

Fixed term blues

The Employment Relations Authority has delivered good news in recent decisions relating to fixed term contracts. **Paul Robertson** explains.



IT'S NEARLY CHRISTMAS AND employers are weighing up their staffing needs for 2019. It may be prudent to appoint someone on a fixed term. If the correct procedure is not followed, the employer may be held liable when they try to rely upon the fixed term. A little known statute may reduce the liability of some employers.

THE FACTS

The cases involved beginning teachers employed by two Auckland high schools. In each case the teachers were offered fixed term employment to suit the needs of the school.

In the Birkenhead College decision, the teacher was appointed to the technology department for a year. The reason given was that the needs of the department were being reviewed during the year. In the Westlake Girls' decision, the teacher was appointed to the social sciences department during the restructuring of the department. The teacher ended up being offered a series of fixed term contracts that lasted a year.

In both cases their fixed term

agreements did not comply with the requirement to accurately record the reason for the fixed term in the appointment letter. This meant that the boards could not rely upon section 66 of the Employment Relations Act as a defence to the dismissal of the teachers at the end of the fixed term.

The teachers sought damages for hurt, humiliation and distress, reimbursement of lost wages and penalties. One teacher sought a declaration that his employment was permanent and that he remained an employee of the school.

THE DEFENCE

The boards argued that the teachers knew the reasons for the fixed term appointments and that the failure to record the reasons in writing should be overlooked. "No" said the Authority, the teachers had been unjustifiably dismissed because no process was followed prior to the dismissals. As the boards had not properly recorded the reasons for the fixed term contracts, they could not rely upon

section 66 of the Employment Relations Act to justify their decisions.

The boards' next argument was that even if there was a procedural mistake, the State Sector Act made it mandatory to appoint teaching staff on merit after an open recruitment process. They referred to the following:

- The beginning teachers, along with other candidates, had all been interviewed and considered for appointment to the permanent positions;
- The beginning teachers in each instance lost out to more experienced teachers who were the best candidates for the positions; and
- The successful candidates had been appointed to the permanent positions.

The Authority agreed. The boards followed an appropriate process when making the permanent appointments, and to allow the beginning teachers to be appointed instead would undermine that process, viz:

- It was artificial to say that the problems with the fixed term contracts meant that the

beginning teachers became permanent employees; the teachers had been dismissed;

- The teachers had been dismissed in a procedurally unfair way;
- The boards were required to compensate the teachers for this procedural failure; but
- Because the boards were obliged to appoint the best candidate in the subsequent year, there could be no claim for lost salary.

\$10,000 was awarded to each of the teachers for the distress that they had suffered because they had been unjustifiably dismissed. The Authority declined to award penalties because the boards had been punished enough.

Nelson v Westlake Girls High School Board of Trustees [2018] NZERA Auckland 355

Langman v Birkenhead College Board of Trustees [2018] NZERA Auckland 356



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