

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 157/08
5118737

BETWEEN DR JOHN DOWDS
Applicant

AND UNIVERSAL COLLEGE OF
LEARNING
Respondent

Member of Authority: P R Stapp

Representatives: Alan Millar for Applicant
Peter Chemis and Andrea Pazin for Respondent

Investigation Meeting: 5 November 2008, Palmerston North

Determination: 26 November 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dr John (Jack) Dowds commenced employment at UCOL in 2004 as Professor and Dean International Programmes. Previously he was employed at Massey University in a permanent position as deputy pro-vice chancellor, College of Business. He was recruited to work at UCOL by Bill Kimberley, human resources manager, and Paul McElroy, the chief executive.

[2] Dr Dowds and Mr Kimberley negotiated the term of an employment agreement for the role. Dr Dowds and Mr McElroy then signed off what purported to be a 5 year fixed term agreement dated 6 December 2004 that included a redundancy clause after Dr Dowds and Mr Kimberley had agreed on the length of the term of the agreement.

[3] Dr Dowds' role at UCOL was to enact strategy and develop international collaborations and alliances. The role was a new one and was dependant on funding.

Another colleague from Massey University, Julia Pedley, was appointed as the programme director, also under a fixed term agreement. In addition, a shared personal assistant was provided for the programme.

[4] Dr Dowds and Mr McElroy regularly met over his role and Mr McElroy broached the matter of redundancy. Following a consultation process Dr Dowds' employment was terminated on the grounds of redundancy before the expiry of the 5 year term.

[5] Dr Dowds was paid his entitlements including holiday pay, leave, notice and a redundancy payment, which he accepted.

The issues

[6] Dr Dowds has relied upon the oral terms he says he agreed to with Mr Kimberley. He says he has relied upon this instead of the intended employment agreement that was presented to him and contained a redundancy clause because he says Mr Kimberley told him that the clause was not a matter of moment and was a standard clause and should not be of concern. Mr Kimberley denied providing any such assurance. Dr Dowds says he did not agree to redundancy provisions on the basis of his understanding that the oral terms applied. Dr Dowds says his redundancy was predetermined and a sham. UCOL denied Dr Dowds' claims.

[7] The issues are:

- Was the fixed term agreement genuine?
- Was Dr Dowds given an oral assurance that he could reasonably rely upon for the redundancy clause not to apply, despite the employment agreement being signed off by the parties?
- Was UCOL permitted to rely on the redundancy clause in the employment agreement to bring the agreement to an end?
- Was Mr McElroy's role in Dr Dowds' redundancy decision unfair?
- Are there any causes of action to resolve the employment relationship problem?

Is the fixed term genuine?

[8] I am satisfied that the fixed term employment agreement meets the requirement of stating the way in which the agreement would end and the reasons for ending in that way. It was not a perfectly executed document in best practice, but contained sufficient information for Dr Dowds to be on reasonable notice of the parties' intentions, including that the agreement could end for redundancy. The document contained a termination of employment clause and the reasons for the fixed term arrangement.

[9] Dr Dowds' position is entirely undermined by the existence of the signed employment agreement. He was given the agreement in advance to read and get advice. He says he did discuss the agreement with other people and he did subsequently sign it. There has been no reason given to suggest that the provisions of s 63A of the Employment Relations Act were not met. I am satisfied that there has not been any inducement to get Dr Dowds to sign the agreement because:

- Dr Dowds changed his evidence and conceded for the first time during the Authority's investigation that the redundancy clause would apply in exceptional circumstances.
- Dr Dowds' evidence was not consistent with the evidence from Julia Pedley who told me she decided to take a chance.
- A letter dated 13 December 2007 did not refer to Mr Kimberley's assurance and other issues existed over the employment agreement and Dr Dowds leaving a full time permanent position at Massey University. These included the length of the term of the agreement and an incentive package including the money being automatically paid and there would need to be good reason for it not to be paid.
- An aide memoir produced by Dr Dowds did not refer to the assurance he says Mr Kimberley gave him.
- Mr Kimberley is an experienced human resources officer and his lack of knowledge on the detail required for a fixed term arrangement does not make him unreliable. He emphatically denied giving any assurances that the redundancy was of no moment.
- Julia Pedley says that Dr Dowds did not raise the assurance with her.

- Dr Dowds' representative's correspondence referred to honouring the contract to ensure income for the five years. There was no mention of any assurance from Mr Kimberley.
- The employment agreement superseded any other arrangements, including any oral arrangement or assurance.
- UCOL's practice of having a signed agreement.
- Dr Dowds has not been able to contradict the evidence that the employment agreements are of a standard type.

Was UCOL permitted to rely on the redundancy clause in the employment agreement?

[10] It was entirely permissible for UCOL to include a redundancy provision in the employment agreement. The law permits it even if the agreement is for a fixed term. The nature of the position and UCOL's funding arrangements entitled UCOL to rely on the clause to bring the agreement to an end.

[11] Dr Dowds has complained that the job description did not mention or reveal the funding arrangements for the position. However the reason for the position and the nature of it was clear under schedule 2 of the agreement that states: "*...the role is new and there is uncertainty as to its on going viability.*" The viability of the role had to be subject to the tertiary education funding arrangements. Thus, I accept that there was a genuine redundancy in the absence of any other reasons being advanced for the cause of the employment ending and the correspondence from UCOL at the time supports there being a genuine redundancy associated with tertiary sector funding.

Mr McElroy's role in the redundancy decision

[12] I am satisfied that Mr McElroy was not involved in any predetermination and sham.

[13] My reasons are that Dr Dowds directly reported to Mr McElroy. The two of them regularly met to discuss Dr Dowds' role. In one of the last meetings Mr McElroy took the opportunity to broach the difficulty about having to make savings because of funding arrangements in the tertiary sector. I accept that Mr McElroy decided to

broach the matter in advance of a formal consultation because of their relationship and that Mr McElroy genuinely attempted to scope out the savings associated with redundancy and what Dr Dowds' position was likely to be. Dr Dowds was given the opportunity to engage in a consultative process that was documented. He was given all the information. The position relied on funding under the tertiary funding regime. I am also supported by the evidence that there were three other people affected in Mr McElroy's deliberation on needing to make savings: Ms Julia Pedley the programme's director, who was redeployed; a personal assistant who was paid an allowance that later ceased; and another academic working elsewhere at UCOL.

[14] Dr Dowds has not challenged the substantive reasons for the redundancy decision. Mr McElroy's outline of the reasons was put to Dr Dowds in writing, and I am satisfied that Dr Dowds had every opportunity to pursue any details if he wished to. Instead Dr Dowds took a view that UCOL's action was illegitimate and he declined to participate actively in the consultation process offered to him by UCOL.

[15] Mr McElroy also had regard to redeployment in his deliberations. It was raised on notice in writing by Mr McElroy that Dr Dowds could have taken up if he wanted to.

[16] Dr Dowds' representative put forward an opportunity for UCOL to have "*without prejudice*" negotiations. It was open to UCOL not to accept that proposal and instead to opt for the consultation process as set out. It was reasonable for UCOL to expect Dr Dowds to be open and communicative, even if he held a strongly different point of view over what was happening. Once this was made clear the responsibility rested with Dr Dowds to make a decision to engage further or accept the consequences of not doing so.

[17] I was asked to consider that the employment relationship problem was about unfair bargaining for the individual employment agreement under s 68 and s 69 of the Employment Relations Act. There was no evidence supporting the late claim of unfair bargaining. I entirely reject that this has any basis to Dr Dowds' employment relationship problem because he signed the employment agreement.

[18] In any event no grounds for establishing unfair bargaining under s 68 (2) of the Act have been established.

Causes of action to resolve the employment relationship problem

[19] The applicant has primarily sought to obtain the payment for the period of the fixed term under the employment agreement not worked on the basis that the agreement was a genuine fixed term. He had to show that the termination of the agreement was in breach of the terms. Thus, his reliance on his understanding of the oral arrangements he said had been entered into that did not include any redundancy. Also, he had to rely on the decision to terminate his employment during the currency of the fixed term being unjustified. He has not supported either contention, I hold. Thus, he is not entitled to a pay out and is not entitled to any remedies for a personal grievance.

[20] An issue was raised about a breach of good faith, based on the employer not revealing all the aspects of the employment at the time it was entered into. I dismiss this also, because Dr Dowds accepted the employment agreement, he signed it and discussed the terms of that agreement with other people. During the Authority's investigation meeting Dr Dowds accepted that the redundancy clause in the agreement that he signed would only apply in what he called exceptional circumstances. I note that he had unconditionally accepted the redundancy pay.

Determination of the Authority

[21] The applicant's claims are dismissed.

[22] Costs are reserved.