

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Russell Allen (Applicant)  
**AND** The New Zealand Institute of Studies (Respondent)  
**REPRESENTATIVES** Applicant In Person  
Jo Douglas, Counsel for Respondent  
**MEMBER OF AUTHORITY** Dzintra King  
**INVESTIGATION MEETING** 23 August 2005  
**DATE OF DETERMINATION** 29 September 2005

**DETERMINATION OF THE AUTHORITY**

The applicant, Mr Russell Allen, says that he has been unjustifiably dismissed and disadvantaged by the respondent, the New Zealand Institute of Studies (“the Institute”). The alleged disadvantage is that the respondent unilaterally varied the applicant’s employment agreement by placing him on unpaid leave without his agreement, refusing to rectify this breach when it was brought to the Institute’s attention and refusing to allow the applicant to work out his notice period, or, alternatively, to pay him in lieu of notice. The respondent denies the claims

The applicant seeks reinstatement, reimbursement for lost remuneration and compensation. He also seeks a compliance order that the Institute pay him four weeks’ salary in lieu of notice.

**Background to the redundancy situation**

The respondent runs an English language school. As with many such institutions the Institute was dependant upon the number of enrolments for its income and the enrolment numbers fluctuated and were not within the control of the respondent. Mr Allen was originally employed on a part time contract in February 2002. The position became full time and permanent in June 2002. Mr Allan taught mathematics in the Foundation Studies programme.

Ms Johanna Cogle, the Principal of the Institute, said that in February 2004 the numbers of students enrolled in the Foundation Studies programme did not warrant the employment of a full time mathematics teacher. There had been a decline in interest in the Foundation Studies programme and students were more interested in the new NZ Diploma of Business course which had been introduced in 2004. Although many of the Foundation Studies teachers had been able to be redeployed into the NZ Diploma in Business course over 2004 this had not been possible with Mr Allen. In July 2004 a number of new staff were employed on part time, fixed term contracts to teach marketing and law but no new staff were employed to teach mathematics.

In November 2004 when Ms Cogle returned from China the marketing team confirmed that the Foundation Studies programme had a low level of enrolments. Ms Cogle said she was conscious that four weeks' notice of redundancy had to be given and that therefore there was not much time to allow a consultation process to take place before the December close down. In the week beginning 29 November 2004 the management team determined that staffing levels would need to be cut back. A group of staff were identified as being at risk of redundancy. This group included Mr Allen.

#### Mr Allen's situation

On Wednesday 1 December 2004 the at-risk staff met with Ms Cogle and Mr James Harrison, the Director of Academic Programmes. They were told that there might be a surplus staff situation and that staff who could be redeployed into other positions, even if those were short term or part time, would be offered those positions. The positions were not identified. Staff were given the option of taking leave without pay from 10 January 2005 to 25 February 2005 in case student numbers improved; otherwise they would have to accept redundancy. Ms Cogle told staff four weeks' notice would be given, any alternative options put forward by staff would be considered and individual interviews would take place over the following two days. Mr Allen was met with on 3 December. Mr Allen was told what his current leave entitlement was. Mr Allen had little annual leave left and had already arranged to take annual leave from 16 December.

The affected staff found the proposals unacceptable and indicated that they were seeking legal advice. Mr Laurent was instructed and had a number of communications with Ms Cogle. On 8 December she advised Mr Laurent of the reasons redundancies might be necessary and why LWOP was being offered as an alternative. She said the Institute was prepared to consult further but that it needed to make a decision on whether or not people were redundant by 10 December, which would allow the giving of four weeks' notice. A meeting with Mr Laurent and affected staff was held on 13 December and Ms Cogle said it was agreed that staff would indicate their choices.

Mr Allen did not pick either the LWOP or redundancy option but instead suggested that he work part time for part time pay. Ms Cogle said that as he had not indicated a preference but had indicated he was interested in part time work that she assumed he was choosing the LWOP option. On 14 December he spoke to Ms Cogle about his proposal but he said it seemed she had not read it. He then saw Mr Harrison and told him he would not be in the following day as he would be on sick leave. He again saw Mr Harrison late that same day but Mr Harrison did not know anything about Mr Allen's proposal. Mr Allen then said "Then I should come in on 10 January as normal?" and Mr Harrison said that was correct.

Ms Cogle said Mr Allen's proposal was discussed sometime on 14, 15 or 16 December, and declined, as it would not allow the necessary savings to be made and, if accepted, would mean the same option would need to be applied to other staff. This was not relayed to Mr Allen until he wrote seeking a response in 2005.

On 16 December Ms Cogle wrote to Mr Allen saying:

*Thank you for agreeing to take Leave without Pay over the January/February 2005 period.  
Your cooperation is deeply appreciated.*

...

*You will be placed on leave as from Monday 10<sup>th</sup> January 2005.*

Attached to this letter was a document headed "Individual Employment Agreement Leave Without Pay" which Mr Allen was asked to sign. He did not, unsurprisingly, as he made his objections to this proposal clearly known.

On 10 January Mr Allen reported for work. Ms Cogle was away. Mr Harrison asked him to go home as there was no work for him. Mr Allen wrote to Ms Cogle on 10 January saying:

*At no time either in writing or verbally have I ever indicated I was prepared to accept Leave without Pay over the January/February 2005 period. ... I have no intention of accepting leave without pay as this constitutes accepting a substantial cut in my annual pay, and is contrary to my contract with NZIOS.*

On 10 January Mr Harrison wrote to Mr Allen telling him there was no work and he was not expected to come into work for the rest of the week. On the same day Mr Allen wrote to Mr Harrison and Ms Cogle stating:

*As things stand I expect to be paid in full from 10<sup>th</sup> January 05, either indefinitely or until I have been made redundant following the proper channels as laid out by Mr Laurent at the meeting on 13<sup>th</sup> December 2004.*

On 17 January when Ms Cogle returned wrote saying:

*Thank you for your letter regarding the 'leave without pay' situation.*

*This was discussed at length with staff in the weeks of 1-20<sup>th</sup> December 2004. It was made very clear to staff that unless alternative employment could be found then there were only two options; leave without pay or redundancy.*

*You chose to take leave without pay during part of this period. At no stage have you indicated that 'redundancy' was an option which you wished to consider.*

In a separate letter she stated that at the time of his suggestion he was on leave and therefore was unavailable for discussion but that the proposal to work part time was unacceptable. This was the first Mr Allen knew of this. She went on to say he could make further suggestions but that the Institute intended making a decision as to whether his position was redundant by the end of the week, that it was unlikely his employment could be continued and that there were no alternative positions. This was followed up by a letter dated 13 February, which, referring to the 'offers' said:

*You have chosen to contest the right of the school to make you these offers and we have agreed to mediation in this matter. Currently you are on leave without pay.*

She then said that as enrolments had not picked up:

*This leaves us with no alternative but to declare your position redundant with four weeks notice. The termination of your employment will take effect from Friday 25<sup>th</sup> February 2005.*

#### Leave without pay

There was no contractual provision that entitled the Institute to impose leave without pay upon Mr Allen. Mr Allen did not acquiesce to this and its imposition constituted a disadvantage. He has lost income as a result of the imposition of leave without pay and that lost income must be reimbursed.

Mr Allen presented for work on 10 January and he is to be paid from that date until the date on which he was given notice of redundancy, which was 13 February.

### Notice Period

Clause 4 (f) of the employment agreement states:

*Where the employee is to be declared redundant he/she shall receive not less than four weeks' notice of termination of employment. In lieu of such notice an employee shall receive four weeks' pay.*

Mr Allen was entitled to be paid four weeks' wages in lieu of notice. This was not paid and the non-payment was in breach of the employment agreement. Mr Allen is to be paid the balance of the wages owing for the four week notice period, that is, from 25 February to the end of the four week period.

### Dismissal

The individual employment agreement states at clause 4 (d):

*For the purpose of this Agreement, redundancy is a condition in which the Company has surplus staff to requirements because of the re-organisation or the closing down of the whole or any part of the Company's operations due to a change in plant, methods or materials, economic circumstances, lesser number of students or like cause requiring a permanent reduction in the number of employees.*

I am satisfied that a genuine redundancy situation existed, which was due to a reduction in the numbers of students, and that consequently Mr Allen's position ceased to exist. The process whereby this took place left something to be desired and cannot be said to have been fair.

The Institute's Operations Manual specifies a procedure to be followed when staff are made redundant. There was a failure to identify core staff and there was a failure to provide criteria for staff selection.

Section 4 Employment Relations Act 2000 requires the Institute to deal with its employees in good faith. The duty of good faith requires an employer who is proposing to make a decision that will have an adverse effect on the continuation of employment to provide access to information and an opportunity to comment on that before the decision is made. That did not take place in this case.

There was also a failure on the part of Ms Cogle and Mr Harrison to familiarise themselves with Mr Allen's work record and skills which may have had an adverse impact on redeployment possibilities.

### Remedies

Mr Allen is entitled to be compensated for the humiliation and distress he suffered both for the unjustifiable dismissal and for the disadvantage caused by the withholding of his salary. Mr Allen is to be paid the sum of \$4,000 pursuant to s.123 (1) (c) (i).

He has also sought reinstatement. I have found that the redundancy was genuine and there is therefore no position into which he can be reinstated.

For the same reason, there can be no award for loss of income arising from the dismissal.

Wages

Mr Allen raised an issue regarding payment of wages. I am seeking further information regarding this matter and will issue a supplementary determination in due course.

Costs

Costs were reserved. Should the parties be unable to resolve this matter the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum I reply within 14 days of receipt of the applicant's memorandum.

Dzintra King  
Member of Employment Relations Authority