fluctuate for varying reasons. The need for teachers fluctuates accordingly and to deal with the situation, language schools often contract teachers for short periods of time on independent contracts or employ on fixed term employment agreements which are often repeatedly “rolled over”. A teacher in such a situation could therefore be deprived of the benefits enjoyed by employees such as being able to utilise the personal grievance provisions contained in the Act and rights to redundancy compensation, for example. The Union recognised this to be an issue for both the language schools and the teachers and attempted when negotiating collective agreements for its members, to address the matter.

[23] Paragraph 1(c) of the Collective stated:

“Fixed-Term Staff means people who are employed for a specific term which relates to a specific reason such as to teach a short-term course, cover for a teacher on annual leave or to meet a specific short term requirement. It will involve a fixed term employment agreement of up to 25 hours per week contact teaching time. These people are paid a wage assessed at an hourly rate inclusive of lesson preparation and basic administrative duties for the time required/specified. Fixed term agreements will be in accord with Section 66 of the Employment Relations Act and will not generally be “rolled over” more than once. Except in exceptional circumstances a teacher will be regarded as a permanent employee if employment continues following two fixed term agreements.”

[24] In mid August, Mr Minto, who was responsible for negotiating collective agreements with language schools, told Mr Williamson that he did not believe he was a contractor but rather an employee and should be covered by the terms and conditions contained in the Collective. Mr Williamson joined the Union and authorised Mr Minto to discuss his employment status at St George with Mr Moncur. On 17 August, Mr Minto emailed Mr Moncur as follows:

“...I note that...[] and Dean Williamson have agreements which suggest they are contractors. These agreements are not legal for several reasons. Firstly their work is covered by the collective

employment agreement so they are automatically on the CEA for the first 30 days of employment. Only after that point could they enter into an individual CEA with the school. Secondly, their "contractor" agreement would not pass the legal test for a contractor in any case and neither do they have agreements with any valid reason for being fixed-term agreements. Section 66 of the ERA, as well as ourselves, would therefore see them both as permanent employees of the school..... I look forward to hearing from you on these matters."

[25] Mr Moncur agreed to change Mr Williamson's status from that of a contractor to a fixed term employee covered by the terms and conditions of the Collective. Mr Moncur says Mr Williamson was still to finish on 2 September as initially agreed with him. This was the date on which the group of Korean students was leaving St George and there was no further work for Mr Williamson.

[26] At the investigation meeting, Mr Minto said his concern was that as a language teacher at St George, Mr Williamson should not have been contracted but rather employed as a fixed term employee under the Collective. Mr Minto said a reason such as that a "class was finishing" he considered to be a valid reason for a fixed term employment agreement.

[27] On 22 August, Mr Moncur emailed Ms Natasha Henry at the Union as follows:

*"Hello Natasha,
It should be possible for Stephen [Bayldon] to action Dean's request as the fixed term agreement should be signed some time this week. Dean will need to cancel the current contractor agreement before the fixed one can be offered, however. The fixed term agreement will be sent to John[Minto] tomorrow or Wednesday. Thanks"*

[28] It is my view that following the Union's involvement, the parties agreed Mr Williamson was an employee employed for a fixed term and his terms and conditions of employment were contained in the Collective. The purpose of the fixed term nature of the employment was there was a temporary overlap of Korean students and a language teacher was required to provide additional teaching services during that short time.

[29] As it transpired the documentation recording the change in Mr Williamson's status from that of a contractor to being employed for a fixed term was never completed. Approximately one week before Mr Williamson was due to leave St

George, Mr Bayldon spoke to him in the staff room, and confirmed he would not be required after 2 September and that his role would finish on that date as agreed.

[30] I find that the effect of the agreement reached between St George and Mr Williamson's representative, the Union was that Mr Williamson was employed for a fixed term to provide teaching services from 25 July to 2 September and that his terms and conditions of employment were contained in the Collective.

Issue Three

If Mr Williamson was employed for a fixed term, did St George comply with s.66 of the Employment Relations Act ("the Act")?

[31] Mr Williamson says Mr Stephen Bayldon, who is currently Director of Studies at St George but who at the time was the leading teacher, requested that he stay on and teach permanently. Mr Bayldon and Mr Moncur both deny this. Mr Bayldon says he may have enquired about Mr Williamson's availability to undertake casual work but the needs of language schools are such that he is constantly reviewing teacher availability. Mr Bayldon says this enquiry was in no way a promise of permanent employment to Mr Williamson. Mr Bayldon says he confirmed with Mr Williamson a week before the teaching assignment came to an end on 2 September that he would be finishing that day.

[32] Mr Moncur says St George had no need for Mr Williamson to remain permanently as a language teacher. Mr Moncur says Mr Williamson was employed for a specific reason which ended on 2 September. In any event, Mr Moncur says there was no further work that could be offered, because of the continuing decline in student numbers.

[33] I prefer the evidence of Mr Bayldon and Mr Moncur. It was always envisaged by Mr Bayldon and Mr Moncur that Mr Williamson would teach at the school for a specific period of time to fulfil a specific need which would end on 2 September. Mr Williamson accepted this and knew his role was to finish on 2 September. Mr Williamson's employment ended on 2 September. Mr Williamson subsequently claimed he had been dismissed and his dismissal was unjustified.

[34] Section 66 of the Act says:

- (1) *An employee and employer may agree that the employment of the employee will end –*

- (a) *at the close of a specified date or period; or*
 - (b) *on the occurrence of a specified event; or*
 - (c) *at the conclusion of a specified project.*
- (2) *Before an employee and an employer agree that the employment of the employee will end in a way specified in sub-section (1), the employer must –*
- (a) *have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
 - (b) *advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*
- ...
- (4) *If an employee and an employer agree that the employment of the employee will end in a way specified in sub-section (1), the employee's employment agreement must state in writing –*
- (a) *the way in which the employment will end; and*
 - (b) *the reasons for ending the employment in that way.*
- ...
- (5) *Failure to comply with sub-section (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.*
- (6) *However, if the employer does not comply with sub-section (4), the employer may not rely on any term agreed under sub-section (1) –*
- (a) *to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or*
 - (b) *as having been affected to end the employee's employment, if the former employee elects to treat that term as ineffective.*

[35] I find that Mr Williamson was told by Mr Moncur prior to commencing at St George that he was to teach the English language for period of just over five weeks while there was an overlap of two groups of Korean students. St George had a genuine reason for requiring that Mr Williamson's appointment as a language teacher be for a fixed term. At the time the parties understood the arrangement was that of an independent contract. I have made a finding that the arrangement was that of employment, not a contract for services.

[36] In mid August, Mr Moncur for St George and Mr Minto for Mr Williamson agreed that Mr Williamson was an employee not a contractor and that therefore the

terms of the Collective applied to him. The Collective defines *Fixed-Term Staff* in Clause 1(c) and it is set out above. The definition is generic, it is not specific to Mr Williamson. The Agreement was in writing and does specify in clause 1.1 the way in which Mr Williamson's employment is to end. However, the Agreement did not set out in writing the reasons for it ending in such a way. By failing to properly record the arrangement in writing, St George failed to comply with s.66(4). However, I find Mr Williamson was well aware that he was employed for a fixed term period to fulfil a specific teaching requirement.

[37] Section 66(6) of the Act is clear. An employer may not *“rely on any term agreed under sub-section (1) to end the employee's employment if the employee elects to treat the term as ineffective; or ...as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective”*. Mr Williamson, while not formally *“electing”* to treat the term of the fixed term agreement as ineffective, did so in my view by claiming he had been unjustifiably dismissed by St George on 2 September. St George, by failing to put in writing the reasons for the employment ending on 2 September, was not permitted to rely on the expiry of the fixed term period of employment to end Mr Williamson's employment. It would be prudent for St George to ensure inclusion of more specific details in any future fixed term employment agreements to ensure disputes of this nature do not arise again.

[38] In *Schneller v. Ranworth Healthcare Ltd*⁴, the Employment Court held:

... if, however, what purported to be a fixed term employment agreement did not meet the statutory requisites, the employee's employment was to be regarded as of indefinite duration and a dismissal amenable to consideration as a personal grievance alleging that it was unjustified.

[39] Despite there being a genuine reason for employing Mr Williamson on a fixed term employment agreement, and Mr Williamson being aware of that reason, St George's failure to comply with s66 of the Act means the employment agreement is to be *“regarded as of indefinite duration and [the dismissal on 2 September] amenable to consideration as a personal grievance alleging that it was unjustified.”*

[40] I find the decision to terminate Mr Williamson's employment on 2 September when the fixed term was purportedly to come to an end, amounted to a dismissal.

⁴ Unreported, AC33/07, 5 June 2007

Issue Four

Was Mr Williamson unjustifiably dismissed?

[41] The decision to dismiss Mr Williamson must be justifiable in accordance with the test as set out in s.103A of the Act which states:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[42] In applying this test, the Authority must also consider four factors specified in s.103A(3) as well as any others it considers appropriate.

[43] Section 103A was considered by the Full Court of the Employment Court in *Angus v. Ports of Auckland*⁵. The test requires the Authority in this matter to determine whether, on an objective basis, Mr Williamson's dismissal was within the range of options open to a fair and reasonable employer. If the dismissal was within the range, then it will be justified.

[44] St George had formed a view that Mr Williamson was required for a short period to fulfil a teaching need. There was no further investigation by St George as to whether or not Mr Williamson was still required in the role, presumably this was because St George was of the view that it had employed Mr Williamson on a fixed term basis and was of the view that it could rely on the fixed term nature of his employment to terminate it. Because of this and understandably in my view, St George did not follow the steps that a fair and reasonable employer would normally have followed prior to dismissing Mr Williamson.

[45] St George may very well have come to the conclusion that Mr Williamson was no longer required and that his employment was to be terminated for redundancy. St George as a fair and reasonable employer had an obligation to raise these issues and obtain a response from Mr Williamson before considering whether his employment should come to an end.

⁵ [2011] NZEmpC 160

[46] The failure by St George to comply with the provisions of s.103A(3) renders the dismissal unjustified. Mr Williamson is entitled to remedies as a result of his unjustified dismissal. Mr Williamson obtained employment on 26 September for just over 2 months and then further employment at the end of January 2012 for approximately one year. Mr Williamson claims 10 weeks loss of wages as a result of his unjustified dismissal.

[47] Mr Williamson received his final pay on 14 September for the pay period ending on 2 September. Mr Williamson obtained further employment on 26 September three weeks after he was dismissed by St George and there was no evidence to suggest that the further period of unemployment for part of December 2011 and January 2012 was as a result of his dismissal by St George.

[48] I order St George to pay Mr Williamson the equivalent of 3 weeks salary being lost wages as a result of his dismissal. Three weeks nett salary at \$559.08 per week amounts to \$1677.24.

[49] Mr Williamson claims distress compensation in the sum of \$4,000 but provided no evidence to support this claim. Mr Williamson was aware that his employment with St George was for a particular purpose and for a particular length of time. Mr Williamson accepted the engagement on that basis.

[50] I make no order for compensation for hurt and humiliation. I order St George to reimburse Mr Williamson the filing fee of \$71.56.

Costs

[51] Neither party was represented. Costs are to lie where they fall.

Anna Fitzgibbon
Member of the Employment Relations Authority