Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 47
3015315

	BETWEEN	A TEACHER Applicant
	A N D	A SCHOOL BOARD OF TRUSTEES Respondent

Member of Authority:	David Appleton
Representatives:	Mr X, Counsel for Applicant Richard Harrison, Counsel for Respondent Antoinette Russell and Emma Dowse, Co-Counsel for Secretary for Education as intervenor
Investigation Meeting:	27 March 2018
Submissions Received:	27 March 2018 from Applicant, Respondent and Intervenor
Date of Determination:	17April 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. The applicant was employed as a casual employee in the capacity

of a short term relief teacher on terms which mirrored those of the Secondary Teachers' Collective Employment Agreement 2015 – 2018.

B. The applicant was not an employee between short term relief teaching engagements and the respondent did not owe a duty of good faith to the applicant between such engagements.

C. Accordingly, the Authority does not have the jurisdiction to investigate the applicant's claim that he was unjustifiably dismissed when he was removed from the short term relief pool by the respondent after an engagement had ended, or that the respondent acted ultra vires in so doing.

D. Costs are reserved.

Prohibition from publication order

[1] The applicant is a teacher and the respondent a secondary school in the South Island of New Zealand. The applicant was removed from the short term relieving pool of the school after an incident which occurred while he was relief teaching a class of year 9 children. The school reports that the incident resulted in one of the students being subsequently teased and distressed, and being unsettled for two weeks afterwards. The school is concerned that publication of this determination identifying the teacher, the school and/or details of the incident could cause fresh teasing, and further distress for the student.

[2] For this reason, I prohibit from publication the following information and evidence which was put before the Authority:

a. The identities of the parties, the school and the school's location;

b. The identities of the staff at the school;

c. The identity of the student; and

d. Details of the incident that occurred on Friday 10 March 2017, other than those set out in this determination.

[3] Whilst suppression of details of the incident will make the rationale for parts of this determination difficult to fully understand for non-parties, the parties and their representatives are, of course, fully aware of the incident.

[4] Finally, I also prohibit from publication the identity of the applicant's counsel as he practises predominantly in the region in which the school is located.

Employment relationship problem

[5] The applicant claims that he was unjustifiably dismissed by the respondent by being removed from its short term relieving pool and was subjected to an unjustified disadvantage in his employment when, inter alia, the school made a report to the Education Council. The applicant seeks reinstatement to the relievers' pool, as well as compensatory remedies.

[6] The respondent denies these claims, asserting that the applicant was employed as a day relief teacher on a casual basis, and that all actions it took occurred when the applicant was no longer employed by the respondent, so that it owed no employment duties to the applicant at the time. It also argues that, in any event, its actions were fair and reasonable, and justified.

[7] The key preliminary issue to be determined by the Authority therefore is whether or not the respondent owed any employment duty to the applicant between day relief assignments.

The intervenor

[8] The respondent asserts that the relevant employment agreement governing the relationship between the parties in these proceedings is the Secondary Teachers' Collective

Employment Agreement 2015 – 2018 (the Collective Agreement), the parties to which are expressed to be the Secretary for Education "acting under delegation from the State Services Commissioner made pursuant to section 23 of the State Sector Act 1988 and acting in accordance with section 74(5) of the State Sector Act 1988" and The New Zealand Post Primary Teachers' Association (the Association).

[9] Several thousands of teachers are employed as short term relievers in New Zealand under the terms of the Collective Agreement or other collective agreements, and so the Secretary for Education and the Association were each approached by Mr Harrison, with the leave of the Authority, to enquire whether they wished to take part in the proceedings as intervenors, as the determination of the Authority in this matter would be of general interest to teachers and schools. The Secretary for Education expressed a wish to do so but the Association did not, I understand, give any substantive reply. The Secretary for Education has therefore been granted leave to present submissions to the Authority in the capacity as an intervenor.

[10] It is worth mentioning that the applicant's counsel does not necessarily agree that the applicant was employed pursuant to the terms of the Collective Agreement, so that is also a matter that needs to be determined.

Material facts

[11] The applicant is a qualified secondary school teacher who started to do relief teaching for the respondent in March 2015.

[12] In March 2017 the applicant was asked if he could act as a day relief teacher on Wednesday 8 March and between Friday 10 and Tuesday 14 March 2017. On Friday 10 March the applicant took a Year 9 class. An incident then occurred during the class which was in the form of a verbal interaction between the applicant and the class and with one student in particular. As a result of what the applicant said, or implied, the class got very

excited. The applicant says that he regretted saying what he did almost immediately and then told the class to settle down.

[13] The incident resulted in the student's parent sending in an email of complaint. The email stated, amongst other things, that the child had been "physically threatened, bullied and humiliated" by the teacher. According to the school, another parent sent in an email of complaint in almost identical terms, although the applicant and the Authority have not seen this other email.

[14] The applicant said that he worked at the school on Monday 13 and Tuesday 14 March not knowing about the complaint but that, after school on 14 March, when his particular relieving session at the school had ended, he was given a letter by the headmaster (dated 13 March) stating that serious concerns had arisen about his conduct after two parents had sent emails of complaint and incident reports had been written by two students who witnessed the incident (not by the student who had been the focus of the comment). The letter from the headmaster stated:

> You are a relief teacher to [the school] and as such are not bound by an employment agreement with [the school] beyond each individual engagement. The purpose of this investigation is solely to determine your response to the allegations being made and to consider what course of action, if any, that [the school] should pursue. Please be aware that if the allegations are upheld it is the view of the school that a mandatory report would need to be submitted to the Education Council.

[15] The applicant was invited to provide a written response to the deputy headmaster by that Friday, 17 March. The letter referred to three allegations, the most serious one relating to the incident mentioned above. A separate allegation was that the applicant had used a moderately offensive swear word[1] several times in front of the class when he had experienced trouble with some equipment, and the third allegation was that he had made a joke in front of the class which could have been seen as open to misinterpretation[2].

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[1] This is my characterisation of the word, not the parties'.
[2] Again, this is my characterisation, as the deputy head did not characterise the joke in any way in his letter.

[16] The letter to the applicant stated that the allegation was that the applicant had "acted in a manner which brings the profession into disrepute". The details of the words used which made up the most serious allegation were described in the letter but not the parent's allegation that the applicant had "threatened, bullied and humiliated" their child. Details of the other two allegations were also briefly described. Neither the emails of complaint nor the incident reports written by two student witnesses were included with the letter.

[17] The applicant says that he was not invited to a meeting and was not offered the opportunity to discuss the complaint or speak to it and was not given copies of the alleged complaints, incident reports or any witness accounts or notes of any interview with the parents and students. The applicant wrote a response and emailed it to the deputy headmaster on 17 March. He says that he explained the context of the words used but did not feel that the written words were as good as being able to talk about the event or demonstrate his tone of voice and actions on the day. Despite this, the letter is relatively lengthy and explains the context of the incident in reasonably full and well expressed terms.

[18] On 23 March 2017 the deputy headmaster wrote to the applicant saying that he had carefully considered the applicant's response to the allegations made and the circumstances surrounding the situation. The deputy headmaster stated that the allegation relating to the comment that the applicant had made was upheld and that it was, "in itself a serious breach of the teacher code of conduct in which [he had] behaved in a manner which would bring the profession into disrepute".

[19] The deputy headmaster also found, on a balance of probabilities, that the allegation of swearing was also upheld, which the deputy headmaster stated was "contrary to the expectations of a teacher in class". With respect to the joke made, the deputy headmaster said "whilst less serious, this is wholly inappropriate in the context of a Year 9 class and in relation to what had already been said".

[20] The deputy headmaster stated in the letter that he proposed that the applicant be removed from the school roster of relief teachers "as a result of behaviour which is highly

inappropriate and in the case of the first allegation may constitute serious misconduct". He stated that he was obligated by law to report any behaviour which "may possibly be serious misconduct" to the Education Council in the form of a mandatory report. He said that he proposed to make a mandatory report with the recommendation of a censure only.

[21] The deputy headmaster gave the applicant the opportunity to consider his proposed actions and asked him to submit his response by email by 3.30 pm on Monday 27 March.

[22] The applicant responded in writing on 27 March protesting about the procedure that had been used and made a reference to the "Education New Zealand section 2.4 teacher conduct and discipline requirements". Notwithstanding the applicant's response, the applicant was dropped from the pool of relief teachers, although it appears that no formal notification of that was given to the applicant in writing.

[23] On 6 April 2017 the deputy headmaster emailed the applicant to reiterate that, as a relief teacher, the applicant did not have an employment agreement with the school and that he was a casual employee. He also stated that the school had to report any teachers' behaviour which may possibly be serious misconduct. He stated that the obligation on the school to report the matter to the Education Council was not optional. The mandatory report to the Teachers Council was completed by the deputy headmaster on 6 April 2017. As at the date of the Authority's investigation on 27 March 2018, no decision had yet been made by the Education Council. The applicant is no longer teaching.

The issues

[24] The following issues need to be determined by the Authority:

Under what terms and conditions was the applicant employed?

Whether the respondent owed any employment duties to the applicant between short-term relieving engagements?

If so, whether the respondent unjustifiably dismissed the applicant, and

whether the applicant was unjustifiably disadvantaged in his employment by the respondent's actions.

Under what terms and conditions was the applicant employed?

[25] The applicant's counsel says that it is not clear what terms and conditions the applicant was employed under, as he was not a member of the Association but that no written individual employment agreement between the parties is in existence. The applicant said in his oral evidence that he never thought about what terms he was employed under while he was relieving. The respondent asserts that the conditions of employment for the applicant mirrored those set out in the Collective Agreement.

[26] The Collective Agreement at clause 1.3 states that it is binding on "each employee who is employed by a board of trustees of a state or integrated school to teach in a school defined in 1.4 below and who is or becomes a member of the Association" and "each employer, as defined in 1.8(c) below". Clause 1.4 is the coverage clause and states that the agreement covers work undertaken in state and integrated schools by a number of 'teachers' as defined in that sub clause. This definition includes "Teachers in secondary (Year 9-13) schools and their subsidiary units".

[27] Section 75, subsections (1) to (3) of the State Sector Act 1988 provide as follows:

> **75 Actual conditions of employment**
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> (1) The Commissioner may declare that all or any part of the conditions of employment fixed under a collective agreement for persons employed in the education service are to be the actual conditions of employment.
> (1A) The Commissioner may, in addition to the actual conditions declared under subsection (1), approve further conditions of employment for an individual employee who is employed in the education service under a collective agreement if the conditions are—
> (a) mutually agreed by the employee and his or her employer; and
> (b) not inconsistent with the conditions of the collective agreement.
>
> (2) The conditions of employment of employees in the education service who are not bound by any collective agreement shall be determined in each case by agreement between the employer and the individual employee, but

> the employer shall obtain the written concurrence of the Commissioner to the conditions of employment with that individual employee.
>
> (3) The Commissioner, in carrying out the function under subsection (2), may promulgate in writing to employers, either generally or specifically, the conditions of employment for persons who are to have their conditions of employment determined in accordance with that subsection. Where the conditions of employment agreed between the employer and the person to be appointed comply with the conditions of employment promulgated by the Commissioner, the employer shall, without any further action, be deemed to have obtained the written concurrence of the Commissioner to those conditions of employment.

[28] The Ministry of Education website contains a number of individual employment agreement templates which are stated to be for teachers, principals and other staff not covered by a collective agreement. None is expressly stated to be for secondary relievers, although there is a "fixed-term (reliever) individual employment agreement template for primary school teachers". This covers both short term relievers (defined to be for a period not exceeding three weeks) and long term relievers ("a continuous period beyond three weeks"). The terms and conditions of employment under the agreement are expressed to be those of the Primary Teachers' Collective Agreement 2016-2018 that are applicable to fixed-term reliever teachers, modified as necessary.

[29] Interestingly, I note that, at clause 1.6.9, the Primary Teachers' Collective Agreement 2016-2018 defines short term relievers as "fixed term employees who are temporarily employed on a casual basis to relieve in a permanent teacher position for a period not exceeding three weeks". This is different from how the deputy headmaster of the respondent characterises a short term reliever. He contrasted fixed term relieving employees ("long term relievers") with casual relieving employees ("short term relievers"). However, he was relying on the terms of the Collective Agreement in making this distinction I understand. Of course, in law, casual employment engagements are fixed term employment engagements which end at the conclusion of each specified event or project for which the casual engagement was arranged.

[30] Ms Russell asserts that a template 'Individual Employment Agreement (Secondary School Teachers) which is on the Ministry of Education website is intended to be used for 'casual' employees', although that is not obvious on its face. This agreement states that the terms and conditions of employment under the agreement are those terms and conditions of the Collective Agreement.

[31] In any event, it appears that no promulgated individual employment agreement (whether a fixed term agreement or a casual agreement) has ever been signed by the applicant.

[32] The applicant was paid by Education Payroll Limited on behalf of the Secretary for Education. The copy payslips provided to the Authority by the Ministry of Education show that the pay was designated as "day relief payments" which included holiday pay with each payment. This arrangement is in accordance with the terms of the Collective Agreement at clause 4.8.5. Holiday pay received by the applicant amounted to around 23% of his gross pay in each pay period. Whilst I cannot reconcile that percentage exactly with the terms of the Collective Agreement, it is much more generous than the 8% that s 28 of the Holidays Act 2003 provides.

[33] I also note that the payslips indicate the accrual of sick leave entitlement to the applicant. This is also provided for in the Collective Agreement, at clause 6.2.2(c). I cannot easily reconcile the rate of accrual of sick leave that the applicant enjoyed whilst relieving for the school with the terms of the Collective Agreement, but it is plain that his accrual rate was much more generous than the provisions of s 63 of the Holidays Act would have allowed.

[34] There was only one aspect of the applicant's day to day conditions which seemed not to accord with the terms of the Collective Agreement. That was the fact that he did not always receive pay for 'no less than 2 hours per day' of relief work, as provided for in clause 4.4.2. Mr Harrison submitted that this was an error by NovoPay, and that the applicant had a pay claim against the school as a result. The deputy headmaster who gave evidence to the Authority was unable to shed any light on why the applicant was paid the way he was as payroll did not fall within his responsibilities.

[35] On balance, I find that the applicant was employed under terms which mirrored those of the Collective Agreement, on the basis that he was a secondary school teacher who had not signed an individual employment agreement with different terms, and that he was treated in all practical respects as if he were employed under the Collective Agreement (save for not getting two hours' pay as a minimum).

Did the respondent owe any employment duties to the applicant between short-term relieving engagements?

[36] Having established that the applicant was employed under terms that mirrored the Collective Agreement, that finding leads to the prima facie conclusion that the applicant was a casual employee, in accordance with clause 3.2.5(a) of the Collective Agreement. This clause provides:

> 3.2.5 Relievers
> A reliever may be temporarily employed in a teaching position during that teacher's absence (e.g. while on leave, or attending in-service courses or outdoor education). Relievers are defined as follows:
> (a) A short-term reliever is a teacher employed on a casual basis for a period not exceeding six weeks;
> (b) A long-term reliever is a teacher employed for a continuous period beyond six weeks.

[37] However, the applicant's counsel submits that the applicant was actually employed as a permanent, part time relief teacher. It is therefore important to establish the actual relationship between the parties. Once that has been established, it will be necessary to ascertain what duties existed between engagements in light of that relationship. The sub questions to ask, therefore, are:

a. Was the applicant employed as a casual employee, or as a permanent part time employee; and

b. If he was employed as a casual employee, did the respondent owe him continuing duties between engagements in any event?

Was the applicant employed as a casual employee, or as a permanent part time employee?

[38] The first step is to consider s 6 of the Act 2000 ("the Act") as it covers the meaning of 'employee'. The relevant provisions of s 6 provide as follows:

> (1) In the Act, unless the context otherwise requires, **employee-**
>
> a. Means any person of any age employed by an employer to do work for hire or reward under a contract of service;
>
> ….
>
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
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> (3) For the purposes of subsection (2), the court or the Authority—
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> (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.

[39] The Employment Court has explored this issue in detail and one of the seminal cases is *Jinkinson v Oceana Gold NZ (Limited)*[3]. The principles that may be extracted from *Jinkinson* are as follows:

a. The substance of the employment relationship should prevail over the form of any agreement;

b. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work;

c. If those obligations only exist during periods of work, the employment will be regarded as casual;

d. If there are mutual obligations that continue between periods of work, there will be an ongoing employment relationship;

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3 [2009] ERNZ 225.

e. Regularity of work and continuity of the employment relationship are indicative of ongoing employment as opposed to casual employment;

f. Where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.

[40] It is also helpful to bear in mind the following passages from the judgment of former Chief Judge Colgan in *Bay of Plenty District Health Board v Wendy Leeanne Rahiri*[4]

> [9] Speaking generally, however, the law is not simply that casual employees cannot bring grievances including allegations of unjustified dismissal. That may be the consequence of that status in some cases, although, case by case, it is a fundamental matter of contractual terms and conditions, of pleading, and of proof, to determine whether, in any particular case, an employee is or was a casual employee, and the consequences of that status. An examination of the various cases decided by this Court in this field indicates that they are very fact-specific and only very general guidance can be drawn from the leading cases. This case is no exception.
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> [10] It is also pertinent to note that the relevant legislation, that is the Act and appropriate parts of the so-called minimum code of legislative protection of employees, does not differentiate between classes of employees or, indeed, define employees for gate-keeping purposes, as 'permanent', 'part-time' or 'casual'. All that the Act requires is that there was an employment relationship between an employer and an employee at the relevant time. In the case of a dismissal by an employer, that relevant time is the date of dismissal. In the case of a constructive dismissal, that relevant time includes both when the fundamental breaches by the employer are alleged to have occurred and when the employee either resigned or abandoned his or her employment in response to those fundamental breaches.
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> [11] In some cases, it can be argued for an employer that each separate work engagement by the employer of an employee is a distinct and fixed-term period of employment at the conclusion of which there is no longer in existence a relationship of employer and employee. If, however, the parties agree to a further working engagement, then, as the argument goes, a new employment agreement is constituted, again for a fixed term, at the conclusion of which there is again no longer an employment relationship. In many cases the unreality or at least the artificiality of such a categorisation of some employment relationships, is patent. It would, in law, require such

[4] [2016] NZEmpC 67.

> employers and employees to enter into fresh written fixed-term employment agreements before each casual engagement, which engagements may be as short as several hours.
>
> [12] There are numerous examples of employments categorised as 'casual'. Often in such cases, the employer's refusal to offer further work engagements is taken by the employee to be a "dismissal". In many such cases, if the Authority or the Court finds that there was no extant employment relationship, then the parties were not, at the relevant times, employer and employee. It follows in such cases that there can be no access by the employee to the personal grievance procedures in respect of a claim of unjustified dismissal.

[41] The first step to take in determining the nature of the employment is to examine the terms of the Collective Agreement itself. In order to do so, I must apply the usual principles of contractual interpretation. These are derived from the well-known authorities of *Vector Gas Limited v Bay of Plenty Energy Limited*[5], *Silver Fern Farms Limited v New Zealand Meat Workers and Related Trade Unions Inc*[6] and *New Zealand Professional Fire Fighters Union v New Zealand Fire Service Commission*[7], amongst others. The key principles may be summarised as follows:

a. The principles of contractual interpretation applicable to employment agreements are the same as apply to all contracts.[8]

b. The starting point is the natural and ordinary language of the parties.[9]

c. If the language used is not on its face ambiguous, then the court (or Authority) should not readily accept that there is an error in a contractual text.

d. It is valid to cross-check the provisional view of what the words mean against the contractual context and extrinsic evidence, if admissible, to identify contractual context if it tends to establish a fact or circumstance capable of

[5] [2010] NZSC 5, [2010] 2 NZLR 444
[6] [2010] NZCA 317
[7] [2011] NZEmpC 149
[8] *Silver Fern Farms*
[9] *Vector Gas*

demonstrating objectively what meaning the parties intended their words to bear.

[42] I shall adopt these principles in determining the issue before the Authority.

[43] The Collective Agreement distinguishes between short-term and long-term relievers in clause 3.2.5, as set out above. The Collective Agreement also provides the following conditions in respect of short-term relievers:

(a) Short-term relievers can progress from one pay progression step to the next upon completion of each 190 days or 950 hours' relieving service, subject to satisfactory performance as attested by the principal of a school where the teacher has recently been employed as a relief teacher (clause 4.2.3(d)(iv));

(b) Short-term relievers are paid at the rate of 1/190th of the appropriate annual salary for each day worked (inclusive of holiday pay) provided that the maximum daily rate payable for relievers employed for no more than six weeks shall not exceed 1/190th or step 6 of the base scale – trained teachers, or step 10 of the base scale –untrained teachers, as applicable (clause 4.4.1);

(c) Short-term relieving teachers are to receive holiday pay progressively during the year after each period of employment, except as provided for in 4.4 and 4.5.2(b) where the rate of pay includes holiday pay (clause 4.8.4);

(d) Short-term relieving teachers have a sick leave entitlement based on the aggregate of the service completed since the last date of permanent employment, for every 190 days or 950 hours of short term relief service which equal one year of sick leave service (clause 6.2.2);

(e) Applications for leave for family reasons from relieving teachers have to be referred to the Secretary for Education (clause 6.5.1);

(f) Relieving teachers employed "on a casual basis for only a few days at a time" may not apply for sports leave (clause 6.6.4);

(g) Relieving teachers employed "on a casual basis for only a few days at a time" may not apply for cultural leave (clause 6.6.5); and

(h) Relieving teachers in short-term positions may be granted assistance towards their daily travelling expenses to and from school in accordance with certain conditions (clause 7.7.1).

[44] Whilst the terms of the Collective Agreement clearly define a short term reliever as a teacher employed on a casual basis, *Jinkinson* and s 6 of the Act make clear that the Authority must consider all relevant matters, including any matters that indicate the intention of the persons, and is not to treat as a determining matter any statement by the persons that describes the nature of their relationship. Therefore, it is also necessary to examine the practical and day to day realities of the arrangement between the parties.

[45] The school operates a pool of relievers that is organised by the relief co-ordinator, with the deputy headmaster supervising the former when necessary. The relief pool is made up of people who have contacted the school specifically to provide day relief. If the decision is made to use the person for day relief on an on-going basis, then they will fill out the appropriate NovoPay form and are given the staff manual and a brief introduction to the school.

[46] The applicant was placed into the College's relief pool from 11 March 2015. The NovoPay form identifies him as a day relief teacher. I note that, when the applicant was first appointed by the respondent as a relief teacher, a NovoPay "new appointment for teachers" form was completed by the school. This identified the applicant as having "day relief" tenure, but the 'employment status' designation (between 'full-time' and 'part time') was left blank.

[47] The day relief teachers are used to cover short-term absences of staff. That is mostly to cover sick leave, although day relief teachers are also used to relieve staff undertaking professional development, and other activities necessitating their absence. The deputy headmaster says that these engagements are arranged on a daily basis, usually the evening

prior to the engagement, but sometimes it would be in the morning if an absence due to sickness had been notified on the same morning.

[48] When cover is required, the relief co-ordinator will contact people in the pool. The deputy headmaster says that there is no obligation on the part of the day relief teacher to undertake the offer of work and, if someone is not available, the relief co-ordinator will try someone else from the pool. However, certain relievers are contacted often, because they are often available.

[49] The applicant says in his written statement of evidence that the school was the only school he worked for[10] and he was one of the first relief teachers to be called upon and he always accepted. He says that, over time, his work was so regular that he knew he could rely on consistent work at the school each week and month.

[50] The applicant says that he went beyond what most of the other relief teachers did at the school, attending school sports games after school and weekends. He says he attended most staff meetings when at work and during his breaks he would continue to supervise students most of the time. He confirmed in his oral evidence that these were all voluntary activities though. The applicant said he had declined offers of employment from other schools in 2017 as he wished to continue working at the school, it being his *alma mater*.

[51] In response, the deputy headmaster said that day relief teachers have no obligation to participate in staff meetings, assemblies, professional learning or any other activities outside of providing cover for a class or classes. They are not expected to plan or prepare for lessons, nor are they required to undertake any post-lesson activities such as marking, reports or parent meetings. Day relief is for each day, although there will be occasions where a short-term reliever will agree to cover for a number of days, although that would not exceed six weeks.

[10] Payroll evidence shows that he also began to do relieving work for an intermediate school from November 2016, which continued on a fairly regular basis until October 2017.

[52] The deputy headmaster says that the school has between 25 and 30 people on its books in the day relief pool. The practice is to share the work around within the pool as the school needs to ensure that those who wish to have an engagement regularly are contacted regularly to avoid them becoming unavailable. In the area in which the school is situated there are five secondary schools within 10 kilometres of each other which means that some people who undertake short-term relief will be in the relief pools of a number of those schools. The applicant was on the books of at least one other school, which was not a secondary school.

[53] The deputy headmaster says that there were times when the applicant declined offers of day relief, which would be the case for most relievers in the pool. The applicant said that he made himself available to relieve at the school as often as he could as he was hoping to get permanent employment there.

[54] The Secretary for Education produced in evidence an affidavit affirmed by a Senior Advisor (Education Payroll) at the Ministry of Education to which were annexed Education Service payslips for the applicant and a spreadsheet showing the applicant's hours per week from March 2015 to October 2017. An analysis of this spreadsheet shows that the applicant worked for the school as a reliever on 60 separate weeks between 9 March 2015 and 19 March 2017. During the same period he worked for another school as a reliever on 6 separate weeks. Once he was removed from the reliever's list at the school he then worked at the other school as a reliever on 25 occasions between 13 March 2017 and 1 October 2017. He overlapped between the two schools in the same week on two occasions.

[55] On the 60 occasions he worked for the school, he averaged 11 hours relieving a week. At the other school he averaged 14.5 hours a week.

[56] There is a distinct regularity in the work that the applicant did in the sense that he did relieving for the school for several weeks in a row. He worked every week, or nearly every week for four terms. However, the hours worked each week did fluctuate from as little as 1 hour to as much as 20.5 hours. This is not surprising given that the applicant was a reliever, filling gaps left by teachers who were absent for a number of reasons. That is to say, whilst

some of the absences would be predictable, many would not be. The regularity of work is probably a factor of the size of the school and the fact that the applicant prioritised relieving for the school, and so was nearly always available.

[57] The applicant responded to questions from the Authority in his oral evidence that he had not been obliged to accept offers to work as a relief teacher at the school when he was called, and that he was not paid any retainer between engagements. He did not advise the school in advance if he was going to be away absent, and any activities outside of the class room he did as a volunteer. This included supervising students during break times.

[58] I do not accept the submission of the applicant's counsel that, over time, the applicant was called first out of the relief pool and that he would always be available for relief work when called. Clearly, he was often called, but so were other relieving teachers. The fact that the applicant prioritised the respondent school over other schools does not change the nature of the relationship in my view.

[59] There are two factors which strongly suggest that the arrangement was a genuine casual arrangement. The strongest factor is the lack of mutuality of obligation. The applicant could say no to an offer of work, with no repercussions, and the school did not have to offer him work. The evidence shows that it offered regular work to several other reliving teachers.

[60] The other strong factor is that there was no work for the applicant to do if no teacher was away. The need for the applicant to do relieving work was wholly dependent on a teacher being absent. That need was therefore largely unpredictable, and the applicant could not therefore rely on work being offered to him every week.

[61] *Jinkinson* held that, where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations. This principle is usually relied upon to show that a relationship was not a casual one where the work is so regular that it is predictable, and so an expectation can arise. However, I believe that any expectation on the

applicant's part was defeated by the inherent unpredictability of the arrangement. Although the applicant expected to be called, that expectation only arose when a teacher was absent, and neither party often had any real control over that.

[62] In his submissions Mr Harrison said that there was a long history with the education sector of relief teachers being casual employees. He adduced no evidence of this, but, equally, he was not challenged in his assertion by either counsel for the applicant or for the Secretary for Education. I accept that short term relief teachers are regarded as casual employees within the education sector.

[63] When I consider the evidence set out in the preceding paragraphs, I conclude that there is a strong argument that the applicant was employed as a casual employee. Even though the applicant did carry out engagements regularly, that was a function of the size of the school and the regular need for relievers. Crucially, I find there was no legitimate expectation that the applicant would be called on any given occasion, or that he would accept an offer of work.

[64] Having concluded that the relationship was one of casual employment, I must now consider whether the respondent owed any duties to the applicant between casual employment engagements.

Did the respondent owe a duty to the applicant between casual employment engagements?

[65] In support of this proposition, counsel for the applicant refers first to the Employment Court case of *Lewis v Howick College Board of Trustees*[11], in which the then Chief Judge referred, at paragraphs [5] and [6], to the high standards with which employers of teachers have to act when their decisions can have career ending consequences, because of the automatic triggering of an investigation by what is now the Education Council. This reference supports, according to the applicant's counsel, the need for the respondent's obligations to continue beyond the specific hours of relief work undertaken.

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[11] [2010] NZEmpC 4

[66] Whilst I agree that a school employer has to be careful of making any decision that may have career ending consequences for a teacher, I do not see that, without more, that duty of extra care on its own imposes a duty of good faith upon the employer between casual relieving engagements. Counsel for the applicant does not explain the legal mechanism that he says operates to impose such a duty between casual employment engagements in the case of teachers.

[67] Counsel for the applicant also refers to two Employment Relations Authority cases to support a proposition that a duty of good faith continues between engagements in a casual employment relationship. One is *James and others v New Zealand Vineyard Estates Limited*[12] and the other is *Pearson v Aotearoa Coolstores Limited*[13]. Of course, Authority determinations are not binding upon the Authority, but they may be informative and persuasive.

[68] In *James*, the Authority found that four employees were casual workers, who drove to the vineyard each day expecting to be assigned work, and who expected the work to be available for around four months, from November to March. The Authority found that the ending of the casual arrangement by the employer in December was not a dismissal, but that there was a disadvantage suffered by the four employees because they had not been informed by the employer of concerns about their work performance.

[69] This fact scenario does not support the proposition put forward by the applicant's counsel that a duty is owed between casual engagements. The four employees worked several hours each for three weeks in a row. The employer had concluded during this time that their performance was not very satisfactory. It was during the engagements that the employer formed the view that performance was sub-standard. Therefore the respondent's duty to be communicative existed during the engagements, and that is where the failure occurred. There was no finding of a continuing duty between engagements in *James*.

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[12] 30 April 2010, CA 105/10, 5149859
[13] 27 August 2010, WA 136/10, 5289707

[70] In *Pearson*, the Authority accepted that Mr Pearson was employed on a casual basis. He was employed subject to an employment agreement which stated that the employment could be terminated "for cause", which was stated to include poor performance and general misconduct, on one day's notice. The agreement also stated that the employee would be given "at least one warning before your employment is terminated on those grounds".

[71] Mr Pearson was regarded as being a poor performer by the employer, but was never given a formal warning as required under the employment agreement. He was terminated summarily for the poor performance concerns. The Authority found that the terms of the employment agreement had not been complied with, as no warning and notice, or pay in lieu of notice, had been given.

[72] Reviewing the facts as stated in *Pearson* it is arguable that Mr Pearson may have been a permanent employee, as he was regularly provided with work over a period of 10 weeks, but his not taking up the availability of the work on a regular basis was regarded as the employer as "poor attendance, poor work ethic and …not [being] a satisfactory worker".

[73] I understand the Member's conclusion that there was a duty to investigate, give a warning, and give notice of termination to derive from the requirements in the employment agreement. However, it seems to have been the very consequences of the casual nature of the employment arrangement which caused the employer concerns. A better analysis therefore may be that the employment was permanent, and the employer's failings were found to be unjustified against that context.

[74] I therefore conclude that each of these two cited Authority determinations should be distinguished.

[75] As I have indicated above in paragraph [43] (a), (c) and (d), the applicant, as a casual employee, did have some employment rights which accrued over time despite his casual status (pay progression, holiday leave and sick leave rights), which may indicate that there is an ongoing duty between engagements, as each casual engagement counts towards the accrual

of these rights. In considering this issue, it is instructive to consider the Court of Appeal decision in *AFFCO New Zealand Limited v New Zealand Meat Workers and Related Trades Union Inc*[14] which was upheld by the Supreme Court in *AFFCO New Zealand Limited v New Zealand Meat Workers and Related Trades Union Inc*[15]. *AFFCO* is relevant because the meat workers in question also had accrued rights (of seniority) which were preserved between seasons.

[76] At paragraph [51] of the Court of Appeal's judgment in *AFFCO* it gave its reasons why it did not accept the Employment Court's judgment that seasonal meat workers continued to be employees between seasons. The factors that the Court of Appeal took into account included the following:

a. A seasonal worker did not perform its services for the employer during the off-season;

b. The employer was not bound to pay wages in that period;

c. The seasonal workers have an undisputed freedom to take employment elsewhere during the off-season;

d. There was no mutual obligation on the parties to give notice of termination of employment at the end of each season.

[77] In the applicant's case, all of these factors also applied if one substitutes the meat workers' inter-season periods with the applicant's inter-relieving periods. Indeed, there was much less predictability in the applicant's case compared to a meat worker as, unlike in the seasonal meat workers situation, the applicant had no contractual right of re-engagement on continuing terms and conditions when another relieving opportunity arose.

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14 [2016] NZCA 482.
15 [2017\ NZSC 135.

[78] As co-counsel for the Secretary for Education submitted, in order for the applicant to show that the respondent owed him a duty of good faith after 3.15 pm on 14 March 2017, when his last short term relieving engagement with the school ended, he must show that he remained an employee between assignments. This is the only mechanism whereby a duty of good faith towards him could subsist between engagements. This is evident from the wording of sub-sections 4(1), (1A) and (2) of the Employment Relations Act 2000 ("the Act"), which provide as follows (emphasis added):

> **4 Parties to employment relationship to deal with each other in good faith**
> (1) The parties to an employment relationship specified in subsection (2)—
> (a) must deal with each other in good faith; and
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
> (i) to mislead or deceive each other; or
> (ii) that is likely to mislead or deceive each other.
> (1A) The duty of good faith in subsection (1)—
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
> (ii) an opportunity to comment on the information to their employer before the decision is made.
> …
> (2) The employment relationships are those between—
> (a) an employer and an employee employed by the employer:
> (b) a union and an employer:
> (c) a union and a member of the union:
> (d) a union and another union that are parties bargaining for the same collective agreement:
> (e) a union and another union that are parties to the same collective agreement:

> (f) a union and a member of another union where both unions are bargaining for the same collective agreement:
> (g) a union and a member of another union where both unions are parties to the same collective agreement:
> (h) an employer and another employer where both employers are bargaining for the same collective agreement.

[79] I have already found that the applicant was a casual employee in law, and therefore, he cannot have been owed a duty of good faith between casual engagements, as he was not an employee at those times.

[80] Similarly, the respondent was not obliged to follow the Teacher Conduct and Discipline Procedure contained in clause 3.4 of the Collective Agreement. It is stated to apply to "teachers". "Teacher" is defined in clause 1.8 as "any person as defined by clause 1.4 of this agreement who is or who becomes bound by this agreement".

[81] Clause 1.4 of the Collective Agreement is the coverage clause. This provides as follows:

> (a) This agreement covers work undertaken in state and integrated schools by:
> • Teachers in secondary (Year 9-13) schools and their subsidiary units; and
> • Teachers in Year 7-13 schools and their subsidiary units; and
> • Specialist secondary teachers of technology of classes at Years 7 and 8 in technology host schools or at schools or centres where the specialist secondary teacher is employed to predominantly teach technology classes at Years 7 and 8.
> [*Notes about technology teachers omitted*]
> • Teachers in composite (other than area) schools and special schools and units who teach Year 9 and above students; and
> • Itinerant teachers of instrumental music employed by secondary schools; and
> • Secondary teachers responsible for teaching and learning programmes for students years 9 and above, or across years 7-10 in Te Aho o Te Kura Pounamu (the Correspondence School), and/or support for those students. The responsibility may be in the development and/or delivery of these programmes or support.

[82] The employer is defined in the Collective Agreement at clause 1.8 (c), which states the following:

> Employer" means a board of trustees constituted pursuant to section 93 or section 95 of the Education Act 1989, or a commissioner where a commissioner has been appointed under Part 9 of the Education Act 1989 to act in place of a board of trustees, of a state or integrated school which employs teachers as described under 1.4(a) above. It also means a new board or trustees of a school created by the establishment of a new state or integrated school, or by the amalgamation of two or more existing schools where either event occurs during the term of this agreement as described in 1.6 above. **Note:** *In relation to a dispute about the interpretation, application or operation of this agreement, the employer shall act, if the Secretary for Education acting under delegated authority from the State Services Commissioner so requires, together or in consultation with the Secretary for Education.*

[83] Relief teachers are not excluded from the definition of 'teacher' in clause 1.4 of the Collective Agreement. However, I find that the applicant was a 'teacher' for the purposes of the Collective Agreement during short term relieving engagements only[16]. It was the respondent who was the employer of the applicant under the Collective Agreement during engagements and, between engagements, the applicant was not employed by the respondent at all. Therefore, the respondent had neither any power nor any obligation to follow clause 3.4 in dealing with the applicant to investigate the incident after 3.15 pm on 14 March 2017, when his relief engagement came to an end.

[84] In conclusion, I do not accept that there was an ongoing duty of good faith between the respondent and the applicant between engagements, or any other employment duty other than the duty to recognise the applicant's previous engagements for the purposes of preserving his accrued rights to pay progression, holiday leave and sick leave when the applicant was next engaged. The decision by the deputy headmaster to remove the applicant from the pool of short term relieving teachers was made after the end of the last engagement, and so there was no duty of good faith that applied, as the parties were no longer in an employment relationship.

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[16] Although, of course, he remained a 'teacher' between engagements for the purposes of the Education Act 1989.

[85] Counsel for the applicant also submits that the decision by the deputy headmaster to remove the applicant from the relieving pool was taken *ultra vires* because there was no delegated authority from the board of trustees to the deputy headmaster pursuant to s 66 of the Education Act 1989[17]. However, even if this allegation is correct, as removal from the pool occurred at a point when the applicant was not an employee, the Authority has no jurisdiction to consider such an argument.

Was there a breach of the duty of good faith during the last engagement?

[86] The applicant has also alleged that there was a deliberate decision to delay the investigation process into the incident on 10 March 2017 until after the end of the applicant's engagement on 14 March 2017 in order to defeat any employment claim by the applicant. However, I cannot reach that conclusion on the evidence I heard.

[87] First, I heard no evidence at all that the deputy headmaster was in anyway motivated to cause disadvantage to the applicant. Second, the deputy headmaster explained that he had to meet with the students to assess what evidence they had, and that he was unable to meet with one of them until 14 March. He also said that he would never give a letter about disciplinary action to a teacher during the teaching day, as it would be likely to disturb their teaching. I accept that evidence.

[88] In addition, given that the deputy headmaster and the headmaster were clearly of the view that the applicant was not an employee between engagements, they were also of the view that they had no duty at all to invite him to comment on their concerns, or to take into account his comments. The school could have simply removed the applicant from the relieving pool without any explanation at all. The fact that the school did seek the applicant's views is testament to a lack of bad faith in their dealings with him in my opinion.

[17] This section was repealed with effect from 19 May 2017, after the decision to remove the applicant from the relieving pool.

Conclusion

[89] In conclusion, I find that the applicant was employed pursuant to terms which mirrored those of the Collective Agreement, that he was employed as a casual employee, and that the respondent owed no duty of good faith to the applicant when it commenced its investigation into the alleged serious misconduct and subsequently decided to remove him from the pool of short term relieving teachers. The Authority therefore has no jurisdiction to investigate the fairness of that decision or the process followed. For the same reason, it also has no jurisdiction to consider the fairness of the decision of the school to make a report to the Education Council about the applicant.

[90] However, I will make these observations. First, having heard the evidence, if I had had the jurisdiction to consider the personal grievance of unjustified dismissal, I would have concluded that the decision to remove the applicant from the relieving pool was one which a fair and reasonable employer could substantively have made in all the circumstances. Whilst I am fully satisfied that the applicant did not intend to physically threaten, bully and humiliate the student, and that his comments and actions were made as part of boisterous schoolroom banter, the comment (or insinuation) that led to the parent complaints was very ill judged, especially given that the applicant did not know the students well and the possible effect on the student in question. It was therefore open to the respondent to conclude that it could amount to serious misconduct.

[91] I am also satisfied on a balance of probabilities that, although clause 3.4 of the Collective Agreement was not followed, even if it had been (and there had been a face to face meeting between the applicant and the respondent) it is unlikely that the applicant would have said anything materially different from what he stated in his letter to the deputy headmaster of 17 March.

[92] It follows from my conclusion at paragraph [90] that the school's decision to make a report to the Education Council was not one it had any choice in, as s 394 of the Education

Act provides that every employer of a teacher "must immediately report to the Education Council if it has reason to believe that the teacher has engaged in serious misconduct".

Costs

[93] I reserve costs. The parties are to seek to agree how costs are to be dealt with between them. However, if they have failed to reach agreement within 14 days of the date of this determination, the respondent may serve and lodge a memorandum of council seeking a contribution towards its reasonable costs, explaining what contribution it seeks, and the basis for that contribution, and the applicant shall have a further 14 days after receipt of the memorandum to serve and lodge its own memorandum of counsel in reply. The matter of costs would then be determined by the Authority on the papers. As an intervenor, the Secretary for Education shall bear its own costs.

David Appleton
Member of the Employment Relations Authority