

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 63  
5150509

BETWEEN                      TREVOR DAVID KILGOUR  
   Applicant  
  
A N D                              QUEEN'S HIGH SCHOOL  
   BOARD OF TRUSTEES  
   Respondent

Member of Authority:        Helen Doyle  
  
Representatives:              William Clark, Advocate for Applicant  
   Barry Dorking, Counsel for Respondent  
  
Investigation Meeting:        30 March 2011 at Dunedin  
  
Submissions Received:        11 and 26 April 2011 from Applicant  
   15 April 2011 from Respondent  
  
Date of Determination:        12 May 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Trevor Kilgour worked at Queen's High School as an audio visual technician for approximately 25 years. His role involved tasks such as compiling audio visual resources, setting up equipment as needed, repairing and maintaining audio visual equipment and lighting, repairing and maintaining equipment in the technology room and involvement in stage lighting and recording for productions.

[2] Mr Kilgour's employer was the Queen's High School Board of Trustees but I shall refer to his employer in this determination as either the High School or the Board of Trustees (BOT).

[3] From in or about mid-2004, Mr Kilgour worked 27.5 hours per week from 9am to 3pm Monday to Friday. In August 2008, there was a review of support staff

hours at the High School with an identified need to reduce costs because of limited operations funding.

[4] In or about late November 2008, there was a proposal by the High School that Mr Kilgour's hours reduce from 27.5 to 5.5 hours per week. This reduction in hours was later confirmed by letter dated 3 December 2008. Mr Kilgour signed the letter agreeing to the changes to his hours on 12 December 2008. Within a day or two of that date he made it clear to the Principal of the High School Julie Anderson that he was unhappy with the change of hours and no longer wished to agree to such a change. It was agreed a discussion about this would wait until the New Year.

[5] When undertaking the review of Mr Kilgour's hours, the High School proceeded on the basis that his conditions were based on those in the support staff collective agreement 2 December 2007 to 1 March 2009 between NZEI Te Riu Roa, the Service and Food Workers' Union and the Secretary for Education acting under delegation from the State Services Commissioner (the collective agreement). Mr Kilgour was not a member of either union party. He explained at some time in or about 1999 he had been advised by a union representative from NZEI that his position would probably not be covered by collective contracts/agreements negotiated by the union on behalf of support staff. He did not revisit this issue of coverage with NZEI until January 2009.

[6] At the time of the review Mr Kilgour did not turn his mind to what conditions governed his employment. He said in his evidence during the Authority investigation meeting that because of the nature of the role he performed he did not have breaks with other staff and, on reflection, he could see that he was *out of the loop* on many staff-related issues.

[7] Mr Kilgour's last known employment agreement at the time of the review of his hours was an individual employment agreement that had been offered to him in 2004. Under the provisions of that agreement any change to Mr Kilgour's hours of work required agreement. Agreement to a change of hours was not required under the conditions of the collective agreement.

[8] The High School in reviewing the hours did not consider whether the change to hours was such that Mr Kilgour's position had become surplus to the requirements

of the High School and did not apply the redundancy provisions set out in Mr Kilgour's 2004 individual employment agreement.

[9] In 2009, following two meetings with the principal and support services manager at the High School, Mr Kilgour delivered the following letter to the High School:

*27/01/09*

*Dear Mrs Julie Anderson,*

*You have asked me to write a letter rescinding the offer of 12/12/2008.*

*At the time, I signed the proposed change to my job under a certain amount of pressure and because I thought I had no other real option. I phoned you on the weekend of the 12th and told you I was not happy with the situation.*

*I cannot keep working at Queen's High. I cannot go from surviving on a wage to surviving on pocket money.*

*The reduction in hours and the wage rate you proposed on 12/12/2008 mean that I do not have a job.*

*Yours sincerely,  
Trevor Kilgour*

[10] Mr Kilgour did not return to the High School and undertake any work in 2009.

[11] The first employment relationship problem is whether Mr Kilgour has a personal grievance that he was unjustifiably disadvantaged by the process leading to a proposed reduction of his hours and whether he is entitled to redundancy compensation. He claims redundancy compensation in accordance with the formula set out in his 2004 individual employment agreement at the pay rate set out in Grade C in the collective agreement for reasons I shall come to.

[12] The second employment relationship problem is that Mr Kilgour says he has a personal grievance that he was disadvantaged in negotiating terms and conditions of employment throughout his time with the High School because his employer failed to offer him from time to time individual employment agreements based on the terms and conditions of the Support Staff in School Collective Agreements as promulgated by the State Services Commissioner (the Commissioner) under s.75 (3) of the State Sector Act 1988. I shall refer to these conditions from hereon as the promulgated

conditions of employment. Mr Kilgour says that as a result he was underpaid and not paid an allowance for his qualifications and as well, or alternatively, he says that the conditions in the collective agreement applied to him automatically as minimum conditions.

[13] The third employment relationship problem is that remuneration reviews to be held every 12 months under clause 4.2 of Mr Kilgour's 2004 individual employment agreement were not carried out.

[14] Mr Kilgour seeks payment of the sum of \$137,929.61 made up of redundancy compensation, reimbursement of underpayment of wages of approximately \$57,828.77 and an unpaid allowance to recognise qualifications of \$3,076.70. Mr Kilgour also seeks interest of \$15,865.49 and \$25,000 for compensation for hurt, humiliation and loss of dignity.

[15] The BOT in its second amended statement in reply says that since 1 July 1999 Mr Kilgour was employed on an individual employment agreement based on an expired site-specific collective agreement and then on an individual employment agreement dated 24 July 2004 that applied as at the time of the review in August 2008.

[16] The BOT acknowledge the requirements in s.75 of the State Sector Act and say that all staff not covered by the collective agreement are now offered the promulgated conditions of employment. The BOT says that regardless of the fact that Mr Kilgour was never offered the promulgated conditions of employment there would not have been a significant change to his wage rate as the BOT considered he was appropriately graded and paid at just slightly above the top rate for Grade A.

[17] The BOT say that even if Mr Kilgour was found to have qualifications for which under the collective agreement he would be paid an allowance and, taking into account a brief period in 2009 when Mr Kilgour was covered by the collective agreement, any amount owing to him would be something over \$700 gross calculated on a working year of 42 weeks for six years before the statement of problem was lodged.

[18] The High School accept that it incorrectly approached the consultation process about the change of hours in 2008 on the understanding that Mr Kilgour was party to an individual employment agreement based on the conditions of the collective

agreement. It says that any disadvantage suffered or liability it has to make a redundancy payment ended because Mr Kilgour subsequently made a decision in 2009 to join the Union and was thereafter covered by the collective agreement which enabled such a change to hours to take place without agreement.

[19] The BOT says that a personal grievance for unjustified disadvantage for the failure to carry out remuneration reviews under the 2004 employment agreement is out of time and further that in any event Mr Kilgour always received a wage increase except in 2000 when there was a major review of all support staff and in 2008 when there was another review.

[20] The BOT also counterclaims or claims set-off for payments it made to Mr Kilgour for the first term of 2009 even though he did not attend at work in the sum of \$4,634.39 gross.

### **Issues**

[21] The issues for determination are:

- What employment agreement contained Mr Kilgour's conditions of employment as at August 2008 when the review into a reduction of hours commenced? Consideration will need to be given to the fact that there is no evidence of the State Service Commissioner's concurrence to that 2004 individual employment agreement and findings will need to be made whether the conditions in the collective agreement automatically applied. Consideration will also have to be given to the fact that the promulgated conditions of employment were not offered to Mr Kilgour.
- Was the process to unilaterally vary Mr Kilgour's hours measured against findings in terms of the first issue unjustified?
- Was Mr Kilgour's position redundant and is he entitled to redundancy compensation and does Mr Kilgour's joining the NZEI and the collective agreement affect any entitlement to redundancy?
- Was the failure to offer Mr Kilgour the promulgated conditions of employment or to obtain the concurrence of the Commissioner to the

2004 individual employment agreement unjustified and if it was, was Mr Kilgour disadvantaged in his employment?

- Was Mr Kilgour paid less than he was entitled to and is he entitled to recover lost wages at the level he seeks?
- Was a personal grievance raised within 90 days about the failure to apply the remuneration review provision in clause 4.2 of the 2004 individual employment agreement or, if it was not and the matter is viewed as a breach of contract, did Mr Kilgour suffer damage as a result of that failure?
- If it is found that Mr Kilgour is owed redundancy compensation and/or was disadvantaged in his employment what remedies should he be awarded and should the money paid to Mr Kilgour for the first term of 2009 when he was not at work be accounted for either by way of counterclaim or set-off?

**What employment agreement contained Mr Kilgour's terms and conditions of employment as at August 2008 when it was proposed to reduce his hours?**

[22] In May 1997, Mr Kilgour was party to a collective employment contract which applied to the High School's support staff. The Authority heard evidence about a further proposed or draft employment contract in 1999. There was no evidence to satisfy the Authority that this contract was settled and more importantly Mr Kilgour could not be certain that he was even a party to the 1999 contract. In the absence of any satisfactory evidence to the contrary, I find that Mr Kilgour's terms and conditions in all likelihood simply remained those as set out in the expired 1997 collective employment contract until 2004.

[23] In or about June 2004, Mr Kilgour had a discussion about his wages and job description with the Support Services Manager at the High School, Diane Daly. The nature of the discussions were recorded in a letter dated 24 June 2004 which confirmed that, following a wage and job description review, the BOT had agreed to a revised job description and a 3% wage increase backdated to 1 January 2004. Mr Kilgour's hours also increased from 25 to 27.5 hours per week for the term time only. Ms Daly enclosed with her letter dated 24 June 2004 what she described as an

updated individual employment agreement and asked that Mr Kilgour sign and return one copy as confirmation of his acceptance of the revised position.

[24] The High School could not find a copy of the 2004 individual employment agreement signed by Mr Kilgour. The copy provided by the High School showed that it had been signed on behalf of the BOT. At one point in the evidence, Mr Kilgour said in answer to questions from the Authority that he could recall signing the agreement and leaving his signed copy with the High School but he seemed less sure in answer to questions at a later time.

[25] There is no dispute, however, that Mr Kilgour was paid the 3% increase and his hours changed. There is criticism, with some justification, by Mr Kilgour that although clause 4.1 of the individual employment agreement refers to the BOT agreeing to pay Mr Kilgour the remuneration set out in the first schedule to the agreement, there is in fact no first schedule detailing what the remuneration is. Notwithstanding that Mr Kilgour was aware of his hourly rate and the increase set out in the letter was paid to him as were subsequent increases.

[26] In determining whether it was this 2004 individual employment agreement, (the 2004 agreement), that was in force at the time of the hours review I need to reach findings on two issues.

[27] The first issue is whether the failure to obtain the Commissioner's concurrence to the 2004 agreement affects the validity of the agreement. Section 75(2) of the State Sector Act 1988 provides:

*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.*

[28] There is strength in Mr Dorking's submission that the obligations under s.75 (2) to obtain the written concurrence are between the BOT as employer and the Commissioner. Mr Clark's submission was that the failure to obtain concurrence means that the 2004 agreement is effectively void.

[29] Section 73 of the State Sector Act 1988 provides that the Employment Relations Act 2000 applies to schools except as otherwise provided in the Act. There

is nothing in s.75 (2) that would support an approach other than under the Employment Relations Act 2000. Under the Employment Relations Act 2000, the ability for a party to challenge and question an employment agreement or have it cancelled or varied is limited -for example s.63A and s.68.

[30] In final wide ranging submissions Mr Clark submitted that there was unfair bargaining under s.68 of the Employment Relations Act 2000, not only in relation to the failure to obtain concurrence, but also for the failure to offer the promulgated conditions. I am not satisfied that there was unfair bargaining at the time of the 2004 agreement. The evidence was not presented in a way that would support such a claim. I do not find that the failure to obtain the concurrence of the Commissioner to the 2004 agreement, a step that an employee would not in the ordinary course of events even be aware of means that the 2004 agreement is not a valid agreement.

[31] The second issue is whether the conditions of the collective agreement applied automatically to Mr Kilgour.

[32] Mr Clark relies on s.75(1) of the State Sector Act that provides:

*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.*

[33] Relying on that section, Mr Clark submits that Mr Kilgour was automatically covered by the promulgated conditions because the terms and conditions are minimum conditions notwithstanding that they were never offered to him. His submission is to the effect that these conditions should be read together with the provisions of Mr Kilgour's 2004 individual employment agreement where those provisions are more favourable.

[34] Mr Dorking's submissions about the historical nature of this section is supported by the Brookers Commentary to the section that provides:

*The concept of "actual conditions" derived from the repealed State Services Condition of Employment Act 1977, under which conditions contained in determinations were the actual conditions of employment. This contrasted with the position under industrial awards, where the conditions were minima. Accordingly, "actual conditions" are neither maxima nor minima, but are the precise, fixed conditions of employment.*

[35] I also find support for Mr Dorking's submission that the reference in s.75 (1) to *actual conditions of employment* does not mean the actual conditions of employment for employees not covered by the collective agreement from reading s.75 as a whole. Section 75(1), if applied in the way that Mr Clark submits it should be, would be inconsistent with s.75(2) which provides that conditions for those employees not bound by any collective agreement shall be determined in each case by agreement between the employer and the individual employee.

[36] There would also be significant other difficulties with the approach put forward by Mr Clark. It is not a straightforward matter to determine what conditions in the collective agreement apply to Mr Kilgour and another difficulty is that Mr Kilgour, understandably, wants to retain the more favourable redundancy and hours of work provisions in his 2004 agreement.

[37] I find that unless Mr Kilgour was a member of the Union and therefore covered by the collective agreement or was offered and accepted the promulgated conditions of employment, there would have to be negotiation and agreement. The Authority does not have the jurisdiction to simply fix terms and conditions of employment.

[38] The sensible approach to take is to consider whether the failure to obtain concurrence to the 2004 agreement or offer the promulgated conditions of employment was unjustified and, if so, what disadvantage Mr Kilgour suffered.

[39] In conclusion I find that Mr Kilgour was at all material times when the review of his hours took place a party to the 2004 individual employment agreement.

### **Changing the hours**

[40] In August 2008, there was a support staff meeting held. In attendance were Ms Anderson, the Executive Officer, Ms Daly, and the support staff including Mr Kilgour. The meeting was called to discuss the school's declining roll and reduction in the operations grant funding from the Ministry of Education.

[41] A memorandum from Ms Anderson dated 12 August 2004 to support staff confirms the background to the review and reports that in accordance with the variation of hours clause 2.5 of the Support Staff in Schools Collective Agreement, the High School was able to set hours once every 12 months for the following 12

months. One months notice before the variation came into effect was required. The support staff were advised if the BOT under the terms of the collective agreement was to review hours, then such a change would be actioned in the fourth quarter of the school year to give everyone a clear understanding of their working hours for the following year.

[42] Mr Kilgour was asked to compile a list of his key tasks and there was a subsequent discussion about this. Ms Daly and Ms Anderson advised Mr Kilgour that their view was there was really only one day of regular work a week for an audiovisual technician of 5.5 hours. Mr Kilgour was advised to talk to people about his situation before any final decisions were made.

[43] On 3 December 2008, no doubt in keeping with the commitment by the High School to provide a clear understanding of employees' working hours for the following year before the end of the 2008 school year, Mr Kilgour was sent a letter confirming his hours of work for 2009 as 5.5 hours with a half hour break for lunch. Mr Kilgour's rate of pay was recorded as \$13.99 per hour together with holiday pay. He was advised that all other employment conditions set out in the NZEI Support Staff and Schools Collective Agreement remained unchanged and he was asked to sign a copy of the letter to confirm his acceptance of the position.

[44] Mr Kilgour duly signed that he did accept the position offered on 12 December 2008. However, on or about 14 December 2008, he was unhappy when a servicing firm at the school questioned him about emergency lights that he had been instructed by the school manager not to touch. Mr Kilgour talked to Ms Anderson about his concerns and also about rescinding his agreement to the offer presented of reduced hours. It was agreed that Mr Kilgour would seek some further advice and that Ms Anderson would meet with him in the new year as the school year was about to end for the 2008 year.

[45] Mr Kilgour obtained some advice from the Community Law Centre and he was advised by Mr Clark to approach NZEI. Mr Kilgour had a discussion with an official from NZEI and it was during that meeting that Mr Kilgour became aware there were different grades in the collective and there was some discussion about where Mr Kilgour's position would fall within those grades.

[46] On or about 13 January 2009, Mr Kilgour gave the NZEI a cheque for his union fees and thereafter, as recorded by the Union from 22 January 2009, became a member of the Union.

[47] Although Mr Kilgour never undertook any work for the 2009 year, there were two meetings held on 21 January 2009 and on 27 January 2009 with Ms Anderson, Ms Daly, Mr Kilgour and his representative Mr Clark. It was during the first of those meetings that Mr Clark, who was present at both meetings, presented Ms Anderson with the 2004 individual employment agreement. The question of redundancy was raised and there was also a discussion about whether Mr Kilgour had been paid correctly in terms of the provisions in the collective agreement.

[48] Although there was a dispute about whether the High School knew that Mr Kilgour had joined the NZEI and therefore was covered by the collective agreement, I find, having considered the evidence, that it was probably the case that Mr Kilgour and Mr Clark thought that Ms Anderson knew about the union membership. I accept Ms Anderson's evidence that in fact she remained unaware of it. Mr Kilgour made it clear that he did not want to accept the offer of part time hours at the first meeting.

[49] At or before the second meeting on 27 January 2009, Mr Kilgour was asked to rescind his agreement formally. Having considered the evidence, I find it is more likely that the letter that Mr Kilgour wrote dated 27 January 2009 was in fact given to Ms Anderson following that meeting. It was agreed at the meeting that the parties would attend mediation. Mr Clark raised a personal grievance verbally but later reduced that to writing by letter dated 27 January 2009. I find that the letter of 27 January 2009 was a letter of resignation and accordingly the relationship between the parties ended at that time. Mr Kilgour did not consider he had a job to return to.

[50] The High School continued to pay Mr Kilgour at his usual rate until the end of the first term. Ms Anderson said that she felt that was the action of a fair and reasonable employer until the matter could be resolved. I accept Mr Clark's submission that there was no formal suggestion made to Mr Kilgour that he either return to his role or that it in fact continued to exist at 27.5 hours per week.

**Was the process to unilaterally vary Mr Kilgour's hours unjustified in terms of the 2004 individual employment agreement?**

[51] Any action of the BOT is required to be determined on an objective basis in accordance with the test of justification under s.103A of the Employment Relations Act 2000 as it was before the amendment to that section substituted on 1 April 2011 by section 15 of the Employment Relations Amendment Act 2010.

[52] Ms Anderson said in her evidence that before commencing the review she relied on advice of an employment adviser from the School Trustees Association that all school support staff were considered to be covered by the NZEI collective agreement or on an individual employment agreement based on that collective agreement. The High School did not follow the process set out in Mr Kilgour's 2004 individual employment agreement and did not realise that any change to the ordinary hours of work of 5.5 hours per day between 9am and 3pm had to be agreed between the employee and the Principal.

[53] A change to Mr Kilgour's hours was simply offered by way of letter in early December 2008 and there were no options included in that letter. There was no consideration given Mr Kilgour's hours were reduced significantly, as to whether his position was in fact surplus. Although Mr Kilgour initially agreed to the change in hours, he shortly thereafter indicated dissatisfaction and was told to leave the matter until the New Year for discussion.

[54] I find that the actions and process in terms of the review and decision to unilaterally vary Mr Kilgour's hours did not comply with the provisions of his 2004 agreement and were therefore unjustified and disadvantaged him. The actions of the BOT and how they acted were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. He has a personal grievance.

**Does Mr Kilgour's joining NZEI and the collective agreement affect any entitlements that he may have had under his individual employment agreement and is Mr Kilgour entitled to redundancy compensation?**

[55] Mr Dorking submits that the High School was able to change Mr Kilgour's hours from the time he joined the Union and was covered by the collective agreement on or about 13-22 January 2009 with a month's notice and therefore Mr Kilgour is not entitled to other compensation or redundancy.

[56] I do not accept that argument. The High School determined as at 3 December 2008 that Mr Kilgour's hours were reduced to 5.5 per week. He was offered those hours at that time so that he would know in advance of the New Year what they would be. The subsequent joining of NZEI and, by virtue of that, being covered by the collective agreement, does not result in that collective agreement applying in some retrospective manner to either the review process or the outcome reached. I do not find that it was later agreed that the BOT would somehow reverse the original decision and that Mr Kilgour would carry on his original hours. Ms Anderson confirmed under questioning from the Authority that another employee was eventually hired to perform Mr Kilgour's duties at 5.5 hours per week. That supports, in my view, that there was felt by the High School to be a genuine need for a review of Mr Kilgour's hours and a genuine requirement to reduce them in 2008.

[57] Mr Kilgour's position, I find, was surplus to requirements in December 2008. Under the terms of Mr Kilgour's 2004 agreement, when his position became surplus to the requirements or needs of the High School, clause 19 would apply. Under that clause, the BOT would provide at least two weeks' notice of intending redundancy and would consult with the employee regarding possible retraining or redeployment opportunities. If retraining and redeployment was not an option, then the position was to be declared redundant and the employee given a minimum of six weeks' written notice and be paid the redundancy compensation equivalent to four weeks for the first year and two weeks for each year of employment thereafter. The employee was also entitled to reasonable time off without loss of pay to attend interviews, a reference and all possible assistance with respect to finding alternative employment. This process was not undertaken and these options were not offered to Mr Kilgour.

[58] If there were no redeployment or retraining opportunities available, Mr Kilgour should have had his position declared redundant and he should have been advised that he was entitled to compensation on or about 3 December 2008.

[59] If the redundancy was calculated on the basis of Mr Kilgour's hourly rate at the time, then the amount of redundancy owing to Mr Kilgour was \$20,005.70 gross based on 52 weeks at Mr Kilgour's pay rate of \$384.73 per week at \$13.99 per hour. Mr Kilgour, however, says that he should have been paid at a higher rate and that is a matter I shall consider shortly.

[60] Compensation shall be considered together with whether there should be any compensation payable in terms of the alleged unjustified omissions in terms of the obligations of the BOT under the State Sector Act 1988.

**Was the failure to offer Mr Kilgour the promulgated conditions of employment or obtain concurrence unjustified and was Mr Kilgour disadvantaged as a result?**

[61] Mr Kilgour was unaware of the obligations that the BOT had under the State Sector Act 1988 and indeed the conditions in the collective agreements until in or about early January 2009. No issue was taken with whether a personal grievance had been raised within 90 days about these matters. No doubt that was the reason why. The focus for Mr Kilgour and Mr Clark was on the alleged underpayment on the basis that Mr Kilgour's position fell within Grade C and given his long service that he should have been paid at the top of that grade.

[62] Section.75 (3) of the State Sector Act 1988 provides that the Commissioner may promulgate in writing to employers the conditions of employment for persons not bound by the collective agreement. Mr Dorking was able to confirm that the Commissioner had promulgated individual employment agreements from at least 1997. In practical terms that meant the conditions of the support staff collective agreements when settled were able to be offered to support staff not covered by the collective agreement with any modifications as an individual employment agreement. If there is agreement between a BOT and employee about those conditions then the BOT is deemed to have obtained the written concurrence of the Commissioner to those conditions of employment.

[63] In this case Mr Kilgour was not offered the promulgated conditions and the BOT did not obtain the written concurrence of the Commissioner to the 2004 agreement. Mr Clark submits that those omissions were unjustified and referred to the negotiating environment particularly in relation to wages given the absence of any knowledge of the promulgated conditions. He submitted that Mr Kilgour did not have the advantage of progressing through the grades and that he was underpaid.

[64] Mr Kilgour did from time to time raise the issue of his wages. He said in his evidence that he felt his approaches were ignored. He did receive for most years a percentage increase of which he was advised in writing. The evidence supports that in terms of wage increases and indeed as set out earlier in a review of his hours, Mr

Kilgour was treated as if he was a party to an individual employment agreement based on the conditions of the collective agreement. I find that the provisions in s.75 of the State Sector Act 1988 reflect the special nature of the negotiating environment in education and support a desire for some consistency in employment agreements.

[65] I do not find a straightforward failure to comply with the obligations in s.75 unjustified. In this case what I find unjustified is the actions of the BOT in largely treating Mr Kilgour as if his conditions of employment were the promulgated conditions of employment in circumstances where the BOT had not obtained the written concurrence of the Commissioner to the 2004 agreement, offered the promulgated conditions of employment to Mr Kilgour or, even drawn those to his attention. Ms Anderson accepted that the promulgated conditions should have been offered in her oral evidence. This impacted on Mr Kilgour's ability to negotiate wages and other matters with an understanding of the negotiating environment during his employment. I do not find that how the BOT acted in terms of Mr Kilgour's 2004 agreement were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[66] When considering a claim for unjustified action there needs to be corresponding disadvantage. Mr Clark submits that Mr Kilgour was entitled to be paid at the top of the top grade in the collective agreement and should be reimbursed at that level for six years. A comparison of the 2004 agreement and the collective agreement show Mr Kilgour was paid a little higher than the top step of Grade A.

[67] I have considered then whether Mr Clark is correct that Mr Kilgour's position should have been placed and paid at a higher grade. I accept that Mr Kilgour lost the opportunity to argue that his position should be placed within either Grade B or C. However, for reasons that I shall set out, I am not satisfied that he has made out his claim that his position would automatically have fallen within one of those two grades.

[68] Clause 3.3.1 of the collective agreement provides that every position shall be classified as either administrative or associate and then graded by the employer according to the level of skill, qualifications, relevant experience and responsibility which are required according to the definition set out in clauses 3.4.1, 3.4.2, 3.4.3, 3.6.1, 3.6.2 and 3.6.3. It was agreed that had Mr Kilgour's conditions been those in

the collective agreement, then he would have been graded within the associate class rather than within the administrative classes.

[69] The definition of the grades for the associate class is found in clause 3.6 that provides:

3.6 *Associate Class – An associate position primarily involves working either directly or indirectly with teachers and students to support the teaching and learning outcomes of students.*

3.6.1 *Grade A.*

(a) *This position is closely supervised. It involves duties and tasks which are specified and clear and are carried out in well defined procedures.*

(b) *Some examples of the duties required within this grade are:*

- *prepare and/or maintain resources;*
- *support teaching programmes and student learning;*
- *assist with routine needs of students.*

3.6.2 *Grade B*

(a) *The position involves a range of duties for which advanced knowledge, skills and experience are required. The position is likely to involve periods without supervision or may be sole charge.*

(b) *Some examples of the duties or level of duties required within this grade are:*

- *support and contribution to teaching programme and curriculum delivery, including work with students either individually or in groups which assists their learning;*
- *contributing to and maintaining health care programmes for students;*
- *management of equipment and resources.*

3.6.3 *Grade C.*

(a) *The position involves a high level of responsibility and specialist knowledge. It will include management and/or administrative and/or financial responsibilities. Where the position does not involve supervision of staff it will involve management of specialist equipment and resources which make a significant contribution to the delivery of the curriculum.*

(b) *Some examples of duties or the levels of duties required for this grade are:*

- *management of systems and/or specialist equipment and resources;*
- *management of health care programmes.*

[70] It appeared primarily that what led Mr Kilgour and/or his advisers to the view that his position fell within Grade C was the list of job titles in a memorandum attached to the agreement under clause 3.3.1. This list classifies the job title of technician under Grade B and C. Clause 3.3.1 provides that the memorandum is a list of job titles provided by the parties to act as guidelines for BOT's as to the appropriate grading for a variety of occupational classifications but within that clause the parties acknowledge that as particular job titles may relate to positions with differing job content, the grading of particular job titles may differ from school to school. Importantly therefore job content is important rather than simply titles and there may be differences from school to school.

[71] The memorandum provides for positions falling under associate class Grade A teacher aide, library assistant, technical assistant, nurse. Grade B also includes technical assistant and Grade C a technician, librarian, nurse or network administrator.

[72] The High School maintains that Mr Kilgour's position fell within Grade A and his position was not regarded as one that involved a high level of responsibility and specialist knowledge as required within Grade C. Ms Anderson was firm in her view that Mr Kilgour's position was not seen as one falling within Grade B and Grade C.

[73] Mr Clark, in his submissions, submitted that Mr Kilgour's position was not closely supervised under Grade A. Mr Clark refers to the Employment Court judgment of *The Red Beach School Board of Trustees & The Attorney-General in respect of the Secretary for Education v. the New Zealand Educational Institute* (unreported) AC13/07, 20 March 2007, Judge Couch. That was a case concerning the grading of teacher aides who were employed to work with special needs children at Red Beach School. There was discussion in that judgment about placement within the grades. The teacher aides were graded A. They considered they should have been properly graded B. Judge Couch agreed with the argument.

[74] This question of supervision is one that Judge Couch considered in the *Red Beach School* case. Judge Couch considered the definition of Grade A contained three key elements in that the position must be closely supervised and must involve

duties and tasks which are specified and clear and they must be carried out in accordance with well defined procedures. It was agreed in that case that *closely supervised* related to the work rather than the person performing the work.

[75] Mr Kilgour had a registered certificate under the Electrical Registration Act 1979 that enabled him to carry out prescribed electrical work and servicing of appliances. Those matters aside his duties and tasks were quite specific and clear. Several of the particular jobs required Mr Kilgour assisting where called upon in terms of any electrical faults in the school and other types of activities. In terms of stage lighting and recording, for example, the job description records that the technician will be involved in practice and performance arrangements and will be instructed by the staff member running the programme. Grade C requires a high level of responsibility and specialist knowledge. It includes financial, management and administrative responsibilities. I am not satisfied that there is such clear evidence that Mr Kilgour managed systems as such in terms of Grade B and Grade C to say the position fell within those grades rather than that he prepared and maintained resources.

[76] I do not find that Mr Kilgour has made out his claim that his position automatically falls within Grade B or C of the collective agreement. He lost the opportunity to argue that his position should be remunerated at a higher level because he had no knowledge of the grading system.

[77] Mr Clark provided details of Mr Kilgour's registration with the Electrical Registration Board and qualification. Mr Dorking submits that if accepted by the BOT as a relevant qualification this would have enabled Mr Kilgour to be paid an extra 29c per hour. I find that Mr Kilgour lost a realistic chance of being paid an allowance because it is quite strongly arguable that the BOT would have accepted the need for consistency between employees in terms of allowances and further that Mr Kilgour's qualification would have been recognised in terms of the collective agreement as within the NZ Qualification frame work. Mr Clark referred the Authority to a science qualification that Mr Kilgour had. There was no evidence that this was used in the work he performed and therefore I think it less likely that this would have been recognised.

[78] I find that the fair way to calculate the allowance is on the basis of the actual hourly rate that Mr Kilgour was paid under his 2004 agreement. My calculations

therefore differ from Mr Dorking's in that I have calculated a further 29 cents an hour for a 27.5 week is \$7.97 per week. Over 42 weeks that is \$334.95 and for six years that is the sum of \$2009.70.

[79] As a result of the promulgated conditions not being offered to Mr Kilgour, drawn to his attention and/or no concurrence having been sought then it is arguable that Mr Kilgour lost an opportunity to be paid an allowance for his electrical qualification.

I order Mr Kilgour be paid the sum of \$2009.70 gross being payment for an allowance under s. 123(1) (b) of the Employment Relations Act 2000.

[80] The next issue to consider is the question of compensation. When asked to clarify his claim for \$25,000 under the head of humiliation and loss of dignity, Mr Kilgour said that he had been underpaid for years, had received injuries on the job for which he could not get ACC and still had no money. There was little evidence directly about the effect of the reduction of hours and failure to adhere to the process in relation to the review. Mr Kilgour said the main reason for him wanting to rescind his agreement to 5.5 hours per week was that he felt he was unfairly blamed for a matter that was not within his scope of duties.

[81] I find that, had a proper process been followed, particularly in relation to the review of his hours, then this would have reduced Mr Kilgour's concerns in respect of some of his financial troubles. Mr Kilgour's redundancy entitlement was quite significant and had that been presented as an option he would have had an opportunity to make choices in a considered and careful way.

[82] In some respects, the humiliation and loss of dignity that Mr Kilgour now says he suffered in relation to the provisions of the collective agreement came about by an informal assessment that his position fell within Grade C. I have not found that to have been the case. Notwithstanding that, I accept there was some humiliation and loss of dignity caused to Mr Kilgour because, in effect, he lost opportunities as he did not have a real understanding of the negotiating environment. To a degree I have compensated him in terms of his qualification. I accept that over the years though when his attempt to negotiate a pay increase over and above the general percentage increases came to nothing he did suffer some humiliation and loss of dignity.

[83] In all the circumstances and taking the matters into account which are, in some respects, interlinked, I consider that compensation in the global sum of \$7,000 to be a fair amount. This is not a matter where there was any issue of contribution.

I order Mr Kilgour be paid the sum of \$7000 without deduction being compensation under s. 123(1) (c) (i) of the Employment Relations Act 2000.

### **Review of wages provision**

[84] I do not find that Mr Kilgour raised a personal grievance about a failure to comply with a review of his wages as required in his individual employment agreement within 90 days of the grievance occurring or coming to his attention. There was no evidence provided if the matter was viewed as a breach of contract in relation to any damage Mr Kilgour may have suffered particularly for the two years in which his wages were not reviewed. There is with any breach of contractual provisions an issue of nominal damages. In this case however the broad complaint that Mr Kilgour was treated other than in accordance with his 2004 agreement overlaps with matters above and the compensation that has been awarded and I make no additional award for damages.

### **Counterclaim or set-off**

[85] I find that the amount paid to Mr Kilgour for the first term of 2009 should be fairly set-off against the amount that is owing to him for redundancy compensation. If Mr Kilgour has suffered with respect to payment of his benefit then he should take that matter up with the appropriate organisation in light of this determination.

[86] The redundancy compensation will need to be re-assessed in light of the allowance and the impact of that in terms of a weekly amount. I am satisfied that the parties can undertake that calculation.

[87] In exercising my discretion under clause 11 of the second schedule of the Employment Relations Act 2000 there should be interest payable on that amount from 27 January 2009 at the rate prescribed under section 87 (3) of the Judicature Act 1908 but one that reflects the environment at the time of 5.5% until it is paid.

[88] I reserve leave for the parties to return to the Authority if there are difficulties with the calculations.

**Costs**

[89] I reserve the issue of costs. I am hopeful that the parties can reach agreement guided by the usual principles that apply in the Authority in regard to costs. If costs cannot be agreed then Mr Clark has until 2 June 2011 to lodge and serve his submissions as to costs. Mr Dorking then has until 23 June 2011 to lodge and serve submissions in reply.

Summary of findings and order made:

- I have found that Mr Kilgour is entitled to redundancy compensation. I have left it to the parties to make a small adjustment in light of the findings about the allowance and I have awarded interest on that sum from 27 January 2009 until the date of payment at 5.5%. The amount paid to Mr Kilgour for the first term of 2009 when he did not work and had already resigned is to be set off against that sum.
- I have awarded Mr Kilgour the sum of \$2009.70 gross being an allowance under s 123 (1) (b) of the Employment Relations Act 2000.
- I have awarded Mr Kilgour the sum of \$7000 compensation under s.123 (1) (c) (i) of the Employment Relations Act 2000.
- I have reserved the issue of costs and made timetabling orders for an exchange of submissions.

Helen Doyle  
Member of the Employment Relations Authority