

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 73A/08
5115268

BETWEEN PAUL BRADFORD
 Applicant

AND TAI POUTINI POLYTECHNIC
 Respondent

Member of Authority: James Crichton

Representatives: Paul Bradford in person
 Paul Wilson for Respondent

Investigation Meeting: 12 June 2008 at Greymouth

Determination: 19 June 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By statement of problem filed on 11 March 2006 in the Authority, the applicant (Mr Bradford) alleged that he had a personal grievance by reason of an unjustified dismissal, and that he had also suffered disadvantage as a consequence of a number of unjustifiable actions of his former employer, the respondent (the Polytechnic).

[2] The Polytechnic denied all Mr Bradford's allegations including, in particular, the allegations that he had suffered a personal grievance at its hands either by way of an unjustified dismissal or by way of having suffered a disadvantage as a consequence of unjustifiable actions which it took against him.

[3] When Mr Bradford filed his statement of problem, he did it in the form of a succession of numbered propositions which he referred to as *facts*. One group of such propositions concerned Mr Bradford's claim that his signature had been forged in the

processing of student assessments. For reasons which will be apparent from the Authority's interim determination dated 23 May 2008, it became expedient for the so-called *forgery* allegations to be dealt with separately and those matters are disposed of in that earlier interim determination.

[4] It follows that the present determination is concerned with the other matters.

[5] Mr Bradford was first employed by the Polytechnic on 4 March 2002 as a tutor in the Jade and Hard Stone Carving programme at the Polytechnic. Mr Bradford is, in his own right, an extremely talented and nationally-recognised jade carver and is himself a graduate of this very programme. Later in 2002, Mr Bradford was employed by the Polytechnic as a teacher of Jade Carving in the Continuing Education Programme. His first engagement here began on the 5th of August 2002, and the sixth and final one concluded on the 31st of May 2005.

[6] In the Jade and Hard Stone Carving Programme the Polytechnic employed Mr Bradford on a series of short term engagements numbering 10 in total from the first engagement starting on 4 March 2002 down to the final engagement concluding on 25 August 2006. None of these engagements contemplated a full span of hours and the average number of hours required to be worked per week in the first half of that four year period was probably about 10 hours, whereas in the second half of the period the number of hours per week dropped slightly to be perhaps 8 hours on average, or a little less.

[7] None of the individual 10 contractual engagements were for anything like a full year, and the majority were for 2 or 3 months and typically spanning an academic term of the Polytechnic. The longest single span of engagement was about 9 months, but as I have already noted, the number of hours required to be worked each week was quite modest.

[8] In the Continuing Education Programme, Mr Bradford typically taught a short course of roughly a month's duration each requiring a commitment of 30 hours.

[9] At the conclusion of the final fixed term engagement in the Jade programme on 25 August 2006, no further work was offered to Mr Bradford. This was because the Polytechnic had decided to restructure the delivery of the Jade and Hard Stone Carving programme so as to deliver it through a different employment structure than had been the case hitherto. Mr Bradford's employment had been on a series of fixed

term engagements based on the requirements of the academic programme and the number of students who were presenting for the course. The Polytechnic took the view that this could be improved upon and in the winter of 2006 determined to advertise a new permanent part time position to deliver the Jade programme. Mr Bradford was offered the opportunity of applying for this position and did in fact apply for it, but in the result was not appointed.

[10] It seems the most significant factor in Mr Bradford not being appointed to this position was his refusal to contemplate performing all of the tasks which the Polytechnic wished the successful appointee to perform. Particularly, Mr Bradford indicated in his application for the new role that he only wished to teach practical carving and would neither teach theory nor be involved in the assessment of students because this would involve him in having to engage with the programme's supervisor with whom he had a less than satisfactory relationship.

[11] Once he completed his period of service on 25 August 2006, and being unhappy about the way in which matters had developed, Mr Bradford took a number of steps including complaining to the appropriate authorities about the alleged forging of his signature on assessment documents, complaining to the Police about the alleged forgery of his signature and ultimately filing his statement of problem in the Employment Relations Authority, having raised a personal grievance initially, within time.

Issues

[12] The first and most significant issue for determination is whether Mr Bradford could have had a reasonable expectation of continuity of employment by reason of his successive reappointments on a term by term basis, or whether it was indeed available to the Polytechnic to continue to employ Mr Bradford in that way. If the Authority were to find that the Polytechnic could not continue to employ Mr Bradford on a succession of limited term contracts, then the Authority could conclude that Mr Bradford was unjustifiably dismissed when his final contract came to an end by effluxion of time on 25 August 2006.

[13] However, Mr Bradford may still have a cause for complaint even if the Authority does not find that he was unjustifiably dismissed. This is because it may be that the way Mr Bradford was treated by the Polytechnic was such as to constitute a

disadvantage to Mr Bradford because he was subjected to unjustifiable actions by the Polytechnic. It follows that the second issue for the Authority to determine is whether there is or has been any disadvantage to Mr Bradford as a consequence of any unjustified actions of the Polytechnic.

[14] Finally, the Authority will need, for the sake of completeness, to deal with the balance of the other allegations which Mr Bradford makes in pursuit of his wider concerns relating to personal grievance. By virtue of the evidence that the Authority has heard, it is possible to make judgements about the other matters which Mr Bradford is troubled by.

Unjustified dismissal

[15] I am satisfied after reflecting on the evidence I have heard that Mr Bradford has no grounds to contend that he has been unjustifiably dismissed. It is true that Mr Bradford has experienced a succession of fixed term engagements both in his role as a tutor of the Jade and Hard Stone Carving programme, and in his role as a tutor of a succession of short courses in the Community Education Programme. In the first case, there have been 10 different fixed term engagements, and in the second there have been a total of six fixed term engagements.

[16] The legal position is clear. An employer may not employ staff on fixed term engagements without a proper purpose. Further, where there have been a succession of fixed term engagements there is a risk that the continuation of that arrangement will create a legitimate expectation that such arrangements will continue to the extent that those arrangements become in fact an open-ended contract of employment.

[17] The use of fixed term engagements in tertiary education is endemic. It is a function of the operational exigencies of the industry. On the one hand, there are often funding constraints which militate against certainty. The absence of continuing funding makes it difficult for employers to commit to unfettered employment obligations.

[18] On the other hand, the demands of students will fluctuate from time to time and be almost impossible to accurately predict. That factor, coupled with the natural progression of the academic environment through a number of terms with significant breaks between them make it more rather than less difficult for education industry

employers to commit to permanent staff when student numbers are uncertain and there is no work to be done outside of term time.

[19] I am satisfied on the basis of the evidence I heard that given the hours of work demanded of Mr Bradford over the period that he was engaged both in the Jade Carving Programme and in the Community Education short courses it would have been quite unreasonable to expect the Polytechnic to do anything other than employ him on a succession of fixed term engagements. Indeed, I was told during the course of the hearing that during any academic year, the Polytechnic would have several hundred staff in a similar position to the one that Mr Bradford was previously in when he was in the employ of the Polytechnic.

[20] One of the ironies of this particular employment relationship problem is that, if Mr Bradford had chosen to offer the Polytechnic all of the skills which he undoubtedly possesses to fulfil the permanent part time role which they determined to replace his position with, he might well have been successful and have won a position which would give him continual access to teaching students (a role he clearly enjoyed) together with academic tenure which of course his succession of temporary positions did not accord him.

[21] However, when the Polytechnic decided to change the way in which the Jade and Hard Stone Carving programme was delivered, and replace a succession of time engagements with a permanent part time role, Mr Bradford while applying for the position, elected not to offer to teach theory (which was part of the job description) nor to do assessments of students' work which was also part of the job description. His rationale for taking those steps was his difficulty in working with his then supervisor, Mrs Painter-Arps. During the course of the investigation meeting, Mr Bradford accepted my description of the relationship between him and Mrs Painter-Arps as *fraught*. Polytechnic witnesses also accepted that the relationship between the two was not all that it could be, although Polytechnic witnesses were at pains to assure me that Mrs Painter-Arps had a high regard for Mr Bradford's artistic work and for the affection and esteem that his students had for him. Indeed, Mr Samuel Blight, who is the Director of the West Coast Campus of the Polytechnic, accepted during the investigation meeting that it was a loss to the Jade and Hard Stone Carving programme when Mr Bradford left the Polytechnic. Mr Blight said that *..It*

was not my wish to exclude Mr Bradford from the programme when I decided to restructure the role.

[22] It follows that to some extent anyway, Mr Bradford is the author of his own misfortunes. Clearly there was a difficulty in his relationship with Mrs Painter-Arps. That is a matter for which both he and the Polytechnic need to take some responsibility. It is not good enough for either of them to blame the other for the unsatisfactory relationship and certainly Mr Bradford's evidence at the investigation meeting seems to be predicated on the footing that there was no fault with him and only fault with her. While I did not hear from Mrs Painter-Arps, it seems to me inconceivable that Mr Bradford could be blameless and Mrs Painter-Arps could be responsible for all of the deficits in that relationship.

[23] I do think that both parties have an obligation to try to address those sorts of difficulties which are hardly unknown in workplaces, and to the extent that the Polytechnic did not assertively deal with the inadequacies in the relationship between the two, they must be as culpable as I find Mr Bradford was in not dealing appropriately with a key workplace dynamic.

Unjustified disadvantage

[24] Although I have reached the conclusion that Mr Bradford has not been unjustifiably dismissed from his employment at the Polytechnic, I reach a different conclusion in relation to the question whether he has suffered disadvantage as a consequence of unjustifiable actions of the Polytechnic. The reason I reach this conclusion is because I have decided that the Polytechnic has an obligation, just as Mr Bradford has, to ensure that the workplace relationships are effective and efficient and, where there are difficulties, that those difficulties are properly and effectively dealt with.

[25] In my opinion, neither party has discharged its obligation to ensure that there was a wholesome appropriate working relationship between Mr Bradford and his immediate supervisor, Mrs Painter-Arps.

[26] It is not enough for each party to blame the other for the deficit. Both parties (Mr Bradford and the Polytechnic) need to accept the obligation to create and sustain effective workplace relationships and where those effective workplace relationships cease to exist or become frayed, both parties must diligently work to deal with them.

That is the essence of the good faith obligation which the Employment Relations Act 2000 creates on all parties to employment relationships.

[27] It is perfectly clear from the evidence before the Authority that the central challenge in the relationship between Mr Bradford and the Polytechnic was the difficult relationship that Mr Bradford had with Mrs Painter-Arps, his immediate superior. Despite the self-evident difficulty in that important relationship, there is only limited evidence that the Polytechnic took appropriate steps to deal with the matter. Neither party can excuse their obligation to develop wholesome workplace relationships by pointing the finger at the other and saying they are responsible.

[28] It follows that I find that the Polytechnic has failed to fulfil its obligations as an employer by failing to address and confront the unsatisfactory workplace relationship between Mr Bradford and his supervisor and that, in doing that, the Polytechnic has taken an unjustified action which has been to Mr Bradford's disadvantage.

[29] Before concluding this part of the determination, I need to deal with an allegation that Mr Bradford makes about the Polytechnic's communication strategies during his employment. In particular, he complains that at the point at which the final term contract ended in August 2006, he was deprived of the information that there was a restructure of the area and that he only found out two days before the end of his final term contract that he could not expect a further renewal.

[30] I accept on the basis of the evidence I heard that the Polytechnic might have been more explicit in its communication strategy with Mr Bradford because it does seem to have been assumed that Mr Bradford knew or ought to know what was happening. No doubt the Polytechnic thought that Mr Bradford would be aware of the change, if only because he had applied for the new position and must have been aware that the employment agreement which he signed (the last one), had a finite finish date on it.

[31] However, while all of those assumptions are fair as far as they go, Mr Bradford's evidence is that he expected that he would get another contract for a further period of time.

[32] I am not prepared to make findings of fault against the Polytechnic on this particular issue, but I do suggest to it that it needs to be quite explicit with its staff

(whether casual, part time or otherwise), such that staff understand precisely what is happening and what the potential consequences for their continued employment may be. While I understand the Polytechnic's reservation about the extensive pool of part time staff that it manages, I think it has an obligation to ensure that affected staff know about changes to their employment and I do not think that it can afford to rely on affected staff picking up the information because they are part of a new recruitment situation

The other allegations

[33] In addition to raising a personal grievance on the grounds of unjustified dismissal and unjustified disadvantage, Mr Bradford raises a plethora of other claims against the Polytechnic. These he lists as unfair treatment, lying, bullying, forgery, assessment document tampering, misappropriation of authority and copyright infringement.

[34] It is appropriate to deal with each of these in turn. I am not satisfied that Mr Bradford has suffered any unfair treatment at the hands of the Polytechnic save for the issue about the relationship between Mr Bradford and his immediate superior which I have referred to specifically above.

[35] I have found no evidence that Mr Bradford has been lied to by his employer.

[36] Nor do I think there is any evidence of bullying, either of Mr Bradford or indeed by Mr Bradford, but I do accept that the relationship between Mr Bradford and his immediate superior was unsatisfactory and I have dealt with that issue separately.

[37] The forgery allegation and the allegation of assessment document tampering have been dealt with in my earlier interim determination.

[38] The final two claims are of misappropriation of authority and copyright infringement. There is no evidence of the first and as to the second, this relates back to Mr Bradford's unsuccessful claim that assessment of student work attended to by him in his capacity as a tutor was improperly interfered with. Again I find no evidence of that wrongdoing either.

Determination

[39] I am satisfied that Mr Bradford was not unjustifiably dismissed from his employment and that he could have no reasonable expectation of continued employment given the circumstances pertaining to his employment at the Polytechnic.

[40] However, I think that both Mr Bradford and the Polytechnic are responsible for a failure to deal appropriately with an unsatisfactory working relationship between Mr Bradford and his immediate superior and that, to the extent that the Polytechnic as employer failed to address that exercise in a robust fashion, Mr Bradford has made out his case that he has suffered a disadvantage as the consequence of an unjustified action, or in this case, strictly speaking, a lack of action by the Polytechnic.

[41] However, I am required by the statute to consider whether Mr Bradford, by his behaviour, has contributed to the situation giving rise to the personal grievance and to look at whether any remedies that might otherwise be awarded ought to be reduced by the extent of that contribution, if any.

[42] My considered view is that Mr Bradford has contributed to the circumstances giving rise to his successful personal grievance claim and the he is every bit as much to blame for the unsatisfactory relationship that he had with his immediate superior. Mr Bradford's failure to address his own behaviour appropriately is clearly encapsulated in his refusal to provide the Polytechnic with all of the elements of the new tenured part time tutoring position for which he applied, just because those parts of the role would necessitate him working with Mrs Painter-Arps.

[43] In those circumstances, it is not appropriate to make any award in favour of Mr Bradford.

Costs

[44] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority