

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Gavin John Hurlimann (Applicant)  
**AND** Auckland College of Natural Medicine Limited (Respondent)  
**REPRESENTATIVES** Gavin John Hurlimann In Person  
Ross France, Counsel for Respondent  
**MEMBER OF AUTHORITY** Dzintra King  
**INVESTIGATION MEETING** 27 February 2006  
**SUBMISSIONS RECEIVED** 16 March 2006 from Respondent  
31 March 2006 from Applicant  
**DATE OF DETERMINATION** 26 April 2006

DETERMINATION OF THE AUTHORITY

The applicant, Mr. Gavin Hurlimann, says that he has been unjustifiably dismissed by the respondent, the Auckland College of Natural Medicine Ltd (“the College” or “ACNM”). He also claims that he has been discriminated against and not provided with training because he contacted ASTE and attempted to initiate bargaining for a collective employment agreement. He further claims that the duty of good faith was breached in that his contract “was erroneously couched as an independent contractor’s agreement to avoid the minimum legal requirements of the Employment Relations Act 2000”; and that he is owed unpaid wages.

The major issues for determination are:

1. Was the applicant was an employee or a contractor?
2. If he was an employee, when was he dismissed and was the dismissal justifiable?

In making this determination I have not taken account of additional material supplied by Mr France with his closing submissions. This material was not placed in evidence and I cannot now take note of it.

Employment Status

Mr. Hurlimann was employed by the College pursuant to a “tutor contract” dated 5 July 2005 which does not specify Mr. Hurliman’s employment status. The contract was for a twelve month term and the notice period was eight weeks for both parties. Clause 9 of the contract refers to the need to submit a “fortnightly pay claim or invoice” upon receipt of which “wages will be paid into your nominated bank account”. Mr. Hurlimann gave the respondent invoices. No PAYE was deducted.

Mr. Hurlimann said he had not paid provisional tax and that there had been no discussion about the payment of tax.

Mr. Hurlimann was initially engaged to teach Unit Standard 7147 which deals with knowledge of western pharmacology in relation to the practice of acupuncture. On 15 August Mr. Hurlimann accepted a variation to include three Core Health Unit Standards.

Mr. Hurlimann did not submit timesheets and he did not attend the College for all the hours for which he worked. He was required to submit teaching materials in advance for approval, the College was assigned intellectual property rights, he was to be available for meetings regarding his teaching duties and student performance and was to submit a monthly report.

The legislation requires me to determine the real nature of the relationship and in doing so to consider all relevant matters. Mr Hurlimann was under the control of the College, he had to submit his material to the College for approval, he had to attend meetings and supply reports. He worked set hours teaching at the College. He did not have the ability to employ another person to replace him and he used the College's premises. Although he worked at home for part of the time this is not inconsistent with his being an employee. Most teachers or tutors would spend time at home preparing and marking lessons. The only factor against his being an employee was that he submitted invoices. Mr Hurlimann was an employee.

### Dismissal

Mr. Hurlimann's contract required him to prepare teaching materials in advance and to submit these "in adequate time for approval by the Principal".

On 19 September he had a performance review which resulted in a salary increase. On 23 September Mr Hurlimann signed the performance review document saying he was satisfied with the final decisions which included a need for up to date reports, improvements as per the student evaluations and the requirement that teaching material be submitted in time for moderation and be available to students before lessons started.

Mr. Hurlimann supplied material for the Core Health course. This was moderated by Ms Jessica Li Feng, the Academic Principal, on 5 October who decided that the lesson plan could not be approved and the course could not be delivered the following week and she recommended that the course be postponed until the teaching materials were well prepared.

### 5 October

On 5 October Mr. Pieter Watson, the College's Manager, left a message on Mr. Hurlimann's phone saying that the College had decided it wanted to postpone the delivery of the Core Health course. This was followed up by an email from Mr. Stephen Xu:

*Thank you very much for sending us the teaching material for Core health. Jessica, Pieter and me have looked and discussed you material. We found that the way you prepared lesson plan is not correct and not suitable. U/S is for assessment not for lesson plan. In addition, in your plan there are Power Point, handout and assessment plan will also be included. However, you have not submitted yet. We understand that you are still busy for revising U/S 7141 and will submit the changes to Jessica by each lesson. This is not a good practice for our teaching. To make our system more systemic and smooth, we would like to ask tutor to submit the material completely before two weeks the course start so ACNM can have time to moderate and the tutor can have time to revise it. Therefore we decided that*

*ACNM cancelled the Core health course for the following team [sic]. The Core Health course will start next February.*

*For the above, we would like to ask you to stop preparing the teaching material for U/S 6422, 6127 and 20100 and concentrate on U/S 7141. Pieter will discuss with you this issue next week.*

Mr. Hurlimann said there had been no prior discussion with him about this and that it constituted a unilateral variation of his employment agreement.

Mr. Hurlimann asked that the intended meeting with Mr. Watson be postponed for a week as he was attending a course.

#### 19 October

Mr. Hurlimann emailed teaching material to Ms Li Feng via Mr. Watson. This material was two days late for the lesson which had taken place on 17 October. The respondent says this was the last teaching material submitted by the applicant for moderation.

#### 31 October

It was not until 31 October that the parties met to discuss the cancellation of the Core Health course. The meeting was attended by Mr. Watson, Mr. Xu and Mr. Hurlimann. In the meantime, Mr. Hurlimann had consulted ASTE and had been advised that he was an employee. Mr. Xu apologized for delaying the course and said it was for the sake of all the parties. Mr. Hurlimann said he would have an ASTE representative contact Mr. Watson about contract irregularities, the copyright issue and obtaining compensation for the stopping of the Core Health course.

After the meeting, Mr. Hurlimann handed Mr. Watson the following letter:

**RE: Unit Standards 7141, 6422, 6127 & 20100**

*This correspondence is to advise that I will no longer be assigning copyright or intellectual property rights to the Auckland College of Natural Medicine (ACNM) for course material relating to the above Unit Standards.*

*In addition, I require a translation of the attached e-mail [of 5 October] as it is illegible [sic].*

*Finally, I advise that due to ACNM's breach [sic] of contract (as per attached e-mail) I shall be seeking compensation with the assistance of the Association of Staff in Tertiary Education and the Employment Court.*

#### 2 November

On 2 November Mr. Russell Taylor, a Field Officer with ASTE, contacted Mr. Watson about having a meeting and arranging for the negotiation of a collective. Mr. Watson replied that he wanted to seek legal advice prior to meeting with Mr. Taylor.

On 2 November Mr. Xu sent a letter to Mr. Hurlimann headed "Re: Notice of Termination of Contract". He said he was surprised and disappointed to receive Mr. Hurlimann's letter dated 31 October and believed his actions were destroying the trust between them. He said that ACNM

could not see any breach of contract and that he could not understand why Mr. Hurlimann had not spoken to him if he did not think the postponement was fair to him. He also said:

*Your declaration of ceasing the clause of copyright or intellectual property fundamentally changes the contract and is an action to breach the contract.*

...

*I believe we need to negotiate a new contract. According to clause 2 of the contract [the notice clause], I agree to terminate the current contract from 27 December 2005 on the grounds of your notice of termination made on 31 October 2005. In the meantime, ACNM request that you to continue your teaching in a professional manner.*

...

*ACNM is still open to discuss any issue that you want to discuss.*

### 3 November

On 3 November Mr. Taylor emailed Mr. Watson advising that in his view Mr. Hurlimann had been terminated unjustifiably and that reinstatement was sought. There was also reference to Mr. Hurliman's being an employee.

Mr. Watson replied shortly thereafter saying:

*Gavin has overstated the case: the letter says that we will renegotiate if he wishes to substantially change the contract, and that the contract runs for another 8 weeks (as per the contract) which happens to be end December.*

### 7 November

On 7 November Mr. Xu observed, with Mr. Hurlimann's permission, a lesson taught by Mr. Hurlimann. He noted that Mr. Hurlimann used material that had not been moderated and had changed the teaching plan without permission, that the subject level was higher than Mr. Hurlimann's qualifications and that he encouraged students to apply their knowledge to patient treatment when the course was theoretical only.

At 11.42 am Mr. Watson emailed Mt Hurlimann asking him to send in his teaching materials for moderation before Thursday and at 3.45pm that day reiterated the need for moderation. Mr. Watson also said:

*As you know, Stephen and I are keen to discuss the terms of a new contract; please let us know a suitable time. We were hoping you might mention it today.*

### 8 November

Mr. Taylor emailed Mr. Watson regarding a meeting with ACNM and wanting to discuss Mr. Hurlimann's situation and suggesting a 10.30am meeting.

In an email to Mr. Taylor Mr. Watson spoke of a meeting with ASTE and said:

*We may discuss Gavin's situation but he has indicated twice that he does not wish his current contract to continue. I suggest that you view the relevant correspondence and advise him to comply with the contract fully.*

9 November

At 10.24am Mr. Taylor emailed Mr. Watson saying:

*In relation to Gavin I advise there has not been any refusal to negotiate – in fact there has been a request to negotiate a new employment agreement hopefully a collective one and the documentation I have says he has work until July 2006.*

At 11.42 am on Wednesday 9 November Mr. Watson emailed saying:

*I need you to reply as soon as possible, and to send in your teaching materials for moderation before Thursday please.*

At 7.22pm Mr. Hurlimann replied saying that he was still waiting for information from a Dr Gascoigne to complete the teaching materials and he had been advised regarding a new contract by ASTE.

10 November

Mr. Hurlimann said he was still waiting for material from Dr Gascoigne to complete the teaching materials.

11 November

On 11 November Mr. Hurlimann wrote a letter to Mr. Xu headed “Staff harassment”. It said:

*This correspondence is to advise the Auckland College of Natural Medicine (ACNM) management regarding any action that may be viewed as unfair, discriminatory or threatening toward staff members of ACNM.*

The letter went on to refer to ss.7 to 11 and 101 to 128 of the Employment Relations Act.

A meeting was held with Mr. Hurlimann at 12.10 pm. It lasted approximately half an hour. Present were Mr. Hurlimann, Mr. Xu, Ms Li Feng, Mr. Watson and Ms Linda Wang, a tutor, was present as a witness. Mr. Hurlimann had called this meeting to talk about staff harassment.

The notes taken at the meeting indicate that Mr. Xu was very reasonable. He said he was glad Mr. Hurlimann was there and asked him what had prompted him to write the letter. Mr. Hurlimann replied that it was specifically about threatening to cancel a staff member’s course if he did not submit material for moderation. Mr. Xu said he had not said he would cancel the course but that as the ACNM Upskill manager he needed to know her study progress and that the copyright of the US 7141 Mr. Hurlimann had told her was his was in fact that of ACNM. He denied pressuring staff to join or not join ASTE and denied harassing anyone. Mr. Xu said he wanted legal assistance to negotiate a collective.

Mr. Xu asked about Mr. Hurlimann who replied he was not there to talk about himself and that Mr. Xu could only talk to him on Mondays between 9.30 and 11.30 (which was his teaching time) and that he wanted a witness. Mr. Xu readily agreed and Mr. Watson said he would confirm whether the meeting would take place at 9.30 on the Monday.

Mr. Xu told Mr. Hurlimann they wanted to know about any changes to his teaching material and emphasized that any changes had to be submitted for approval.

14 November

Mr. Hurlimann agreed to meet with Mr. Watson but did not attend. Mr. Watson emailed Mr. Hurlimann saying:

*I asked to see you at 10.30 to discuss the following: Jessica is going to write the final exam for 7141 and would like you to draft review questions for the next two Monday lessons, please. These need to be submitted with answers before Friday 18<sup>th</sup>. Because you have not sent ACNM your teaching plan for this term we need it immediately please.*

*Separately, ACNM is happy to negotiate a new contract; however, 7141 has only 3 credits and because the NDA is still under review with NZQA, as you know, we cannot be sure that it will still be part of NDA in the future. Therefore, based on the above, ACNM has decided not to enter into an employment agreement as such, and wishes to continue with independent contractors.*

There was no reply to this.

17 November

By 17 November Mr. Hurlimann had not responded to three requests for material made on 31 October, 7 and 14 November. Mr. Watson emailed Mr. Hurlimann:

*As per my earlier emails, ACNM places high value on receiving teaching materials in time for them to be approved. You still have not sent teaching materials for pre-moderation, this term, even though I have requested you in writing several times. ...*

*You are not required to attend any further lessons, exams, performance appraisals or staff meetings unless contacted by myself or Stephen. In fact, you are formally requested not to attend any further lessons, exams, performance appraisals or staff meetings unless contacted by myself or Stephen.*

Provision of teaching material

Ms Li Feng said that Mr. Hurlimann altered the curriculum for his Term 4 classes and did not submit any material for moderation. He gave material to students with his name on them claiming copyright. Between 31 October and 14 November Mr. Hurlimann continued teaching with unapproved and unmoderated materials. ACNM produced some teaching materials which Ms Li Feng said she had obtained from students after the lessons and that she had not received them directly from Mr. Hurlimann. I accept that evidence.

At the Investigation Meeting Mr. Hurlimann asserted that he had placed teaching materials in the pigeon holes behind the reception area at ACNM instead of emailing documents. Three of ACNM's witnesses deposed that they had never seen Mr. Hurlimann place material in the pigeon holes or leave anything at reception. When I asked Mr. Hurlimann why he had not stated previously that he had left hard copy he said he had been advised not to do so by Mr. Taylor. I was unable to obtain a sensible explanation as to the rationale for this advice. Mr. Taylor referred me to an email dated 23 November as evidence of the fact that the respondent had been notified of the hard copy.

*The course content has been thoroughly moderated already – Gavin will produce evidence to this effect. I am aware of the pharmacology course content (handouts, PowerPoint etc) sent to Jessica Feng by Gavin by e-mail & the hard copy delivered to the college.*

### Dismissal

Mr. Hurlimann was dismissed twice: once on 5 October and then again, within the eight week notice period, on 17 November.

#### 5 OCTOBER DISMISSAL

The first dismissal was an acceptance by the respondent of Mr. Hurlimann's breach of contract. In constructive dismissal situations there has to be a breach of a contractual term, which must be a breach of a sufficiently serious nature to allow a reasonable employee to conclude that the employer does not intend to be bound by the contract and, therefore, cannot be relied upon to perform it fully or consistently in the future. Mr. Hurlimann was indicating to his employer his intention to perform only those parts of his contract that he wished to perform and this undermined the employment relationship to a sufficient extent to allow the employer to terminate the contract.

Mr. Hurlimann's assertion that he would no longer assign copyright or intellectual property rights to the respondent was a breach of contract. He did not seek to discuss the issue with his employer; he simply decided he would no longer be bound by an express term of his contract.

I do, however, find it difficult to ignore the fact that the respondent had itself breached Mr. Hurlimann's contract by withdrawing from him the ability to teach the three courses it had agreed he could teach on 15 August. The respondent appears to be denying that Mr. Hurlimann gave notice of a personal grievance on 31 October. His letter refers to a breach of contract, his union, compensation and the Employment Court. The respondent could have been in no doubt that Mr. Hurlimann was dissatisfied with the College's action and was intending to seek legal redress.

Mr. Hurlimann has not claimed an unjustifiable disadvantage as such but he has claimed that his employment agreement was breached. The College's action constituted an unjustifiable disadvantage. Whatever problems the College may have had with Mr. Hurlimann's supply of materials for moderation and the quality of those materials he was entitled to have an opportunity to address any concerns prior to the decision being made to cancel the courses. Mr. Hurlimann also lost income as a result of that action.

Mr. Hurlimann's breach of contract was the precipitating cause for the decision by the College to terminate his contract. There was no justification for Mr. Hurlimann's action and the College was entitled to treat the contract as being at an end.

While the College kept stating it was willing to enter a new contract there was of course no guarantee that a new contract could or would be concluded.

#### 17 NOVEMBER DISMISSAL

Mr. Watson's email of 17 December was notice to Mr. Hurlimann that he was not to attend at the College and carry out any work. Mr. Hurlimann had failed to attend a meeting he had agreed to attend and he had not responded to requests that he supply material. I do not accept the evidence that hard copy of the material was left in pigeon holes. Had Mr. Hurlimann prepared the material it is very strange that he would not notify his employer that he had done so and of its whereabouts. Mr. Hurlimann did not submit the requested review questions and answers before 18 November.

In determining whether a dismissal is justified the employer's actions are not to be subjected to pedantic scrutiny. In NZ Food Processing IUOW v Unilever NZ Ltd ERNZ Sel Cas 582 at 595 Goddard CJ referred to the need for a fair and reasonable procedure and that the minimum requirements would normally be notice, an opportunity to explain and an unbiased consideration. He said:

*Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.*

When I consider whether, in the circumstances of the instant case, the decision made by the employer was substantially fair and reasonable according to the standards of a fair-minded but not over-indulgent person, I conclude that it was fair and reasonable. Mr. Hurlimann knew he was required to produce material for moderation and he knew that there were time constraints. The need for him to produce the material in a timely fashion was an express contractual term.

While it may be the case that the College did not always moderate material submitted this was a decision that the College was entitled to make. The evidence was that Mr. Lade's material might not have needed to be moderated because he was an experienced person whereas Mr. Hurlimann was a new, inexperienced tutor and the College had already noted concerns with Mr. Hurlimann's teaching material.

The dismissal on 17 November was justified.

### Unpaid Wages

Mr. Hurlimann submitted a belated wages claim. The respondent acknowledges that Mr. Hurlimann is entitled to be paid from the time of his last invoice until the end of the notice period for the hours he would have taught together with 15% on top of the hourly rate to cover preparation and marking. Mr. Hurlimann should supply the respondent with an invoice for payment.

The contract provides that anything over and above this associated with the production of course materials and assistance should be notified in advance and approved. Mr. Hurlimann gave no evidence that he had sought and received any such approval.

Mr. Hurlimann says he has not invoiced for class time from 1 August till 18 September but there the evidence shows an invoice for that period which has been paid.

As I have found Mr. Hurlimann was an employee the respondent should pay him holiday pay at 6%. That calculation can be made at the same time the parties discuss payment for the Core Health course.

### Discrimination

Mr. Hurlimann was involved in the activities of a union but he was not discriminated against because of this involvement. The allegations regarding denial of training relate to a period prior to

Mr. Hurlimann's union involvement and the College had no knowledge of any union involvement at that stage. I accept Mr. Xu's evidence that he had not heard of ASTE until 31 October.

### Good Faith Breaches

I find the respondent did not erroneously couch Mr. Hurlimann's employment agreement as a contract for services in an attempt to avoid the provisions of the Employment Act. The employment agreement does not assert that it is a contract for services. The respondent accepts that it does not meet the requirements for an individual employment agreement and I accept that that was because the employer believed it was entering into a contract for services.

The other breach of good faith claims relate to disputes about the evidence and claims that the employer's evidence is misleading or without foundation. Those are matters that go to an assessment of the strengths of the parties' cases.

### Remedies

I have concluded that both the 5 October dismissal and the 17 November dismissal were justified. Mr. Hurlimann continued in employment in the interim period. Mr. Hurlimann suffered an unjustified disadvantage when he was prohibited from teaching Core Health. Mr. Hurlimann is entitled to compensation for any humiliation and distress caused by that action and also to any lost wages.

Mr. Hurlimann gave no evidence regarding distress caused by postponement of the Core Health course. I am therefore unable to make a compensatory award.

Mr. Hurlimann was denied the ability to derive income after the Core Health course was suspended. The parties should endeavour to reach agreement on how much is owed to Mr. Hurlimann. If they are unable to agree leave is reserved for the parties to seek a determination on this issue from the Authority. If required, I would at that stage also consider the issue of contribution regarding Mr Hurlimann's actions in relation to the withdrawal of the Core Health courses.

### Penalties

Mr. Hurlimann has sought the payment of unspecified penalties. The one possible penalty action is that for breach of s. 62. I decline to award a penalty for this breach because the employer genuinely believed Mr. Hurlimann was entering into a contract for services.

### Costs

The parties should try to resolve the issue of costs. If they are unable to do so the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King  
Member of Employment Relations Authority