

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 79
5327104

BETWEEN DOMINIC SPEED
 Applicant

AND BOARD OF TRUSTEES
 WELLINGTON GIRLS
 COLLEGE
 Respondent

Member of Authority: G J Wood

Representatives: J Evans for the Applicant
 P McBride for the Respondent

Investigation Meeting: 30 and 31 May 2012 at Wellington

Submissions Received: 31 May 2012

Determination: 16 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Dominic Speed, claims that he was unjustifiably dismissed by the respondent, the Board of Trustees of Wellington Girls College (WGC), was unjustified, that the procedure followed in investigating allegations of misconduct was unfair causing him disadvantage, and that the actions of the school in presenting unnecessary information and withholding relevant information to the Teachers Council also caused him disadvantage. Mr Speed was a teacher at WGC between 2006 and 2010 under a Work Visa, Mr Speed being an immigrant from the United Kingdom.

[2] WGC claimed that Mr Speed's employment either came to an end by way of frustration, or that he had to be dismissed because it could no longer lawfully continue

to employ him because he did not have a Practising Certificate. As well as being registered teachers are required to have a Practising Certificate. Practising Certificates are issued by the Teachers Council to people who are registered teachers and who have had a satisfactory *Police vet* within the past three years.

[3] WGC claims that Mr Speed's other grievances were not raised within 90 days and that it does not consent to them being raised out of time. No application for exceptional circumstances has ever been made for any grievances that were out of time.

Factual discussions

[4] Mr Speed is an experienced teacher who was employed under an Immigration Visa by WGC from 27 January 2006. His Visa was renewed a number of times and he was last granted a permit allowing him to teach at WGC on 15 May 2009. Mr Speed was principally employed as an economics teacher, but was able to teacher other subjects such as mathematics and IT.

[5] Mr Speed's Practising Certificate was due for renewal in September 2010. He submitted his application in April 2010 and this was endorsed by the Principal of WGC. It appears however that the Police (for reasons that need not be gone into in any depth) had reason to question Mr Speed's suitability as a person of good character and/or his fitness to be a teacher and informed to the Teachers Council accordingly. As a result the Teachers Council referred the matter to its Complaints Assessment Committee. WGC was unaware of all this until October 2010.

[6] In the meantime, based on allegations of domestic violence, which Mr Speed was later found not guilty of, Mr Speed was facing a number of serious criminal charges in June 2010. These matters came to the attention of WGC when the Police came to the College to interview him. As accepted by Mr Speed, WGC had a duty to investigate these matters, in case there were some implications for his suitability to teach college students.

[7] Mr Speed was placed on paid leave forthwith. He was later suspended from school from 19 July, a decision not challenged by Mr Speed or his then representative, the Post Primary Teachers Association (PPTA).

[8] A number of issues, which went wider than the criminal issues, including a complaint from a parent, were then to be investigated by WGC through its Personnel sub-committee, although the Principal acted as its investigator in the first instance. This later came to include claims of a loss of trust and confidence in him. I do not need to refer to this disciplinary process any further, however, as despite a number of concerns raised by Mr Speed the fact is that no decisions were ever made by the Board of WGC in respect of his ongoing employment over these allegations and therefore he can not have been disadvantaged. This also includes issues as to his suspension because Mr Speed was paid right throughout and never formally took issue with his suspension, except to seek his reinstatement for full duties as soon as possible.

[9] Mr Speed was then negatively affected by the decision of the Complaints Assessment Committee to adjourn its processes because further charges were put before the District Court, as well as the disciplinary matters before the WGC.

[10] Around the same time the WGC became aware for the first time of complaints being dealt with and investigated by the Complaints Assessment Committee. Not only that but it also became aware that Mr Speed's Practising Certificate had expired. The Teachers Council informed the WGC that Mr Speed could not be legally employed by it and that it was unlikely to grant an extension (as often occurred when there were administrative delays with the issuing of certificates) in the light of its Complaints Assessment Committee's investigation.

[11] The Teachers Council also requested a full report from the principal of WGC on the issues related to Mr Speed's employment. I accept that the Principal was required to provide all information she had on Mr Speed's employment and that she later did as she was obliged to do.

[12] In a letter to Mr Speed, the Personnel sub-committee noted that the Complaints Advisory Committee did not expect any decision until the next year and that the Board was committing an offence by continuing to employ a person who did not hold a Practising Certificate in a teaching position, as was indeed Mr Speed himself.

[13] However, at a meeting later in the month the Personnel Committee determined to direct the Principal to write to the Teachers Council requesting an extension of Mr

Speed's Practising Certificate, which she did. The Board was not, however, prepared to consider him for a supernumerary position, because of the extra cost involved of supervision etc.

[14] It was then noted that if the application was not granted then Mr Speed's employment would, subject to submissions from him, have to end. No submissions were received from Mr Speed. The application for an extension was denied by the Teachers Council. As a result Mr Speed was informed on 1 December 2010 that *in order to meet the Board's Education Act obligations your employment ... with the Board has now terminated.*

[15] In June 2011 the Complaints Assessment Committee, having referred matters to its Impairment Committee, decided to take no further action against Mr Speed. He had not, however, for whatever reasons, had his practicing certificate renewed by the date of the investigation meeting.

[16] This year WGC faced another problem with an unregistered teacher whose employment, unlike that of Mr Speed, was not terminated, although this appeared to be for administrative reasons, and the Teachers Council later confirmed that teacher's certification.

The law

[17] Part 10 of the Education Act 1989 deals with teacher registration. In s.120 Interpretation – a teaching position is held to mean:

...a position in the general education system that –

(a) requires its holder to instruct students: ...

[18] Section 120B deals with restrictions on the continued employment of teachers. It states:

(1) An employer must not continue to employ in a teaching position –

(a) Any person –

(i) whose registration has been cancelled; and

(ii) who has not since been registered again; or

(b) Any person whose practising certificate is suspended under s.139AW(1)(d); or

- (c) *Any person whose authorisation has been cancelled, and who has not since –*
- (i) *been authorised again; or*
 - (ii) *been registered as a teacher; or*
- (d) *Any person whose limited authority to teach is suspended under s.139AW(1)(d).*
- (2) *No employer shall continue to employ in any teaching position any person who holds neither a practising certificate nor an authorisation, if that person is not under the general supervision of a person who holds a practising certificate.*
- (3) *No employer shall in any calendar year continue to employ in any teaching position any person who holds neither a practising certificate nor a authorisation, if the sum of –*
- (a) *The period or periods for which that person has already during that year been employed by the employer in a teaching position or positions; and*
 - (b) *Any period or periods (of which the employer is aware) for which that person has already during that year been employed by any other employer in a teaching position or positions; and*
 - (c) *Any period or periods (of which the employer is aware) for which that person has during that year been employed as a teacher by the employer at an early childhood education and care service; -*
- is not less than the period specified in the sub-section (4);*
- (4) *The period referred in sub-section (3) is –*
- (a) *20 half-days; or*
 - (b) *any greater number of half-days the Teachers Council has allowed in any particular case, -*
- each being a half-day on which the school or early childhood education and care service at which the person was then employed was open for instruction.*

[19] Section 137 deals with offences. Sub-section (2) provides that:

Every person commits an offence, and is liable on summary conviction to a fine not exceeding \$5,000, who appoints any person to a position, or continues to employ any person in a position, knowing that the appointment or employment is contrary to s.120A or s.120B.

[20] The question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and

how the employer acted, were what a fair and reasonable would have done in all the circumstances at the time the dismissal or action occurred.

[21] As was made clear in Mr Speed's application for review against his deportation (*Speed v. Chief Executive of the Department of Labour and the Attorney-General* CIV-2011-485-1369) Mr Speed is currently unemployable as a teacher.

[22] Similarly, in *Masina v. The Commissioner, Te Kura Kaupapa Maori O Piripono Te Kura Whakahou O Otara* 2010 [NZEMPC] 141 where someone is employed as a teacher in contravention of the Education Act it was held at paragraph [60] that:

...the employer was effectively left without any alternative but to dismiss Mr Masina once it was clear that he was not going to obtain the LAT [Limited Authority to Teach] within a timeframe that would enable him to take up the position as principal. In view of the decision that had been made by the [Teachers] Council, Mr Waititi [The School Commissioner] was left in an impossible position.

[23] This was because, as was held in *Christchurch City Council v. Davidson* [1996] 2 ERNZ 1 (CA) employment contracts can not override the law of the land. After all it seems axiomatic that a fair and reasonable employer would not break the law by continuing the employment of someone if that employment was unlawful in and of itself.

Determination

[24] In comprehensive submissions on behalf of Mr Speed, Mr Evans concentrated on the argument that at the relevant times Mr Speed was not for the purposes of s.120B of the Education Act employed in a *teaching position*. This was because he was not in a position that required him to instruct students, because he was suspended. He also claimed that WGC was in effect operating a *double standard* by failing to dismiss or even suspend the other teacher who was employed without a practising certificate this year.

[25] I do not accept that Mr Speed was not covered by s.120B. The reference in s.120B is to the *position* held by Mr Speed. His *position* was that of an economics teacher and was not as a *suspended teacher*. This is consistent with s.120, which defines a teaching position as a *position*. No school would engage a person to a position of suspended teacher. Therefore it follows that, as in the *Christchurch City*

Council case, WGC was obliged to comply with the law and not employ Mr Speed any further. It therefore also follows that the dismissal of Mr Speed for failing to have a teaching certificate was what a fair and reasonable employer would have done in all the circumstances at the time.

[26] There can be no issue as to the process adopted by WGC over the dismissal for failure to hold a practising certificate, as this was a straightforward process during which Mr Speed was given opportunities to make representations, but none were made on his behalf. Any matters to do with Teachers Council and the Principal's discussions with it are not matters that can be covered by the claim for unjustified dismissal.

[27] Similarly, any claims of disparity of treatment can not assist Mr Speed because the example claimed of, even if on all fours with his case (which it does not appear to be), occurred after Mr Speed had been dismissed. This is because the test for justification for dismissal involves considering *all the circumstances at the time* and therefore can not cover circumstances that occurred subsequently. In any event, the administrative issues surrounding the other teacher's certification bear little if any resemblance to the position of Mr Speed, because they did not involve a Complaints Assessment Committee process.

[28] As is clear from his evidence, Mr Speed remains aggrieved at the way that he was caught in what appeared to him to effectively be a catch 22 situation between the disciplinary processes of WGC and the investigation process of the Complaints Assessment Committee, as at some point both appeared to be on hold waiting for the other to take action. However that is not a matter that can be dealt with by the Authority pursuant to its jurisdiction over claims for unjustified dismissal, for all the reasons given above. Unfortunately for Mr Speed, he did not take up his opportunities to review the decisions of the Council, no doubt because he was not made aware of his legal options, which may have been the only way out of the apparent catch 22 situation he was in because the WGC had to follow the dictates of the Education Act in relation to uncertified teachers such as Mr Speed.

[29] Mr Speed's claim for unjustified disadvantage over the way WGC investigated the misconduct allegations must fail because his employment was never placed at any risk, as the investigation was never completed. Finally, I accept that WGC was justified in providing to the Teachers Council all the information it held on Mr

Speed's employment, as to have not done so would have been in breach of its duties towards the Council. Thus while I accept that there was potentially disadvantage to him, because WGC's interactions with the Teachers Council could have made Mr Speed's employment less secure, this was justified because WGC was obliged to respond in full to the Teacher Council's inquiries.

[30] It therefore follows that Mr Speed's claims must be dismissed and I so order.

Costs

[31] Costs are reserved.

G J Wood
Member of the Employment Relations Authority