

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 384  
3030534

BETWEEN            VERNON MORRIS  
Applicant

AND                 TAI POUTINI POLYTECHNIC  
Respondent

Member of Authority:    Christine Hickey

Representatives:        Kevin Murray, advocate for the Applicant  
Rachael Brown, Laura Taylor and Courtenay Mercier,  
counsel for the Respondent

Investigation Meeting:    28 February 2019

Submissions and further  
information received:    At the investigation meeting  
7 March 2019 from the Applicant  
8 March 2019 from the Respondent

Date of Determination:    28 June 2019

---

**DETERMINATION OF THE AUTHORITY**

---

**A. Tai Poutini Polytechnic did not comply with section 66 of the  
Employment Relations Act 2000 when it terminated Vernon Morris'  
employment. Therefore, it unjustifiably dismissed him.**

**B. Within 28 days of this determination, Tai Poutini Polytechnic must pay Vernon Morris:**

- (i) lost wages of \$6,645.85 gross; and**
- (ii) compensation of \$10,000.00 under s 123(1)(c)(i) of the Employment Relations Act 2000.**

**C. Costs are reserved and a timetable has been set.**

### **Employment Relationship Problem**

[1] Mr Morris began working for Tai Poutini Polytechnic (TPP) on 3 May 2016 as the Interim Head of the Department of Emergency Management and Search and Rescue (EMSAR). Mr Morris was employed on a series of fixed term employment agreements until his employment ended on 30 November 2017.

[2] Mr Morris claims that TPP unjustifiably dismissed him. He claims that he was an employee in an ongoing employment relationship with TPP. He seeks remedies of lost wages, payment of a notice period, compensation for humiliation, loss of dignity and injury to his feelings and a penalty against TPP for a breach of good faith. Mr Morris also alleges that TPP breached his employment agreement and should pay a penalty for that.

[3] Mr Morris claimed that TPP failed to comply with a section 130(2) Employment Relations Act 2000 (the Act) request for copies of time and wages records. However, once those records were supplied he withdrew that claim.

[4] TPP says that it did not unjustifiably dismiss Mr Morris. Instead, he was employed on a valid fixed term employment agreement and his employment came to an end on 30 November 2017 due to the expiry of that agreement.

[5] TPP also says that it did not breach its obligation of good faith to Mr Morris or breach his employment agreement.

[6] The witnesses provided written statements in advance and, under oath or affirmation, answered questions from me and the parties' representatives.

[7] This determination does not set out all the evidence or submissions received. However, I have fully considered all such material provided.

[8] This determination has been issued outside the timeframe set out at s 174C(3)(b) of the Employment Relations Act 2000 because the Chief of the Authority has decided exceptional circumstances exist.<sup>1</sup>

### **Issues**

[9] The issues I need to consider and determine are:

- (a) Did TPP and Mr Morris agree that he was to be on one or more fixed term agreements or was he employed in an ongoing role?
- (b) Can TPP rely on the final fixed term employment agreement as being effective to end Mr Morris' employment?
- (c) If not, what remedies might Mr Morris be entitled to?
- (d) Whether TPP breached its duty of good faith to Mr Morris; and
- (e) If so, whether it should pay a penalty for that breach; and
- (f) What costs for advice and representation might be paid by the unsuccessful party to the successful party?

### **Did TPP and Mr Morris agree on a fixed term employment agreement when he was first employed?**

[10] Mr Morris had been the Police area commander for the West Coast from 2001 to 2010 and in that role had oversight and control of search and rescue operations. After that he had led New Zealand Police teams overseas, including in troubled post conflict areas such as Bougainville and the Solomon Islands. By April 2016, Mr Morris had left the Police and was looking for a new position.

[11] In May 2016, TPP's chief financial officer and the then acting Chief

---

<sup>1</sup> Under s 174C(4) of the Act.

Executive, Alyson Bone, and the Director of Strategy, Samuel Blight, interviewed Mr Morris for a fixed-term position as interim head of the EMSAR department.

[12] During the interview, Mr Morris was made aware that EMSAR had not previously been a department in its own right, but that the programme had been delivered as part of the outdoor education department.

[13] Mr Morris was informed that the EMSAR programme was not functioning well because of a lack of management and inability to deliver on budget and on time. TPP had decided to treat it as a stand-alone unit in the interim and appoint someone on a temporary basis to try and improve the EMSAR programme. Ms Bone's evidence, which I accept, is that TPP made it very clear to Mr Morris it was an interim solution to allow it to determine the best way forward for the programme. She also emphasised to Mr Morris that it was not clear whether the programme would function better as a stand-alone department or within another existing department.

[14] At that stage, TPP envisaged that it would take a period of approximately three months to work out what the ongoing needs of the EMSAR programme were and to advertise and appoint a permanent person to head it.

### **The first fixed term agreement**

[15] On 5 May 2016, two days after Mr Morris had begun working for TPP, he was given a written offer of fixed term employment with the finish date of 5 August 2016. The document stated that:

**Tenure:** Fixed term, full time, 40 hours per week (1FTE)

*The reason the position is fixed term is to allow sufficient time to recruit for the permanent position.*

[16] The salary was \$80,000 per annum. Mr Morris signed the employment agreement on 18 May 2016.

[17] The position description and person specification were set out in Schedule B of the individual employment agreement that Mr Morris signed. There is some ambiguity in the documents because the position status was recorded at the beginning

of the document as “Permanent Full Time.” However, clause 31 of the document correctly recorded the requirements for “the Interim HOD EMSAR.”

[18] The individual employment agreement also contained other clauses that are more akin to those contained in an individual employment agreement for an ongoing position. However, I am satisfied that Mr Morris was fully aware from the interview and at the time he signed the documents that his employment status was full time, but for a fixed term. Therefore, I consider that Mr Morris was engaged on a fixed term and not an ongoing basis for this first period of his employment.

[19] I do not agree with Mr Murray’s submission that the ambiguous nature of the documents and the fact that Mr Morris began work before being presented with and signing an employment agreement meant he was engaged in an ongoing role. The presentation of the written terms of the fixed term agreement after Mr Morris began work do not mean that he was disadvantaged in any way.

[20] Mr Morris developed an expectation that, if he performed well, when an ongoing role was advertised he would likely be the best candidate and was likely to be appointed. Mr Morris was seen as effective. He was well engaged with and respected in the national EMSAR community as well as being a good manager of his team. TPP agrees that Mr Morris did an extremely good job under difficult circumstances.

[21] However, Ms Bone’s evidence is that by July 2016, although Mr Morris was making good progress with the EMSAR programme, TPP realised that the process of necessary reorganisation was going to take some further time. The reason she gave for coming to that realisation was that by then the EMSAR programme had only achieved 25% of the revenue budget for the year but had not yet achieved a commensurate reduction in costs. There had not been sufficient time to assess whether how Mr Morris was running the programme would be the best way forward, and therefore, whether it should be a stand-alone department or operated within another department.

[22] By then, there had been no formal review of EMSAR operations that had apparently been planned in May 2016 when TPP’s internal stated reason for offering a

fixed term position to Mr Morris was:

This is an interim appointment to provide immediate cover following the resignation and immediate departure of the former Programme Manager. A review of our EMSAR operations is planned and future direction and organisation of the EMSAR dept is not yet confirmed and therefore management have determined that whilst recognising the immediate operational need for a replacement it would be imprudent to make a permanent appointment at this time.<sup>2</sup>

[23] However, I accept that a less formal process was underway, in that Mr Morris' role involved reviewing and improving the programme overall, and there was an ongoing consideration of whether how the programme was being delivered was feasible for TPP for the future.

[24] For completeness, I record that I do not consider that TPP was using the fixed term agreement to simply assess Mr Morris' suitability for ongoing employment.<sup>3</sup>

### **The second fixed term agreement**

[25] TPP decided to extend Mr Morris' fixed term agreement on the same terms and conditions of employment until 20 January 2017. Therefore, on 12 August 2016 Mr Morris signed a further document which offered him a further period of fixed term employment until 20 January 2017. The reason given for the fixed term was again "to allow for sufficient time to recruit for the permanent position".

### **TPP's precarious position**

[26] Towards the end of 2016 it was becoming clear that it was not just the EMSAR programme that had problems. The overall operation of TPP was in crisis. The Tertiary Education Commission had undertaken a routine audit that uncovered serious internal issues that meant there would be a significant deficit in the following

---

<sup>2</sup> From an email dated 4 May 2016 from Rob Van Lent to a new Senior HR Adviser who had asked for the reason for the fixed term agreement.

<sup>3</sup> Section 66(3) provides that excluding or limiting the rights of an employee under the Act or the Holidays Act 2003, or establishing the suitability of an employee for permanent employment are not genuine reasons for making a fixed term appointment.

year. In mid-December 2016, after a request from TPP, the Minister for Tertiary Education Skills and Employment appointed a Crown Manager.

### **The third fixed term agreement**

[27] In November 2016, TPP offered Mr Morris a further period of fixed term employment on the same terms and conditions until 28 April 2017. The reason given was “to allow for sufficient time to recruit for the permanent position”.

[28] In the letter of offer the then acting Chief Executive, Alex Cabrera, thanked Mr Morris for his support and his willingness to carry on with his duties. Mr Morris accepted the offer of the extension to the fixed term on 13 December 2016.

### **Review of use of staff credit cards**

[29] On 12 January 2017, Mr Cabrera sent a memorandum to programme managers and the heads of department, including Mr Morris. The memo said that he had reviewed the use of staff purchase credit cards and had decided to reduce the number of them in order to control expenditure. The memo concluded:

This is not a reflection on any individual use of purchase cards, but is one of the necessary steps we must take to address the current challenges facing TPP.

[30] Mr Morris’ credit card was removed. He asked why his purchase card was withdrawn when some other heads of department had retained theirs. Mr Morris says he did not receive a satisfactory answer to that query. He felt unfairly singled out and undermined by having his credit card removed.

[31] I accept that Mr Morris had one particular urgent situation when he personally went out to Hokitika airport to ensure course materials were freighted to the North Island for the delivery of an EMSAR training session the next day. Because he no longer had a TPP credit card he was poised to pay the cost personally. However, he was with another TPP staff member, who had retained his TPP credit card, who paid for the materials to be sent. Mr Morris found that embarrassing. However, I do not consider that the removal of his credit card was an unjustified action by TPP.

## **The fourth fixed term agreement**

[32] In April 2017, TPP offered a further period of fixed term employment to Mr Morris. That letter was signed by Ms Bone on behalf of Mr Cabrera:

As you will be aware your fixed term employment agreement dated 17 May 2016 was extended to a new-end date of 20 January 2017 in a letter dated 25 July 2016. Then, as indicated in an extension letter dated 18 November 2016, your fixed-term employment was again extended to a new-end date of 28 April 2017.

This letter is to offer you a further period of fixed-term employment on the same terms and conditions until 30 November 2017. *However, the reason for the fixed term is to allow for sufficient time to review the structure of the organisation.*<sup>4</sup>

Vernon, thank you again, for your support and willingness to carry on with these duties.

We recommend that you take independent legal advice on the contents of this letter. To indicate your acceptance of the offer and the reason for the extension to fixed term employment, please sign this letter...

[33] On 27 April 2017 Mr Morris acknowledged by signing the letter that he had been advised to obtain independent legal advice and that he accepted that TPP had genuine reasons based on reasonable grounds for offering him a further period of fixed-term employment.

[34] Mr Morris' evidence is that it remained his expectation that in the future there would be a decision about whether a head of department or head of the EMSAR programme role was the best idea for TPP, that TPP would advertise that role and that he was most likely to be appointed. He based that view on the positive feedback he got from within TPP and from the national EMSAR community as well as how the Head of Department of Trades had been appointed to an ongoing role, from a fixed term one.

## **Mr Morris moves from full time to .8 FTE**

[35] On 10 May 2017, Mr Cabrera agreed with Mr Morris' request to vary his

---

<sup>4</sup> Emphasis added.

employment agreement in that his hours of work changed from 1FTE to 0.8FTE from 15 May 2017.

### **Mr Morris' employment ends**

[36] On Tuesday 7 November 2017 Mr Morris sent Dr Schwellnus, TPP's General Manager, an email in which he predicted an increase in full time equivalent enrolments and in income for the EMSAR department in 2018. Dr Schwellnus forwarded that email with a reminder to Ms Bone and the HR department that a new fixed term agreement for Mr Morris still needed to be budgeted for. She wrote that it would be good if she could get some movement on that fixed-term agreement and waited to hear what else might be required from her.

[37] Apparently in response to that request, on Thursday 16 November 2017, Helen Bradley, of TPP's HR department, emailed Mr Morris and copied in Dr Schwellnus:

Good afternoon Vernon

I am emailing you with regard to your fixed term employment which is due to expire on 30 November 2017. As you are aware the Emergency Management Search and Rescue (EMSAR) programme is currently being reviewed for the upcoming 2018 year. Decisions regarding this are expected to be made within the next week, at which time we will be in a position to discuss your employment situation with you.

Thank you for your patience. Please let me know if there is any further information or clarification required at this time.

[38] On Monday 20 November 2017, Mr Cabrera issued a memo outlining his management team's feedback on the potential centralisation of some functions across the organisation to improve consistency and avoid duplication and inefficiencies in order to improve TPP's financial performance. That memo also indicated that "TPP would proceed to further consider the adoption of a centralised approach".

[39] On 22 November 2017, Mr Cabrera, sent Mr Morris a letter notifying him that his employment would end on 30 November 2017 at the conclusion of his existing fixed-term employment agreement. He gave the following reasons:

Given the uncertainty and fiscal outlook for TPP the EMSAR programme will undergo an urgent review in terms of provision and

resourcing for the upcoming 2018 year. In the interim, delivery of this programme will have to be contained by the current permanent staff capability.

I want to acknowledge the contribution you have made to EMSAR and TPP over the past 18 months and I wish you all the best for the future.

### **Subsequent review and Restructuring of TPP**

[40] On 8 January 2018, Mr Cabrera released a change proposal to all staff for consultation. He reiterated the need for change within TPP because it was in crisis mode.

[41] The 8 January 2018 document outlined details of the centralisation proposal referred to in the November memo and gave an opportunity for affected staff to provide feedback. The document noted that in the West Coast faculty the General Manager's position was to be disestablished and therefore the heads of department and acting heads of department would have a change of reporting line.

[42] The change proposal document noted that the EMSAR head of department role was vacant and that the centralisation project would change the role's reporting line.

[43] Since then there has been significant restructuring and some redundancies at TPP. No new head has been appointed for the EMSAR programme and a number of roles have been disestablished.

### **Can TPP rely on the final fixed term employment agreement as being effective to end Mr Morris' employment?**

#### *The law on fixed term employment agreements*

[44] Under s 66(1) of the Act an employee and employer may agree that the employment of the employee will end:

- at the close of a specified date or period, or

- on the occurrence of a specified event, or
- at the conclusion of a specified project.

[45] However, before an agreement is valid, the employer must have “genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way” and must “advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.”

[46] Section 66 goes on to provide:

(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee’s employment agreement must state in writing—

(a) the way in which the employment will end; and

(b) the reasons for ending the employment in that way.

(5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.

(6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—

(a) to end the employee’s employment if the employee elects, at any time, to treat that term as ineffective; or

(b) as having been effective to end the employee’s employment

## **Analysis**

[47] In answering this question, I need to determine whether TPP had genuine reasons based on reasonable grounds to employ Mr Morris on fixed term employment agreements for the duration of his employment. In particular I need to establish whether TPP had a genuine reason based on reasonable grounds for entering into the final fixed term agreement with Mr Morris.

[48] I also need to consider whether TPP sufficiently advised Mr Morris’ of the way in which his employment would end and the reasons for ending the employment that way.

[49] TPP submits that Mr Morris was a fixed term employee at all times and that his employment expired on 30 November 2017, which was the date the parties agreed it would end.

[50] I am satisfied that the first fixed term agreement was entered into for genuine reasons based on reasonable grounds, as s 66 of the Act requires. TPP genuinely believed that during those three months, with Mr Morris' appointment and work, it would have been able to decide what kind of role there needed to be and to carry out recruitment and make an appointment to the role.

[51] I also accept that TPP had genuine reasons based on reasonable grounds for entering into the second fixed term agreement. I am less certain about the third fixed term agreement because by then TPP was well aware of the significant risk to its ability to continuing running its current programmes and its ability to appoint to any new ongoing employment positions. However, the key agreement is the fourth fixed term agreement.

[52] It is significant that in the fourth agreement TPP's reason for entering into a fixed term agreement and for ending Mr Morris' employment on a fixed date was to "allow for sufficient time to review the structure of the organisation." That conveyed an intention to undertake a review of the structure of the organisation, and that the fixed term appointment would end after that review had been completed. However, there was no review of the EMSAR programme and no review of the structure of the organisation before TPP used the fixed-term agreement to dismiss Mr Morris. TPP dismissed Mr Morris for a reason other than one that emerged from a review of its structure.

[53] I understand that TPP had significant concerns about its financial situation and viability. TPP's financial problems were the reason TPP ended Mr Morris' employment on 30 November 2017. TPP's reasons for ending Mr Morris' employment were genuine. However, the reason was not the reason it had given for Mr Morris being on a fixed term agreement. TPP did not comply with its obligations under s 66 of the Act because the fixed term agreement did not explain to Mr Morris the real reason for his employment ending on the specified date, as s 66(4)(b)

requires.

[54] Therefore, under s 66(6)(b) of the Act, TPP cannot rely on the fact that the agreement had a stated end date to lawfully dismiss Mr Morris. That means that TPP unjustifiably dismissed Mr Morris when it sought to rely on the fourth fixed term agreement to terminate his employment.

[55] Therefore, Mr Morris is entitled to a consideration of remedies.

### **Did TPP breach its duty of good faith to Mr Morris?**

[56] Mr Morris relies on the same facts to make this claim as those relied on for his personal grievance claim. He says that TPP failed to communicate adequately from the beginning about why it was entering into a chain of fixed term agreements with him. He submits that TPP engaged in a course of conduct that was likely to mislead or deceive him. Mr Morris claims that TPP should have a penalty imposed because of that.

[57] I do not consider TPP deliberately engaged in a course of conduct that was likely to or designed to mislead Mr Morris. Mr Morris knew of TPP's dire financial situation and the appointment of a statutory manager. I agree that TPP should have spoken to Mr Morris earlier about its intention to terminate his employment and not offer him another employment agreement. That would have mitigated the negative personal effects on him of what he felt was an overly abrupt and unjustified dismissal.

[58] However, that breach of good faith was not of the egregious kind or magnitude to attract a penalty.

### **Did TPP breach Mr Morris' employment agreement?**

[59] Clause 13.1.1 of Mr Morris' employment agreement states that in the event of restructuring TPP would commence negotiations with Mr Morris concerning the impact of that restructuring on Mr Morris' position. Mr Morris submits that the restructuring must have been known about for between six and seven months but that TPP did not consult with him about how that would impact on his employment.

[60] This claim assumes that TPP understood Mr Morris to be entitled to the same kind of protections in his employment as a permanent staff member. That was clearly not how TPP or Mr Morris understood the relationship between them at the time.

[61] I do not consider these are the kind of circumstances where a penalty should be imposed for a breach of this term of the employment agreement.

## **Remedies**

### *Lost wages*

[62] Mr Morris claims lost income of \$11,400. That includes his claim for 8 weeks' pay in lieu of notice. Sections 123(1)(b) and 128 of the Act allow the Authority to reimburse Mr Morris for income lost as the result of his personal grievance. The amount to be reimbursed is the lesser of a sum equal to the remuneration he actually lost, or 3 months' ordinary time remuneration.

[63] On 8 January 2018, Mr Morris began his new job, at an annual full time salary of \$75,000. When he left TPP he was being paid \$64,000 per annum as a .8 FTE. He was out of work from 1 December 2017 to 8 January 2018. That is a period of five weeks and two days. The full amount of salary he actually lost was \$6,645.85. Three months ordinary time remuneration from TPP was \$16,000 gross.

[64] Therefore, as his lost earnings are less than 3 months ordinary time remuneration, \$6,645.85 is the amount TPP must pay him.

[65] Mr Morris has also claimed that he should be entitled to be paid for 8 weeks' notice. I am satisfied that he was not entitled to that payment, and to award such a payment would mean that he was doubly compensated, given that I have awarded his actual lost wages.

### *Compensation*

[66] Mr Morris claims \$27,000 in compensation for humiliation, loss of dignity and injury to his feelings arising out of his dismissal. Mr Morris' evidence was that the sudden dismissal was very shocking for him. He was gutted to be dismissed as he had

put his heart and soul into rebuilding the department and was very proud of how it was performing. He said he lost sleep over the dismissal, which was particularly difficult as it came just before Christmas.

[67] He said he felt humiliated by being “exited from my position as Head of Department without any dignity.” He also said he was very disappointed that he was not consulted about any planned restructure. He felt that people on the West Coast would assume that he had been terminated abruptly because of poor performance. He felt that would mean he suffered reputational damage.

[68] Mr Murray submitted that Mr Morris was a stoic man that found it hard to express how the dismissal had affected him emotionally and that he should not be penalised for that. However, I can only award compensation for the actual negative impact on Mr Morris’ by way of humiliation, loss of dignity and injury to his feelings. Based on the evidence given by Mr Morris at the investigation meeting I consider compensation of \$10,000 is a reasonable amount for TPP to compensate him.

### **Costs**

[69] I encourage the parties to agree on costs that, in the absence of a *Calderbank* offer, will be based on the principle of the unsuccessful party making a contribution towards the successful party’s costs. The Authority tariff of \$4,500 for a one-day investigation meeting will be the starting point for a consideration of costs.

[70] In the event of no agreement, Mr Morris has 21 days after this determination to make submissions on costs, and TPP has a further 14 days.

Christine Hickey  
Member of the Employment Relations Authority