

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 523
3098092

BETWEEN BRIAN WILSON
 Applicant

AND MANUKAU INSTITUTE OF
 TECHNOLOGY
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Jane Balthazar, counsel for the Applicant
 Mere King, counsel for the Respondent

Investigation Meeting: 20 October 2020 at Auckland

Submissions and/or further evidence: 20 October from the Applicant and from the Respondent

Determination: 21 December 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Brian Wilson, claimed that he had been unjustifiably dismissed by the Respondent, Manukau Institute of Technology Limited (MIT).

[2] Mr Wilson also claims arrears of wages in respect of the period 1 January 2013 – 31 December 2018 when his employment had changed from that of a casual employee to that of a permanent employee, and also payment of claimable meal allowance and reimbursement of expenses incurred on behalf of MIT.

[3] MIT accepts that Mr Wilson was a permanent full-time lecturer from January 2013 until the termination of his employment in December 2018, and that he was unjustifiably dismissed.

[4] MIT has also accepted and paid the meal allowance and expenses claims although it notes that these were not claimed in accordance with MIT procedures.

The Authority's investigation

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[6] The issues requiring investigation are:

- What terms and conditions of employment applied to Mr Wilson's employment between the period of January 2013 and December 2018?
- What remedies should MIT pay to Mr Wilson in respect of:
 - a. Wage arrears; and
 - b. Remedies arising out of Mr Wilson's unjustifiable dismissal

Background

[7] Manukau Institute of Technology (MIT) is based in Auckland. Mr Paul Hollings is the General Manager of Technology Park at MIT (which prior to 1 April 2020 was the Manukau Institute of Technology), and responsible for the general management of the Technology Park Campus which includes oversight of four Schools, incorporating eight practice areas including the Automotive School.

[8] Mr Wilson commenced employment at MIT as a Casual Tutorial Assistant on 15 August 2011. At that time there was a collective agreement in place between the Chief Executive of Manukau Institute of Technology and the Tertiary Education Union Te Hautu Kahutangi o Aotearoa (TEU) (the 2011 Collective agreement).

[9] Mr Wilson was not a union member but he was employed for the first 30 days of his employment on the terms of the 2011 Collective Agreement pursuant to clause 62 and 63 of the Employment Relations Act 2000 (the Act) which was in force at that date and which stated:

62 Employer's obligations in respect of new employee who is not a member of the union

- (1) This section –
 - (a) applies to a new employee who –
 - (i) is not a member of the union that is a party to a collective agreement that covers the work to be done by the employee; and

- (ii) enters into a collective agreement with an employer that is a party to a collective agreement that covers the work to be done by the employee; but
- (b) does not apply to an employee who –
 - (i) resigns as a member of a union and enters into an individual employment agreement with the same employer; or
 - (ii) enters into a new individual employment agreement with the same employer

63 Terms and conditions of employment of employee who is not member of union

- (1) The terms and conditions of employment of an employee to whom section 62 applies are determined in accordance with subsections (2) to (5).
- (2) For the first 30 days after the employee enters into an individual employment agreement, the employee's terms and conditions of employment comprise-
 - (a) the terms and conditions in the collective agreement that would bind the employee if the employee were a member of the union; and
 - (b) any additional terms and conditions mutually agreed to by the employee and employer that are not inconsistent with the terms and conditions in the collective agreement.
- (2A) However, the employee's terms and conditions of employment do not include any bargaining fee payable under Part 6B.
- (3) If the work to be done by the employee is covered by more than 1 collective agreement, subsection (2)(a) applies to the collective agreement that binds more of the employer's employees in relation to the work the employee will be performing than any of the other collective agreements.
- (4) No term or condition of employment may be expressed to alter automatically after the 30-day period to be inconsistent with the collective agreement.
- (5) After the 30-day period expires, the employee and the employer may, by mutual agreement, vary the individual collective agreement as they think fit.

[10] Mr Wilson did not become a union member at any stage during his employment with MIT, nor did he pay any union fees to TEU. Casual employees at MIT who are not members of the union are provided with an individual employment agreement, however Mr Wilson said he did not recall receiving one.

[11] Mr Wilson said that he understood that initially his employment was on a casual basis, however he had an expectation that he would be made a permanent employee. In particular he believed that Mr Gerald Ryan, at that time Head of Manufacturing and Engineering, had followed the requisite steps with MIT for him to be appointed on a permanent lecturer basis in

2013 when he had transferred to the Automotive School and performed all the duties of a lecturer.

[12] MIT's evidence is that no steps were taken by Mr Ryan to action a change in Mr Wilson's status after 2013. There is an email dated 12 March 2013 from the then HR Business Partner to Mr Ryan referring to a conversation regarding the fixed term employment of Mr Wilson. The email states:

The facts as you describe them to me were:

1. B J Wilson is currently on a casual employment agreement via the electrical department.
2. You are planning to employ him in a fixed term capacity.
3. HR has – to date to received (sic) a request to recruit via snap hire and to date – there is no approval from a director of MIT to hire for this position.

[13] MIT has found no evidence that Mr Ryan subsequently submitted a request to recruit a permanent employee.

[14] Mr Wilson said he understood he had been appointed as a lecturer in the Automotive School as represented to him by Mr Ryan. He said that he had not realised he was not being paid as a lecturer because he could not access the MIT Pay Kiosk, and said at the Investigation Meeting that he had not checked the monies being paid into his bank account because: "it was not a big issue at the time" and that he: "always had money".

[15] MIT accepted following the raising of the personal grievance by Mr Wilson and investigation into his claims, that he was employed as a permanent lecturer from January 2013. However MIT states that the transition in Mr Wilson's status from a Casual Tutorial position to that of permanent lecturer had not been actioned in accordance with its procedures and therefore, not having been notified otherwise, it had been unaware of any change in status during his employment.

Termination of employment

[16] Towards the end of the 2018 academic year Mr Paul Hollings, General Manager – Technology Park together with Mr Wilson's line manager at that time, assessed the resourcing required for the MIT department for the following academic year.

[17] Mr Hollings said he had been concerned at the falling number of student enrolments each year, and assessed that there were sufficient permanent employees within the department

to teach the relevant courses. Accordingly a decision was reached by Mr Hollings and Mr Wilson's line manager that the department would not require casual staffing assistance in 2019.

[18] Mr Hollings invited Mr Wilson to attend a meeting in December 2018 at which he intended to explain that Mr Wilson's casual assistance was no longer required by MIT.

[19] Mr Wilson responded advising that he did not want to attend the meeting because he did not have a support person. Mr Hollings said that because it was not a disciplinary meeting and MIT were not proposing to terminate Mr Wilson's employment any earlier than it was contractually entitled to do, he sent Mr Wilson a letter.

[20] The letter dated 4 December 2018 stated:

As you know on Wednesday the 28th November I asked to meet with you face to face on Monday 3rd December. Over the weekend you advised that you were unavailable to meet on the 3rd December as you stated your support person was not available. ...and that you yourself would be unavailable for the rest of the week.

...

The purpose of the discussion yesterday was to inform you that Manukau Institute of Technology would no longer be requiring casual resourcing for the 2019 year...

[21] Mr Hollings said that when he sent the letter dated 4 December 2018 he had not been aware that Mr Wilson had emailed the MIT Accounts Department on 27 November 2018 responding to advice that expenses he was claiming would not be reimbursed because they did not comply with the MIT policy regarding staff claims.

[22] In the email Mr Wilson had sent to the MIT Accounts Department he had stated: "Will also be pursuing FIVE years of back pay now too."

[23] On 26 March 2020 Mr Wilson filed a Statement of Problem in the Authority claiming arrears of salary for the period 1 January 2013 to 31 December 2018, payment of claimable meal allowances and reimbursement of expenses, and compensation for unjustifiable dismissal. MIT has accepted that Mr Wilson was unjustifiably dismissed.

What terms and conditions of employment applied to Mr Wilson's employment between the period of 1 January 2013 and 31 December 2018?

[24] At the time Mr Wilson was initially employed by MIT in 2011 there was an applicable collective agreement covering the work he was to perform. In accordance with the provisions of the Act in place at that time, Mr Wilson was covered by the terms of the 2011 Collective Agreement for the first 30 days (30 day rule).

[25] The operation of the 30 day provisions of s 62 and s 63 of the Act were explained by former Chief Judge Colgan in *Chief Executive of the Open Polytechnic of New Zealand v Halsey* as to provide a new employee with the opportunity to see if he or she wished to continue on the same terms and conditions after the end that period by either joining the union or negotiating individual terms and conditions of employment:

[10] The scheme of the legislation is to require an applicable collective agreement to govern the employment for a trial period in the sense that the new employee is given an opportunity to consider whether he or she wishes to continue on the same terms and conditions after the expiry of that period. If so, that is achieved by the employee joining the union. So that, by law, the collective agreement is applicable to that employment relationship. If, at the expiry of that period, the employee does not join the union, individual terms and conditions of employment will then be settled. These may include some, many or even all, of the terms of the relevant collective agreement but operable on an individual basis, and other individual terms and conditions negotiated and settled between the employer and the employee. They may also include individual terms and conditions of employment that bear little or no resemblance to those in the collective agreement as is permissible at law.

[11] The process is, in effect, a free trial of the collective agreement by the employee for up to 30 days at the end of which time the individual employee must make a choice, whether consciously or by default, to 'purchase' the collective agreement by joining the union or to negotiate other terms and conditions with the employer.¹

[26] Mr Wilson did not join the union, he did not pay union fees. There is no evidence that following the end of the 30 day trial period he engaged in any discussions with MIT and/or settle to amend his terms and conditions of employment.

[27] I find in those circumstances Mr Wilson's terms and conditions of employment remained in place after the expiry of the 30 day rule i.e. that they were those set out in the 2011 Collective Agreement.

[28] As stated in *Halsey* if Mr Wilson had wished to continue to be covered by the terms of the collective agreements as renegotiated by the unions after his 30 day trial period expired, he could have joined the union.² He did not do so.

[29] I consider it would not be correct that Mr Wilson would continue to have the benefit of the subsequent collective agreements, this would be contrary to the intent and purpose of the 30 day rule which is in the nature of a 'trial' as to whether or not the employee chooses to join the union, in which case union fees would become payable.

[30] Accordingly after the expiry of the 30 day trial, I find that Mr Wilson, who was not a union employee, continued to be employed by default of choice otherwise, on an individual

¹ *Chief Executive of the Open Polytechnic of New Zealand v Halsey* [2010] NZEmpC 63.

² See n 1 above.

employment agreement the terms of which mirrored those of the 2011 Collective Agreement in place at the time of the commencement of his employment. The only variations which occurred to Mr Wilson's terms and conditions thereafter I find to have been his transfer to the Automotive School in 2013, and a salary increase which was effective in 2016.

Remedies

Wage arrears

[31] Pursuant to s 142 of the Act:

No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[32] Although Mr Wilson may have become aware of the shortfall in terms of the salary paid to him sometime prior to filing the Statement of Problem in the Authority, I find that pursuant to s 142 of the Act the date of the cause of action commenced on the date that Mr Wilson instituted a claim for arrears of wages in the Statement of Problem filed with the Authority on 26 March 2020.

[33] On that basis the 6 year limitation period covers the period from 26 March 2014 to 26 March 2020.

Reimbursement of Lost Wages

[34] I have found that Mr Wilson's individual terms and conditions of employment mirrored those of the 2011 Collective Agreement in place at the time of his employment apart from a salary increase in 2016.

[35] A full copy of the 2011 Collective Agreement was not provided to the Authority but copies of succeeding collective agreements have been provided (the collective Agreements).³ All provide as clause 3.5:

3.5 Progression as a Lecturer to Step 13

Subject to clauses 3.6 and 3.7, on the completion of a year of service on a particular step a lecturer shall automatically progress to the next step of the salary scale up to step 13.

[36] On that basis I consider it reasonable to conclude that an identical clause to that in the Collective Agreements also existed in the 2011 Collective Agreement.

³ Academic Staff Collective Agreement 01/01/2013 – 31/12/2014; Academic Staff Collective Agreement 01/01/2015 – 31/12/2016; Academic Staff Collective Agreement 01/01/2017 – 31/12/2017; Academic Staff Collective Agreement 01/01/2018 – 31/12/2018.

[37] The Collective Agreements defined a ‘lecturer’ at clause 2.7 as: “... any person employed in a teaching position, or any non-teaching academic staff member in the polytechnic.’ Mr Wilson’s evidence is that he provided teaching and therefore I find his position fell within this definition.

[38] There is no evidence that Mr Wilson fell within the clauses 3.6 and 3.7 provisos which covered double increments for meritorious service, equitable salary relativities or retention (clause 3.6) or Withholding of increments (clause 3.7). Therefore I find that Mr Wilson’s position was that of a L02 Lecturer.

[39] In 2011 the annual salary as set out in Schedule 1 of the 2011 Collective agreement was \$43,574. This is the rate applicable to a L02 Lecturer position.

[40] Mr Wilson became a lecturer in 2013 and therefore would have moved in accordance with the terms and conditions which applied at the commencement of his employment and not varied thereafter on to the initial 02 Lecturer rate of \$43,574.

[41] Thereafter his rate would have increased in line with the provision set out at clause 3.5 to the next step each year as set out in Schedule 1 of the 2011 Collective Agreement.

[42] The amounts paid to Mr Wilson are confirmed by Mr Wilson in the Statement of Problem.

[43] I find that Mr Wilson would have been entitled to the shortfall between the applicable L02 Lecturer salary incrementally increased to the next step each year thereafter in accordance with Clause 3.5 of the 2011 Collective Agreements as set out in the table below:

Year	Salary Step	Paid to Mr Wilson	Shortfall
2014			
Full year	L02: \$43,574.00	\$37,364.80	\$6,209.20
Proportional to claim period	\$32,680.50	\$28,023.60	\$4,656.90
2015	L03: \$46,383.00	\$35,746.14	\$10,636.86
2016	L04: \$49,193.00	\$29,980.00	\$19,213.00
2017	L05: \$51, 238.00	\$33,680.40	\$17,557.60
2018	L06: \$53,281.00	\$35,179.00	\$18,102.00
Total shortfall in the period 26.03.14 - 31.12.18			\$70,166.36

[44] I determine that Mr Wilson is entitled to arrears in the sum of \$70,166.36 gross.

[45] I order MIT to pay Mr Wilson the sum of \$70,166.36 gross as wage arrears pursuant to s 11 of the Wages Protection Act 1983.

Kiwisaver

[46] Mr Wilson submits that he should have been enrolled in Kiwisaver and is claiming Kiwisaver contributions in respect of the arrears of wages claimed.

[47] Mr Wilson commenced employment in 2011 as a Casual Tutorial Assistant. His employment was therefore temporary in nature and pursuant to the Kiwisaver Act 2006 s 12, automatic enrolment does not apply to temporary employment.

[48] Section 10 of the Kiwisaver Act 2006 sets out automatic enrolment:

10 Who automatic enrolment rules apply to

The automatic rules apply to an employee who—

- (a) starts new employment with an employer that is not an exempt employer; and
- (b) is not a secondee; and
- (c) when they start the new employment, is aged—
 - (i) 18 years or more; and
 - (ii) less than the New Zealand superannuation qualification age.

[49] Section 11 of the Kiwisaver Act 2006 defines new employment:

11 Meaning of new employment and secondee

(1) **New employment** means any employment that is started on or after the date of commencement of the automatic enrolment rules, but—

- (a) does not include temporary employment (except as provided in [section 12](#)); and
- (b) does not include employment in respect of which the employee remains on the same payroll as the payroll that he or she was on immediately before starting that employment; and
- (c) does not include employment with an employer that carries on the same business as the business in which the employee was employed immediately before starting the employment; and
- (d) does not include employment which a secondee was seconded, at the end of a secondment, by the employer from.

[50] I find that Mr Wilson's transition to the Automotive School would not have triggered automatic enrolment because the MIT processes which would have made it aware of his change in status were not completed.

[51] Although Mr Wilson's evidence was that he applied to join Kiwisaver upon commencement, MIT's evidence is that it is unaware of any requests by Mr Wilson to join Kiwisaver, nor had he advised it that he had joined Kiwisaver and/or enquired about the employer's contributions.

[52] This accords with Mr Wilson's evidence at the Investigation Meeting that he did not ask anyone from the HR department about Kiwisaver and that he had put the issue: "on hold and not concerned".

[53] On the basis that MIT was not required to automatically enrol Mr Wilson in Kiwisaver at the commencement of his employment, was not aware of his change in status) (which was not authorised or completed in line with its procedures) or informed by Mr Wilson that he had joined Kiwisaver, I find that Mr Wilson's casual approach is a large contributory factor in the default in Kiwisaver contributions being made by MIT.

[54] Nonetheless I find that Mr Wilson having opted in to Kiwisaver and upon becoming a permanent employee was entitled to the relevant employer contributions.

[55] Accordingly I determine that Mr Wilson is entitled to an award in respect of the employer Kiwisaver contributions.

[56] I order that contributions are to be made by MIT at the rate of 3% for the relevant period of the wage arrears. Mr Wilson is also to pay to the IRD the employee contributions at the rate of 3% in respect of the same period, which means that he is responsible for paying any shortfall between contributions made at a lower rate and the applicable rate of 3%.

[57] The Kiwisaver contribution payments are to be made direct to the Inland Revenue Department for the benefit of Mr Wilson.

Holiday pay

[58] Mr Wilson confirmed at the Investigation Meeting that he had received payment of holiday pay at the rate of 8% throughout the period of his employment.

[59] Accordingly I find that Mr Wilson is entitled to holiday pay at the rate of 8% on \$70,166.36 the amount due to him as arrears of wages.

[60] I order that MIT pay to Mr Wilson the sum of \$5613.31 gross as holiday pay pursuant to s 24 Holidays Act 2003.

Interest

[61] I accept that Mr Wilson was deprived of the use of the monies to which he should have been entitled during the period from 26 March 2014 to 26 March 2020.

[62] I order that MIT pay interest on the amount awarded as arrears in accordance with the Interest on Money Claims Act 2016.

What remedies should apply in respect of the unjustifiable dismissal of Mr Wilson?

[63] Mr Wilson has been unjustifiably dismissed and is therefore entitled to remedies pursuant to s 123 of the Act.

Lost wages

[64] Employees are under a duty to mitigate any loss arising from the loss of their employment. In this case Mr Wilson took no steps to mitigate his loss instead advising during the Investigation Meeting that he had decided to: “take a year off “. This was a choice made by Mr Wilson of his own volition.

[65] In these circumstances I make no award for lost wages.

Compensation

[66] Compensation is awarded in accordance with s 123(i)(c)(i) of the Act for humiliation, loss of dignity, and injury to the feelings of the employee.

[67] Mr Wilson provided little in the way of evidence as to the detrimental effect the loss of his employment had upon him. I accept that Mr Wilson had been having what was referred to as ‘exploratory work’ undertaken at the hospital at or about the time his employment ended, however this cannot be attributed to the loss of his employment.

[68] I find that there was no adverse intention in the decision to make Mr Wilson’s position redundant. The decision was the result of a genuine misunderstanding on MIT’s part of Mr Wilson’s status, Mr Hollings genuinely believing Mr Wilson was casual employee.

[69] Acting on that understanding, and with no obligation to do so, Mr Hollings nonetheless tried to meet with Mr Wilson to advise him in person of the ending of the casual relationship. This was a sensitive approach towards an employee Mr Hollings understood to be a casual employee, but of reasonably lengthy duration. It was only after Mr Wilson declined to attend

the meeting that Mr Hollings sent the email advising Mr Wilson that his services would not be required in 2019.

[70] As such I find that any humiliation caused by Mr Hollings actions was at a low level.

[71] Having considered the circumstances I find it appropriate to make an award of compensation at a modest level.

[72] I order MIT to pay Mr Wilson the sum of \$5,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[73] I accept that Mr Wilson did not contribute to the fact that he was unfairly dismissed, MIT having accepted that it was their administrative error. However I consider that Mr Wilson could have taken steps during the course of his employment to have advised MIT of his change of employment status.

[74] His evidence was that he had a casual approach to his salary payments, not advising the HR Department that he was having difficulty accessing the Pay Kiosk, not checking the level of the payments into his bank account from MIT or due under the Collective Agreements and the applicable lecturer salary rates from which he would have been able to calculate any shortfall. Nor did he at any time until towards the end of his employment take any steps to advise MIT of his change in employment status.

[75] However I also consider that MIT, Mr Ryan having advised the HR Department that he wanted to use Mr Wilson in a fixed term capacity, could have been alerted to make enquiries when nothing further was received from Mr Ryan but Mr Wilson continued in its employment.

[76] I make no reduction in the remedies awarded for contrition.

Costs

[77] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[78] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[79] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[80] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴

Eleanor Robinson
Member of the Employment Relations Authority

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].