

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 242/07  
5076635

BETWEEN                      YUET MOI (ANN) NG  
Applicant

AND                              WHITIREIA COMMUNITY  
POLYTECHNIC  
Respondent

Member of Authority:      Robin Arthur

Representatives:            Andrew Swan, Counsel for Applicant  
Jaesen Sumner, Counsel for Respondent

Investigation Meeting:      25 June 2007 at Auckland

Determination:              10 August 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant says she was unjustifiably dismissed from her role as a teacher of English as a Second Language (“ESOL”) with the Respondent on the expiry of a fixed term of employment when she had been given to understand that her employment would be renewed. She seeks lost pay for additional weeks of teaching she says she would otherwise have undertaken and compensation for the distress caused by the ending of her employment.

[2]     The Respondent says the Applicant was employed on a legitimate fixed-term employment agreement with no undertaking by any authorised manager to extend or renew that term and that while she was involved in discussions about possible classes for the following teaching cycle, this did not amount to an offer of employment. Instead there were – as contemplated in the fixed term employment agreement – inadequate student numbers to justify the Respondent providing a further period of employment to the Applicant.

**Issues**

[3] To resolve this employment relationship problem the Authority must address the following issues:

- (i) Was the Applicant employed on a fixed term employment agreement?
- (ii) If so, was that term extended by actions of the Respondent creating an expectation of ongoing employment?
- (iii) If on a fixed term, was the Applicant nevertheless disadvantaged during the latter part of her term by being given insufficient information about the prospects for her position?
- (iv) If there were an unjustified action for dismissal, what remedies are required after considering any acts of mitigation and contribution by the Applicant?
- (v) Costs.

### **The investigation**

[4] Mediation has not resolved this matter. In investigating it, the Authority was assisted by written witness statements from the Applicant and – from the Respondent – Auckland Campus Manager Paul Maguiness, Human Resources Manager Warren Thompson, Programme Co-ordinator Miriam Rieger, ESOL Administrator Galina Filatova, and ESOL Programme Manager Dr Yao Kun Liu. At a half day investigation meeting witnesses answered questions from the Authority and counsel for the parties. Counsel provided oral closing submissions.

### **Nature of the employment**

[5] The Applicant is a well qualified ESOL teacher with experience in Malaysia, Singapore and New Zealand. She worked at the Respondent's Auckland campus as a relief teacher through the first two quarters of 2006 – each quarter being described by the witnesses as a “teaching cycle”.

[6] For the third quarter of 2006 – cycle 3 – she was offered an individual employment agreement for the period from 10 July to 22 September 2006.

[7] A letter of offer for the position described the employment category as “Limited Tenure, Full Time”. The letter of offer for the position stated the reason for Limited Tenure as being:

*It is not certain whether the number of student enrolments will be sufficient to offer this position beyond September 2006.*

[8] Before accepting the position the Applicant met with the ESOL Programme Manager Dr Liu. From that meeting and before signing the letter of offer, the Applicant accepts that she was aware that the employment was for a stated fixed term and the reason for the fixed term was the uncertainty of ongoing student numbers beyond September 2006.

[9] There was an applicable collective employment agreement which was referred to in the letter of offer, along with a 30 day period in which the Applicant could chose to join the relevant Union and become party to that collective agreement. The Applicant did not join the Union and 30 days later signed an individual employment agreement, on 25 August 2006. That agreement expresses its term as starting on 10 July 2006 and ending on 20 September 2006. It also states:

*No expectation of continuation of employment beyond this date is intended or implied.*

[10] I accept the Respondent’s submission, which is not really contested by the Applicant, that before entering this agreement the employer had genuine reasons based on reasonable grounds for providing that the Applicant’s employment would end on the specified date and had told the Applicant of these reasons. In short, at the time of entering the agreement, the Respondent had met the requirements of s66 of the Employment Relations Act 2000 (“the Act”).

[11] The real issue between the parties is whether subsequent actions of the Respondent – particularly Miriam Rieger and Dr Liu – amounted to express or implied promises that the expiry of the fixed term would not be enforced or, put another way, a reasonable expectation of a further period of employment was created.

#### Expectation of extension

[12] The Applicant points to what she says were a number of actions of the Respondent which entitled her to reasonably believe that her employment would not

end on 22 September but would continue into the fourth quarter of 2006 – that is teaching cycle 4. These actions are said by the Applicant to be:

- (i) A reference in a staff induction meeting on 4 September 2006 by Miriam Rieger to fixed term employment agreements of three months being “automatically renewed”; and
- (ii) References in staff meetings during cycle 3 by Dr Liu to good prospects for student enrolments in cycle 4 so staff need not to worry about their employment; and
- (iii) Attending a staff meeting on 20 September 2006 where plans for teaching in cycle 4 were discussed by Dr Liu; and
- (iv) Being given in that staff meeting a class list for cycle 4 classes which listed the Applicant as continuing to teach pre-intermediate class; and
- (v) Seeing a student handbook, which the Applicant says was intended for cycle 4 students, which included the Applicant’s photo and name among the academic staff on the programme.

[13] Ms Rieger denies telling the Applicant, along with other staff attending the induction session on 4 September 2006, that three month fixed term employment agreements were automatically renewed. She accepts that she did discuss the Respondent’s various types of employment arrangement with staff, ranging from permanent or tenured staff through to full time and part time staff on fixed term agreements of varying lengths. However she is insistent that she would not have referred to automatic renewal of fixed term agreements and that any reference to renewal would have clearly been conditional on there being adequate student numbers to sustain the course. I am satisfied her account of the meeting is more likely than not to be correct given her more precise knowledge of the types of employment agreements and the Respondent’s operations.

[14] Dr Liu accepts that he referred in staff meetings to the prospects for student enrolments in cycle 4 but that he did not give any reassurances that employment would continue in advance of information about actual student enrolments.

[15] H says the student handbook which included a photo of the Applicant was intended for cycle 3 students only. However the Applicant says that her photo had not been taken in time for inclusion in the cycle 3 handbook and the handbook that she provided in evidence was clearly prepared late during cycle 3, for distribution to cycle 4 students.

[16] The Respondent accepts that the Applicant's name was included as the teacher for an afternoon pre-intermediate class on a list prepared for cycle 4. However, it insists that this list was provisional only and not intended to indicate a commitment to ongoing employment without knowing whether the numbers of students enrolled would sustain the same number of course that were offered in cycle 3.

[17] Similarly, the Respondent, through the evidence of Dr Liu, insists that the 20 September staff meeting was a review meeting for teachers who had been involved in teaching cycle 3 courses. The minutes of that meeting confirm that the business of the meeting included finalising academic results for cycle 4.

[18] It is also clear that there was a discussion of the student numbers enrolled for cycle 4 and a comment recorded – that Dr Liu says he made – that there were “*not enough students for the afternoon class at the Elementary Level*”.

[19] The Applicant argues that she was entitled from the information about enrolments discussed at that meeting – and Dr Liu's comment that Elementary Level classes may be affected – to believe that the class which she taught (a pre-Intermediate class, not an Elementary one) in cycle 3 would continue in cycle 4, with her as the teacher.

[20] In fact what happened was that she was telephoned at home the following day and asked to call Dr Liu. On reaching Dr Liu by telephone shortly after, she was told that she would not be teaching in cycle 4. The students she taught in the cycle 3 class were to be taught in the following cycle by the teacher who had taken the Elementary Level class for which there were no longer sufficient students to operate as a separate class.

### **Determination**

[21] On the evidence available I find that the Applicant has not made out her case that the actions of the Respondent, particularly through Dr Liu, created a legitimate

expectation of on-going employment. The fixed term agreement entered into in July 2006 complied with the requirements of s66 of the Act. There is no suggestion, on the facts of this case, that the Respondent was misusing those provisions to keep an employee on a string of fixed-term agreements or relying on reasons which are declared 'not genuine' under the Act, either for the initial fixed term of the Applicant or for not extending her employment.

[22] Rather, as the Applicant's own evidence made clear, she was aware and should have been aware throughout, that the prospect of any further work was entirely conditional upon student numbers enrolling for cycle 4. As she said in evidence, this was a point that Dr Liu mentioned to all staff at every staff meeting.

[23] What the Applicant has done is rely on her own inferences and observations of the actions of course managers preparing for the contingencies of the next teaching cycle – including preparing prospective class lists and a handbook. Whatever hopes that may have given rise to in the Applicant, it did not amount to a promise for further work from the Respondent.

[24] For example attendance at the 20 September staff meeting was part of completion of teaching cycle 3 – moderation of student assessment needed to be finalised and the Applicant needed to be there for that along with other staff.

[25] I also consider it unlikely that the Applicant was given a false impression at the meeting about her future prospects because I accept Dr Liu's evidence that he had met with Mr Maguiness earlier that day and had taken the decision that the Applicant could not be offered future work. Having made that decision he is unlikely to have carelessly used words during the staff meeting which would have been misunderstood by the Applicant as providing a promise of further work.

[26] Dr Liu's evidence was that the Applicant was a good ESOL teacher who he would happily have employed for further work, had student enrolments allowed. I accept that no ulterior motive is apparent in having the teacher of the Elementary class in cycle 3 take the pre-Intermediate class in cycle 4. Rather that was simple business sense as that teacher was on a four-year fixed term agreement running through to the end of the year, whereas the Applicant's term was to expire at the end of the week. If the decision had been the other way around, the Respondent would have had to 'pay out' that other teacher for a term's work while also paying the Applicant to teach for

the term. The decision was a business one and it was one the Respondent was entitled to make.

*Unjustified disadvantage*

[27] I have also considered whether the Applicant was unjustifiably disadvantaged during the latter part of the term by being given insufficient information about the prospects of further employment.

[28] The standard of conduct required of the employer is that stated in sections 4 and 103A of the Act. That is the Respondent must have acted in good faith throughout and as a fair and reasonable employer, objectively assessed, would have in all the circumstances at the time.

[29] There is nothing to suggest that Dr Liu and Mr Maguiness ‘played their cards close to their chest’ about what the teaching needs for cycle 4 might be. The trends and prospects for future student enrolments were a constant subject of discussion throughout cycle 3.

[30] The managers might be criticised for leaving a decision about whether to offer the Applicant further work until three days before the end of term but I accept Dr Liu’s evidence that he too was hopeful that prospective student numbers might alter as late as the last two days of term. I do not understand the Applicant to disagree with the notion that ESOL student numbers across a range of institutions are notoriously volatile and are affected by a range of factors ranging from the personal and social through to international economic trends and events.

[31] Despite this uncertainty the Respondent, through Dr Liu and other managers had good faith requirements to be communicative with the Applicant and other staff about the effect of enrolments on their job prospects. I cannot discount the possibility that there was a slightly cynical element in Dr Liu not telling the Applicant sooner that there was no prospect of further work – the later it was left, the less likely she was to make arrangements to teach elsewhere in the subsequent term, which might not suit the Respondent if there were a sudden influx of late enrolments. However neither, on the evidence, did he suggest to her that the prospects for future work were healthier than they were or discourage her from looking for work elsewhere. I do not understand the evidence to show that the Respondent withheld any information or

failed to communicate relevant student enrolment information. In hindsight, Dr Liu could have done more and done it earlier.

[32] Equally, the good faith obligation of active communication goes both ways and there was no evidence that the Applicant approached Dr Liu – knowing her fixed term was due to expire – and asked about the prospects for further employment. If she had done so and been rebuffed or ‘strung along’, her claim would have been stronger.

[33] In all the circumstances I do not find the Applicant suffered any unjustified disadvantage prior to the expiry of her fixed term employment agreement.

[34] Accordingly the Applicant’s claim is dismissed.

### **Costs**

[35] The parties are invited to confer on the issue of costs. If they are not able to resolve that issue between themselves, the Respondent may lodge a memorandum on costs within 28 days of the date of this determination. The Applicant will then have 14 days in which to respond. No application for costs will be considered outside this time frame.

Robin Arthur

Member of the Employment Relations Authority