IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 202
5303465

	BETWEEN	KAREN PIVOTT Applicant
	A N D	LITERACY AOTEAROA INC Respondent

Member of Authority:	David Appleton
Representatives:	Patrick O'Sullivan, Advocate for Applicant Prue Kapua, Counsel for Respondent
Investigation meeting:	24 May 2012 at Invercargill
Submissions Received	5 June 2012 and 20 July 2012 from Applicant 19 June 2012 and 17 August 2012 from Respondent
Date of Determination:	20 September 2012

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

A. **The Applicant was employed by the respondent pursuant to two separate agreements, the first of which expired before the Applicant resigned.**

B. **The Applicant's personal grievances in relation to constructive dismissal and unjustified disadvantage were raised out of time and the Authority declines to grant leave to raise them out of time.**

C. **The Applicant may have a valid claim for relief under the Contractual Remedies Act 1979, and further information is required from the parties in respect thereof.**

D **Costs are reserved.-**

Employment relationship problem

[1] Ms Pivott claims that she was unjustifiably constructively dismissed from her employment with the respondent when she resigned on or around 24 January 2010 and that she was unjustifiably disadvantaged in her employment.

[2] Ms Pivott's advocate has also raised a claim in his submissions dated 18 July 2012 that she was entitled to relief under the Contractual Remedies Act 1979.

[3] The respondent denies that Ms Pivott was ever employed by it, claiming that she was engaged on a short term contract for services to deliver training to individuals who wanted to become literacy tutors. Accordingly, the respondent asserts that the Authority has no jurisdiction to consider the personal grievances.

[4] Although the claims relate to matters which are alleged to have occurred mainly in 2008, and the statement of problem was lodged with the Authority on 23 April 2010, the Authority has not been able to deal with this matter until now due to a concatenation of events including a challenge in the Employment Court in relation to a joinder application and the February 2011 Christchurch earthquake.

A brief account of the facts giving rise to the application by Ms Pivott

[5] The respondent is a national organisation of adult literacy providers which aims to provide student centred learning at no direct cost to the learner. It has a membership of around 45 providers nationwide, which it calls *nga poupou*, and which are autonomous bodies which have similar aims to the respondent.

[6] Ms Pivott was both employed by and the chairperson of one of those *poupou*, called at that time the Southland Adult Learning Programme Inc (this organisation has since changed its name, but shall be referred to as SALP in this determination). Ms Pivott was interested in becoming what she called a *National Trainer*, (although the respondent says that she was more accurately trying to become a *poupou* trainer. I do not address in this determination whether there is any significance in this difference of terminology). This aim of Ms Pivott entailed her holding a qualification known as a *Certificate in Adult Literacy Tutoring, Level 5* (CALT5). It also entailed her providing training to would-be literacy tutors as a probationer for a set number of hours, during which her performance was to be assessed by a national trainer engaged by the respondent.

[7] At the end of that probationary training, if she had been successful, Ms Pivott would have passed her probation and then been allowed to train other trainee literacy tutors without further assessment. She would have also received what she called a *Certificate of Competence* but which the respondent called a *Letter of Acknowledgment* from the *poupou* whose trainee tutors she had trained as part of her probation.

[8] As it happens, Ms Pivott did not complete the probation to the satisfaction of the respondent due to a short term health issue, and so has never achieved her aim. It is the contract under which Ms Pivott was engaged by the respondent as a probationer to deliver that training against which she was to be assessed which is the subject of this preliminary investigation.

[9] The contract in question contains the following clauses, insofar as they are material:

> ***LITERACY TUTOR TRAINING***
>
> ***Probationary Trainer Contract***
>
> *This Short-term Contract for the provision of Literacy Tutor Training is made between:*
>
> *Literacy Aotearoa* [address follows]
>
> *and*
>
> *Karen Pivott*
>
> ***Agreement***
>
> *Literacy Aotearoa and Karen Pivott (Contractor) agree as follows:*
>
> 1. ***Obligations of the Contractor***
> *The Contractor will provide all of the services described in the First Schedule ("the agreed services") to this contract and will perform those services in accordance with the outcome standards and performance criteria as listed in the First Schedule. The Contractor will continue to provide the agreed services for the whole term of this contract.*
>
> 2. ***Obligations of Literacy Aotearoa***
> *Literacy Aotearoa will provide feedback, direction and support to assist the Contractor to fulfil the terms and conditions of this contract and will endeavour to do so within five days of requests being made or within 14 days of drafts being submitted.*

3. ***Term of Contract***

The Contractor will provide the agreed services to Southland Adult Learning Programme, for a minimum of 80 hours, 28, 29, 30 Poutu te rangi (March), 11, 12, 13, Paenga whawha (April) 09, 10, 11, 23, 24, 25 Haratua (May) 2008.

Note: Any changes to the timetable must be negotiated with Jodi Maniapoto, Learning and Qualifications Manager, delegated representative for Te Tumuaki.

4. ***Payment***

Subject to the contractor complying with his/her obligations under this contract, Literacy Aotearoa will pay $35.00 per delivery hour (excl GST) and includes preparation time. In the event that the Contractor is not GST registered, Literacy Aotearoa will deduct Withholding Tax, unless requested by the Contractor to deduct PAYE at the appropriate rate. The contractor will note that delivery hours shall not include meal breaks.

Literacy Aotearoa reserves the right to recover from the contractor a proportion of the funding in the event the Contractor fails to meet the agreed outcomes and performance criteria, as listed in the First Schedule, or fails to maintain service provision for the full contract period in accordance with the terms and conditions of this contract.

5. ***Cancellation***

5.1 If during the term of the contract the Contractor ceases for any reason to supply the agreed services one month's notice in writing will be given.

5.2 If during the term of the contract the Contractor fails to meet the obligations under this contract Literacy Aotearoa may immediately terminate this contract by giving written notice to the Contractor.

6. ***Arbitration***

If a dispute or conflict of any kind arises out of this contract the procedure will be:

6.1 The aggrieved party will provide written notification of the nature of the dispute to the other party.

6.2 The Contractor and Te Tumuaki, or delegated representative, will meet at a mutually agreed venue to seek a resolution.

If the dispute or conflict cannot be settled by this procedure, resulting in an agreement between the parties, then it shall be settled in accordance with the Arbitration Act 1996.

Note: Literacy Aotearoa takes no responsibility for covering any arbitration costs, unless otherwise directed by the arbitrator.

> *7.* ***Copyright***
> *All work produced as a result of this contract is the property of Literacy Aotearoa.*
>
> [Signatures follow for each party]

[10] The contract was signed by Ms Maniapoto on behalf of the respondent on 4 March 2008 and signed by Ms Pivott on 30 March 2008.

[11] Following the body of this contract were two schedules, the first of which set out the key tasks of the arrangement, including the desired outcome and performance criteria. There also followed a form to be filled out by Ms Pivott for assessing her own trainees, a sheet setting out what training resources were provided by the respondent, and a note entitled *Payment of Account* which set out details of how invoices for payment were to be submitted.

[12] Ms Pivott delivered the training herself on all but one or two training dates (because of her temporary health issue) and received payment for the training in June 2008.

[13] In January and February 2009, an email exchange took place between Ms Pivott and Ms Maniapoto in which Ms Pivott asked Ms Maniapoto (on 15 January 2009):

> *Can you please advise me what will happen with my Training for Tutor Training this year. I understand that Nellie* [Ms Garthwaite, the Programme Manager for SALP] *is going to run the next round of training on her own. Does this mean I will need to get to another location to complete my training with you?*
>
> *Please let me know at your earliest convenience.*

[14] Ms Maniapoto replied on 3 February 2009 as follows:

> *Will you be available to deliver CALT L5 to Literacy Westland on the following dates:*
>
> *March 4,5,6,11,12,13,18,19,20,25,26,27*
>
> *Please advise*

Ms Pivott replied on 4 February 2009 as follows:

> *I am able to deliver CALT5 for Literacy Westland for the dates you have requested.*

[15] Ms Maniapoto replied the same day saying:

Thank you. I will advise when arrangements have been finalized. I will be attending on March 4,5 to complete your assessment on section 1.

[16] At some point Ms Pivott contacted the Westland *poupou* to make arrangements. This prompted Ms Maniapoto to write to Ms Pivott in the following terms, by way of an email dated 11 February 2009:

Kia ora Karen

For future reference do not contact the Poupou unless you have my approval. The process is:

1. *I contact the trainer to see if they will be available on the dates requested*
2. *I will negotiate dates with Te Poupou and advise them who will be the trainer*
3. *I will send the trainer a Short Term Contract including the dates and contact details (This is when you contact the Poupou)*
4. *You will be advised of travel, accommodation and Living Away Allowances.*

For further information please contact me.

[17] Ms Pivott replied to this email on 11 February 2009 explaining that she had contacted Westland Literacy to see if there was newspaper print available to use, and that she didn't intend to step on any toes. On 24 February 2009, Ms Maniapoto sent an email to Ms Pivott stating that the Literacy Westland training had been postponed until further notice. She said she would advise of any change. The Westland training was never reinstated as far as Ms Pivott was concerned, and she was not given any further training dates.

[18] Ms Maniapoto emailed Ms Pivott on 28 September 2009 to say that she would advise Ms Pivott of CALT L5 delivery once Literacy Aotearoa had completed the Training Schedule for 2010. This does not appear to have happened, and Ms Pivott resigned on 24 January 2010.

The issues

[19] The Authority must determine the following issues:

(a) Whether the 2008 contract between the parties was an employment contract or a contract engaging Ms Pivott as an independent contractor;

(b) If the 2008 contract was an employment contract, whether it was of a fixed term, expiring prior to Ms Pivott's resignation.

(c) Whether the 2009 arrangement in relation to Literacy Westland was an employment contract, and whether it was still in existence when Ms Pivott resigned.

(d)

(e) Whether the personal grievance for unjustified dismissal was raised in time?

(f) If Ms Pivott was an employee in 2008 and/or 2009, can Ms Pivott's unjustified disadvantage claims be considered, or are they out of time?

(g) Does Ms Pivott have a claim for relief under the Contractual Remedies Act 1979?

Was the contract between the parties an employment contract or an independent contractor's contract?

[20] The starting point in considering this question is s.6(2) of the Employment Relations Act 2000 (the Act) which states:

> *In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.*

[21] Section 6(3) of the Act states as follows:

> *For the purposes of subsection (2) the Court or the Authority –*
> *(a) Must consider all relevant matters, including any matters that indicate the intention of the parties; and*
> *(b) Is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.*

[22] The leading case on determining whether an individual is an employee or an independent contractor is the Supreme Court case of *Bryson v. Three Foot Six Ltd* [2005] ERNZ 372. The Supreme Court held that the starting point is to examine the terms and conditions of the contract and the way it operated in practice and then to apply the three tests known as the control test, the integration test and the fundamental or economic reality test.

[23] Looking first at the terms of the agreement between the parties, Mr O'Sullivan, Ms Pivott's advocate, pointed out that there was no preamble which states in terms that the relationship between the parties was not to be an employment

one but one of independent contractor. However, in many other respects, the contract indicates an intention for the parties to enter into a contract for services. It refers to *the Contractor* throughout, and refers to payment being by way of an invoice. Although a choice is given for withholding tax or PAYE, it was explained by Ms Maniapoto on behalf of the respondent during the investigation meeting that this was to recognise the fact that many probationary trainers would not be registered for GST because their income would fall below the threshold annual limit for registration.

[24] In addition, the contract contains an arbitration clause, which one would not expect to find in an employment agreement. It also lacks many of the clauses that one would expect to find in an employment agreement, such as an employee protection clause or a plain language explanation of the services available for the resolution of employment relationship problems, pursuant to s 65 (2) (vi) of the Act.

[25] All in all, the contents of the contract, on its face, look to be more a contract for services than an employment contract.

[26] As to the intention of the parties, Ms Maniapoto, on behalf of the respondent gave evidence that probationary trainers were engaged as contractors rather than as employees and this was the intention of the respondent. Ms Pivott's evidence was that, whilst she had signed the agreement she had been given, she had not read it thoroughly and had not given any thought to whether she was intended to be a contractor or an employee. Her assumption throughout the period when she was delivering the training, and beyond, was that she was being treated as an employee. However, she had never been engaged directly by the respondent before and so had no direct knowledge of what its processes usually were.

[27] As the Authority is obliged to look beyond the label that the parties put on their relationship, it is necessary to step back and look at the overall picture presented by the arrangement between the parties. In doing this, it is convenient to apply the three tests referred to in *Bryson*.

The control test

[28] This test examines the degree of control or supervision exercised by the employer over the alleged employee's work. There is no doubt that, for the purposes of the arrangement that had been entered into between the parties, the respondent exercised considerable control over Ms Pivott's work. She had no control over the

students she taught, the materials that she used, the structure of the training, the dates on which the training was to be delivered, the methodology of assessing the students' performance, or any other material aspect of the services that she was to deliver.

[29] This was for the obvious reason that the respondent needed to create consistency in the way literacy tutors were trained. Nonetheless, as an indication of employment status, the result of applying this test suggests strongly that the relationship was an employment one.

The integration test

[30] This test examines whether the work carried out by the individual forms an integral part of the business. The business of the respondent was and remains the provision of training in literacy and numeracy. In order to achieve those aims, the respondent relies upon tutors who need to be trained in accordance with the respondent's principles and carefully designed materials and resources. The respondent therefore needs reliable *poupou* trainers who have been through a rigorous assessment.

[31] Had Ms Pivott passed her assessment, she would have passed her probation and then become an accepted *poupou* trainer, employed by one or more of the *poupous* to deliver the respondent's training programmes. In this sense, therefore, Ms Pivott was integral to the respondent's business of delivery its training. However, on the other side, I am mindful that the arrangement between Ms Pivott and the respondent was for a very short term only, namely, the delivery of 80 hours of tutoring. Therefore, in a wider sense of the word, Ms Pivott was certainly not as *integral* as, say, Ms Maniapoto, who has been employed by the respondent as its Learning and Qualifications Manager since 2007. Whilst there is no set time limit beyond which a relationship must become an employment one purely by dint of the passing of time, the length of time that parties are in a relationship will have some bearing on the likelihood of the relationship being an employment one or not.

[32] As the contract in question contemplated the relationship lasting only for as long as it was necessary for Ms Pivott to provide the training to the SALP *poupou*, this inclines me to conclude that the integration test favours an interpretation of the relationship being a contract for services rather than an employment one.

The fundamental or economic reality test

[33] This test addresses whether the alleged employee engaged herself to perform the services with the employer as a person or business on her own account.

[34] Ms Pivott says that she had no intention whatsoever of being an independent contractor. She did have other paid employment (with SALP) at the time she entered into the agreement with the respondent and, although she was required to advise the respondent if she was going to take up other employment, Ms Maniapoto confirmed that the employer did not have any objection to probationary tutors doing so provided that it would not compromise the training they delivered. This approach is found in many part time employment and contractual relationships.

[35] When one stands back and views the overall relationship, including its aims, it does not have the flavour of a contract for services. Very many trainers in New Zealand are independent contractors who provide their services as experts in their field, training in such subjects as health and safety, good employment practice, business accounting, and so on. They typically market their expertise to businesses, negotiate the cost of delivering the training, bear their own travel expenses and submit invoices. In this case, Ms Pivott undertook the work so that she could, on the one hand be assessed as competent to carry out training for *poupou* within New Zealand and, on the other, deliver training to would-be literacy trainers. She was not in the business of touting her expertise in order to train literacy tutors and, as this is a specialist area which falls under the aegis of the respondent, she would not have been able to do so in isolation of the respondent in any event I believe.

[36] Therefore, I believe that this test favours the interpretation of the relationship as one of employment.

[37] Taking all of these factors into account, whilst the arguments are relatively finely balanced, it is my belief that, in law, the relationship between the parties was more likely to be an employment relationship than one governed by a contract for services.

Was the employment relationship recorded in the 2008 agreement of a fixed term nature?

[38] Having determined that the relationship between Ms Pivott and the respondent was an employment relationship in law rather than governed by a contract of services, I must now consider whether the contract was of a fixed term nature and, if so, whether it had lawfully expired before Ms Pivott purported to resign in January 2010.

[39] Ms Pivott said in her evidence that there were three reasons why it could be said that her employment subsisted beyond the end of June 2008 (when she received payment for the training), for as long as January 2010, when she resigned. These reasons are as follows.

[40] First, Ms Pivott says that she had been told by the assessor (Mr Tohini) that the contract was funded for two years. Ms Maniapoto, in her evidence, said that she did not understand this comment as the respondent obtained funding for many purposes but not, as far as she was aware, specifically for Ms Pivott's training. However, it appears to be the case that funding would have been available for Ms Pivott to have continued teaching beyond the 80 hours that she had delivered in order to pass the part of the training programme which she had been unable to complete (because she had suffered a severe nose bleed and had been unable to deliver part of the training personally). Therefore, it seems to be the case that, when a probationary trainer does not complete satisfactorily, for whatever reason, the 80 hours of training that are required to obtain a letter of acknowledgment, funding is available for up to two years for those probationary trainers to continue training until they have satisfied all parts of the criteria necessary.

[41] In my view, this reason does not, in itself, operate to prolong the life of the employment relationship between Ms Pivott and the respondent for the following reason. Ms Pivott had wished to undertake a further set of sessions of training on behalf of the Westland *poupou*. Ms Pivott acknowledged that this would have required her entering into a new agreement.

[42] Ms Maniapoto explained that the new agreement could have been structured so that the aspect of the training that Ms Pivott had been unable to complete during the SALP training could be undertaken as a probationary trainer with an assessor present. Ms Pivott would have also delivered training as a fully fledged trainer,

without an assessor being present. However, the fact that a new contract would have had to have been entered into strongly suggests that the fact that funding existed to enable Ms Pivott to continue to try to obtain her letter of acknowledgment cannot be said to operate as a mechanism for keeping the original contract alive.

[43] Closely connected with this argument is Ms Pivott's second argument. That is, that she did not get her letter of acknowledgment (or certificate of competency as she called it) and, therefore, the relationship could not have come to an end once she had delivered her 80 hours of training for the SALP. However, as explained above, in order to have obtained her letter of acknowledgment, she would have had to have delivered more training which would have been delivered under the auspices of a new contract. The same rationale, therefore, applies in enabling me to conclude that that fact does not keep the contract alive.

[44] Furthermore, there was shown to the Authority a set of documents dealing specifically with the process by which Ms Pivott was assessed as a probationary trainer. This required Ms Pivott to sign a *Candidate's Pre-Assessment Statement*, the purpose of which was to enable Ms Pivott to verify her agreement to the purpose of the assessment, the performance criteria, the specific skills required, where and when the assessment would take place, the responsibilities of the assessor and Ms Pivott's responsibilities. Ms Pivott agreed that she had signed this pre-assessment statement document. The set of documents also included an appeal form by which an assessed candidate could appeal the decision of the assessor's assessment.

[45] In light of this separate document, it appears clear to me that the fact of Ms Pivott not being satisfactorily assessed, thereby depriving her of her letter of acknowledgment, gave her rights under the assessment agreement rather than rights deriving from the employment agreement. The employment agreement was designed to deal with the provision of training to the SALP *poupou* on specified dates in 2008. The assessment documentation was designed to deal with the rights and obligations of Ms Pivott in relation to her qualifying as a *poupou* trainer. Ms Pivott not being able to obtain her letter of acknowledgement did not, therefore, prolong the life of her employment agreement.

[46] For the avoidance of doubt, I do not believe that the assessment document gave Ms Pivott separate employment rights. It referred to Ms Pivott as *the Candidate*, and recorded the agreement between her and the assessor. It was accompanied by

documents setting out the steps to become a Literacy Aotearoa National Trainer, and an appeal process entitling the candidate to appeal against an assessment he or she did not agree with. The agreement, and the arrangement it records have none of the hallmarks of an employment agreement.

[47] The third argument relied on by Ms Pivott is that, if she had been successfully assessed as competent, she would have been placed on a register of trainers. This would have enabled her to apply to train other *poupou*. However, Ms Maniapoto explained that individuals on the register of *poupou* trainers entered into employment agreements with the individual *poupous* and not with Literacy Aotearoa. She also explained that other individuals on the register were contractors. Therefore, I do not consider the fact of being on the respondent's register meant that Ms Pivott was an employee of the respondent. In any event, she was not placed on the register as she was not assessed as competent to be a *poupou* trainer. This argument, therefore, does not assist her.

[48] The final argument to examine is whether the agreement between the parties was a lawful fixed term agreement pursuant to s.66 of the Act. Section 66 of the Act states as follows:

> *(1) An employee and an employer may agree that the employment of the employee will end:*
>
> *(a) At the close of a specified date or period; or*
> *(b) On the occurrence of a specified event; or*
> *(c) At the conclusion of a specified project.*
>
> *(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must:*
>
> *(a) Have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
> *(b) 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.*
>
> *(3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):*
>
> *(a) To exclude or limit the rights of the employee under this Act;*
> *(b) To establish the suitability of the employee for permanent employment;*
> *(c) To exclude or limit the rights of an employee under the Holidays Act 2003.*

> *(4) If an employee and 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 the 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 affected to end the employee's employment, if the former employee elects to treat that term as ineffective.*

[49] First, it is clear I believe, that the respondent had genuine reasons based on reasonable grounds for specifying that the arrangement with Ms Pivott was to end upon the delivery of the training; namely, because there was no reason for it to subsist beyond that date, its purpose being to deliver one set of training in return for payment.

[50] However, the respondent must also have advised Ms Pivott of when and how her employment would end and the reasons for it ending in that way, before it agreed that it would end in the way specified in s.66(1) of the Act.

[51] Ms Pivott's evidence was that she did not sign the agreement until two days after the training had started, when her assessor, Mr Tohini, gave her a copy. This must be true because Ms Pivott has recorded that she signed the agreement on 30 March 2008, when the delivery of the training started two days before.

[52] Ms Pivott also gave evidence that she had not discussed the terms of the agreement with the respondent before she signed it because all the discussions were between her contact at SALP, Ms Garthwaite, and the respondent. However, Ms Pivott states in her brief of evidence that she knew the fundamental aspects of Ms Garthwaite's contract with the respondent, which was that she had to deliver four separate sections and that training was delivered in blocks over an extended period of time.

[53] Ms Pivott also states in her brief of evidence that she had not been alerted to the possibility that the contract was a contract of services rather than an employment contract because she *"just thought that was something to do with the short term nature of the contracts that would come each time a training was scheduled"*.

[54] It is my belief that, although the respondent did not deal directly with Ms Pivott about the terms of the arrangement that was to take place, it did deal with her indirectly through Ms Garthwaite. Ms Pivott was clearly completely content for Ms Garthwaite to carry out the negotiations on her behalf and, in this way, it can be said that Ms Garthwaite acted as Ms Pivott's agent for the purpose of the negotiations, insofar as they went, about the terms of the arrangement. It is also clear from Ms Pivott's evidence that she was aware that the agreement was to be of a short term nature. I also believe that she knew full well which dates she was to deliver the training on before she started them and before she signed the agreement.

[55] Therefore, I am satisfied that the respondent did advise Ms Pivott when or how her employment would end and the reasons for her employment ending in that way when it negotiated with her through Ms Garthwaite.

[56] Next, it is necessary to consider whether s 66(4) of the Act has been satisfied, namely that the employment agreement must state in writing the way in which the employment will end; and the reasons for ending the employment in that way.

[57] In my view, the agreement states the way in which the employment will end in clause3:

> ***Term of Contract***
>
> *The Contractor will provide the agreed services to Southland Adult Learning Programme, for a minimum of 80 hours, 28, 29, 30 Poutou te rangi (March), 11, 12, 13, Paenga whawha (April) 09, 10, 11, 23, 24, 25 Haratua (May) 2008*.

Whilst the agreement does not state expressly the words *the employment will end upon the final day of delivery of the training*, the clause in its totality, taking into account the context created by the heading *term of contract*, does state the way the employment will end. Ms Pivott was in no doubt at the time she signed the agreement, I believe, that its term was intended to last only as long as the training needed to be delivered.

[58] Furthermore, the reasons for the employment ending that way are also contained in clause 3; namely, that the training that Ms Pivott must deliver was to take place on 12 days only.

[59] Therefore, I believe that the terms of s.66(2) of the Act have been satisfied and that Ms Pivott was entirely clear that the contract in question was to last only as long as the training that she was to deliver on the specified dates.

[60] Furthermore, applying common sense principles, if Ms Pivott's arguments were to hold water, it would be necessary to accept that the contract would have subsisted between the end of June 2008 (when the delivery of the training had finished and Ms Pivott had been paid in full), and 24 January 2010 (when Ms Pivott resigned) even though Ms Pivott carried out no further duties under it, the respondent gave her no further remuneration in accordance with it and discussions took place about entering into a new agreement in respect of the delivery of training to the Literacy Westland *poupou*.

[61] I believe that it would be stretching beyond the bounds of credibility an argument that the arrangement between the parties subsisted when no obligations on either side in respect of the agreement subsisted. Whilst Ms Pivott argues that her right to be given the chance to be assessed as competent subsisted as an obligation on the respondent, that right was inherent in the *Candidate's Pre-Assessment Statement*, not her fixed term employment agreement, in my view. The *Candidate's Pre-Assessment Statement* does not record an employment agreement in my view.

Was the 2009 arrangement in relation to Literacy Westland an employment contract, and, if so, was it of a fixed term duration?

Was Ms Pivott a person intending to work?

[62] Mr O'Sullivan, for Ms Pivott, argues that the email exchange between Ms Pivott and Ms Maniapoto relating to the Literacy Westland delivery of training was an offer and acceptance which, pursuant to sections 5 and 6 of the Act, made Ms Pivott a *person intending to work* and, therefore, an employee. (A person intending to work is defined in the Act as a person who has been offered, and accepted, work as an employee). The respondent argues that it did not have the ability to enter into a contract on behalf of or instead of Literacy Westland.

[63] On this submission from the respondent, I note that Ms Maniapoto, in answer to a question in cross examination, stated that Ms Pivott could not make an independent contract with Westland. This could mean either that the agreement could not be with Westland itself, or that Ms Pivott could not contract with Westland independently, but had to do so through the auspices of Literacy Aotearoa. My understanding from the context of the questioning is that it means the latter. However, Ms Maniapoto's email of 11 February 2009, where she refers to her sending *the trainer a Short Term Contract including the dates and contact details* implies that it would be a contract between the respondent and Ms Pivott, in the same way that the Probationary Trainer Contract was described as a *Short-term Contract*. On balance, I believe that the contract would have been with the respondent, rather than Literacy Westland.

[64] The next issue to consider is whether there was offer and acceptance of work as an employee. The exchanges started with an enquiry on 15 January 2009 from Ms Pivott, and a reply from Ms Maniapoto on 3 February asking if Ms Pivott could deliver CALT 5 to Literacy Westland on 12 specified dates in March. Ms Pivott replied on 4 February saying she could deliver CALT 5 for the dates requested. Ms Maniapoto replied saying she would advise when arrangements had been finalised and that she would be attending on 4 and 5 March to complete Ms Pivott's assessment on section 1.

[65] In my opinion, this exchange does indicate an offer (on 3 February 2009) and an acceptance (on 4 February 2009), together with an intention to be bound. There was also consideration, in that the respondent would pay Ms Pivott in return for her delivering the training (at $50 an hour). I also accept that the terms were probably certain enough for there to have been a valid contract between Ms Pivott and the respondent. Although the email exchange recording the offer and acceptance was sparse on detail, I believe that both parties had enough knowledge from the previous 2008 agreement for the essential terms of the agreement to be certain. In addition, I have already found that the relationship between the parties during the previous contract was an employment one. Therefore, I am content that the relationship during the delivery of the Westland training was also to be an employment one, for the same reasons.

[66] In conclusion, I find that Ms Pivott was a person intending to work as an employee and so was an employee for the purposes of delivering the Westland training.

Was the Literacy Westland training agreement between the respondent and Ms Pivott frustrated?

[67] By no later than 24 February 2009 the Westland *poupou* had decided, for a reason that is in dispute, not to go ahead with the training using Ms Pivott. There was, therefore, no longer any need for the contract that had been agreed, which was to enable Ms Pivott to deliver training to the Westland *poupou* during specific dates in March 2009.

[68] These circumstances, where performance of the contract was no longer possible, raises the question of whether the contract was frustrated, and future obligations under the contract of both parties discharged, so that the contract came to an end prior to Ms Pivott's resignation.

[69] In this case, the Westland agreement came to an end on 24 February 2009. Whilst Ms Pivott asserts that there was improper conduct by the respondent in cancelling the training, that is the subject of her personal grievance which was not made known until 24 January 2010 at the earliest, in the resignation letter.

[70] However, I accept the submissions of Mr O'Sullivan on behalf of Ms Pivott that a proper enquiry needs to be conducted to determine whether performance of the contract had been improperly inhibited or obstructed by the actions of the respondent rather than it ending by operation of the doctrine of frustration. That enquiry has not been carried out, and so I find that it would be unjust to deprive Ms Pivott of the opportunity to have her grievance unheard by invoking the doctrine of frustration.

Has the personal grievance for unjustified dismissal been raised in time?

[71] Having found that the agreement to provide training to Literacy Westland was an employment agreement which was never performed, I must determine whether the personal grievance in respect of the alleged unjustified constructive dismissal from that employment was raised in time in accordance with s 114 of the Act. This states that every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance within 90 days beginning with the date on

which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[72] Subsections (3) and (4) of s. 114 of the Act deal with the right of the employee to apply for leave to raise the personal grievance out of time and stipulate that the Authority may grant leave if the delay in raising the grievance was occasioned by exceptional circumstances.

[73] It is important to identify what actions Ms Pivott relies on in her constructive dismissal claim. There appear to be four distinct but interrelated issues that were raised by Ms Pivott's letter of resignation dated 24 January 2010:

a. The failure to give Ms Pivott the opportunity to complete section 1 of her training, to enable her to be assessed as competent to be a National Trainer (or *poupou* trainer, depending on which term is used);

b. The alleged changing of the process of the assessment, which Ms Pivott says went from her having been assessed as competent by Mr Tonihi, to being required to complete the section 1 training again;

c. The alleged undermining of her position at SALP by the CEO of the respondent; and

d. The alleged cancelling by the respondent of the Literacy Westland training dates.

The personal grievance raised by Mr O'Sullivan on behalf of Ms Pivott dated 26 January 2010 does not add any specificity to the letter of resignation.

The assessment of competency

[74] As far as the first two issues are concerned, I have found that these alleged breaches by the respondent are not breaches of the employment agreement that was in place in respect of the SALP training, but concern the assessment agreement which dealt with Ms Pivott's assessment of competency as a National Trainer. In my view, the entering into the new employment agreement in respect of the Westland training does not change that. That employment agreement was to train literacy trainers, which would have given Ms Pivott an opportunity to be assessed for the section 1 part

of the training. However, Ms Pivott's rights under the assessment arrangements were not employment rights in my view. Therefore, the alleged breaches of those rights cannot form the basis of a personal grievance.

Alleged undermining by the respondent of Ms Pivott's employment at SALP

[75] In respect of the third alleged action, Ms Pivott's statement of problem states that she became aware of the full involvement of the respondent in the alleged undermining of her employment relationship with SALP until about August 2008. However, Ms Pivott did not raise this with the respondent until her letter of resignation dated 24 January 2010. Her personal grievance against SALP was not lodged in the Authority until 21 December 2009 and she did not ask for Literacy Aotearoa to be joined to that action against SALP until 1 February 2010 (which was eventually declined).

[76] I accept the principle that an employee coming to the conclusion that the CEO of her employer had (allegedly) undermined her employment with another employer could amount to a constructive dismissal. However, Ms Pivott was willing to enter into an employment agreement with the respondent in February 2009, some six months after she found out about the *full involvement of* [the respondent] in the alleged undermining and did not tell the respondent that she believed that the CEO had *persistently and systematically undermined* [her] *in* [her] *previous relationship with the SALP* until January 2010.

[77] Ms Pivott's personal grievance was therefore raised nearly 17 months after she had discovered the alleged involvement and nearly 14 months out of time. Turning to the exceptional circumstances suggested in s. 115 of the Act that the Authority should take into account when deciding whether to allow a personal grievance out of time, I note that s. 115 (c) includes the circumstance where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by s. 54 or 65 of the Act.

[78] This circumstance is clearly relevant, as no written employment agreement was issued by the respondent. However, s 114 (4) gives the Authority the discretion to grant leave if exceptional circumstances exist and if the Authority considers it just to do so. In light of the fact that Ms Pivott waited as long as she did before raising the

alleged interference into her SALP contract, despite knowing about it since August 2008, I do not consider it just to grant leave.

The cancelation of the Westland training

[79] In respect of the fourth issue, Ms Pivott's resignation letter states the following:

> *It is with even greater disappointment then, that when I have corresponded with Jodi directly I have at times been ignored, had my training dates (Greymouth) cancelled with an off hand remark sorry for the inconvenience, when I had to arrange with my current employer for cover of these dates, and most alarming of all to see some of these communications from Jodi cc (copied) to Nellie, who you knew fully well was no longer my employer, not going to assess me in these trainings, and that those communications had nothing whatsoever to do with SALP.*

[80] The Greymouth (Literacy Westland) training dates were cancelled on 24 February 2009. Ms Pivott only raised her personal grievance about that in her resignation letter dated 24 January 2010.

[81] In his submissions Mr O'Sullivan cited the Employment Court case of *Wyatt v Simpson Grierson (a Partnership)* [2007] ERNZ 489 in examining when the course of action arose. Of relevance in determining this is when the requisite knowledge came to the employee. *Wyatt* states that knowledge arises *when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's actions are unjustifiable.* It is my view that, in respect of the cancellation of the Westland training dates, this came to the knowledge of Ms Pivott in February 2009, and that there were no other subsequent events that occurred with respect of that cancellation which alerted Ms Pivott for the first time that it was allegedly an unjustifiable action. Ms Pivott had already suspected, since August 2008, that the respondent had been instrumental in allegedly undermining her employment with SALP, and so her suspicions should reasonably have been aroused that the respondent's actions in cancelling the training dates were allegedly unjustifiable as soon as the cancellation occurred.

[82] Therefore, insofar as Ms Pivott wishes to rely upon that cancellation as a basis upon which to raise a personal grievance, I believe that she had or should reasonably have had the requisite knowledge with which to do so on 24 February 2009. Turning to the criteria set out in s. 114(3) of the Act, the fact that Ms Pivott waited so long to raise her grievance in respect of that cancellation, without any apparent reason,

persuades me that it would not be just to allow her to raise a personal grievance in respect of that cancellation out of time.

Conclusion

[83] In light of the above, I cannot find that the Authority has jurisdiction to consider a constructive dismissal personal grievance based upon the issues raised in the resignation letter. The issues relating to being assessed for her section 1 training do not relate to her employment. The personal grievance relating to the alleged interference with her SALP employment was raised out of time and I do not find it just to grant leave to allow that personal grievance to be raised out of time. Similarly, the personal grievance relating to the cancellation of the Westland training was also raised out of time and I do not find it just to grant leave to allow that personal grievance to be raised out of time.

Can Ms Pivott's unjustified disadvantage personal grievances be considered?

[84] The alleged actions of the respondent leading to the constructive dismissal personal grievance also form the basis of the unjustified disadvantage personal grievances.

[85] For the same reasons that I decline to allow the personal grievances relating to the alleged constructive dismissal I find that the personal grievances relating to the alleged unjustified disadvantages cannot be allowed.

Does Ms Pivott have a claim under the Contractual Remedies Act 1979?

[86] Ms Pivott's advocate raised this possibility in a short paragraph tucked away in his second set of extensive submissions. Ms Kapua did not respond to the paragraph.

[87] I accept that there is a possible such claim that Ms Pivott may bring in the Authority pursuant to s 162 of the Act, which gives the Authority the power to make any order that the High Court or a District Court 1979 may make under any enactment, including the Contractual Remedies Act. Section 142 of the Act states that no action may be commenced in the Authority in relation to an employment relationship problem that is not a personal grievance more than six years after the date

on which the cause of action arose. Therefore, on the face of it, Ms Pivott's claim under the Contractual Remedies Act may be in time.

[88] However, before the Authority can set down an investigation meeting to consider such a claim, it is necessary for Ms Pivott to amend her statement of problem to set out more clearly the basis of the claim, in the light of this determination. The respondent must also be given the opportunity to lodge a statement in reply. Accordingly, separate directions will be issued in respect of these matters.

Summary

[89] Although I have found that the 2008 agreement between the parties was one of employment, I have also found that it was a fixed term agreement, lawful under s.66 of the Act, and that it expired upon the final date of the delivery of the training that Ms Pivott was contracted to deliver, namely on 25 May 2008.

[90] I have also found that the agreement between Ms Pivott and the respondent which governed her assessment as a trainer was not an employment agreement. It was rather an agreement between the respondent and a candidate for a specified qualification.

[91] I have found that the agreement entered into in February 2009 (the Westland training agreement) was an employment agreement with the respondent but that she raised her personal grievances in respect of alleged unjustified actions a significant amount of time after the actions arose. I also find that Ms Pivott knew or reasonably should have known at the time that those alleged actions arose that they could give rise to a personal grievance. However, I do not find that it would be just to allow her to raise those personal grievances out of time.

[92] Accordingly, I find that the Authority does not have jurisdiction to consider Ms Pivott's claims for unjustified constructive dismissal or unjustified disadvantage in her employment.

[93] Finally, I find that the Authority may have the jurisdiction to consider a claim for relief under the Contractual Remedies Act 1979 and I will issue directions in respect of this possible claim in due course.

Costs

[94] Costs are reserved. If the parties are unable to agree as to how costs are to be disposed of between them within 28 days of the date of this determination, the respondent is, immediately thereafter, to serve a memorandum on Ms Pivott and lodge a copy with the Authority and Ms Pivott will have a further 28 days to lodge and serve any memorandum in reply.

David Appleton
Member of the Employment Relations Authority