IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 40/08
5090747

	BETWEEN	YE LU Applicant
	AND	INSTITUTE OF COMMERCIAL EDUCATION (NZ) LTD Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Applicant in person Mr Wayne Huang, advocate for Respondent
Investigation Meeting:	7 February 2008
Determination:	12 February 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant Mr Ye Lu raised a personal grievance with the respondent Institute of Commercial Education (NZ) Ltd ("ICE"). The grievance was about the redundancy of Mr Lu's position of employment as a tutor with ICE.

[2] The parties having been unable to resolve it themselves, the claim has been investigated by the Authority for determination.

[3] The Authority has established that Mr Lu and ICE entered into an individual employment agreement on 15 January 2007. It contained express terms and conditions under which Mr Lu was employed in the position of English Tutor.

[4] The agreement he entered into with ICE in 2007 was entitled Fixed Term Individual Employment Agreement. It was expressed to replace all former employment contracts between the parties. At clause 3.1 it provided that the parties

had agreed the employment was for the period covering the four school terms falling between 15 January and 21 December 2007. The agreement provided in this respect:

> *This agreement will commence on 15 January 2007, and will end on 21 December 2007. The employer has genuine reasons based on reasonable grounds for specifying that the employment agreement is to end at this time, namely 21 December 2007. The parties also confirm that the Employee has been advised by the Employer when discussing this agreement, the reasons for the employment ending in this way.*

[5] There is no issue about the validity of the fixed term agreement in this case.

[6] On 15 March 2007 along with about six other members of the teaching staff of ICE, Mr Lu attended a meeting which was addressed by the General Manager of ICE, Mr Glenn Zou.

[7] At the meeting Mr Zou handed out a letter announcing a restructuring of the school. Amongst other things the letter announced:

> *1. All former employment contracts signed with the school will expire on 30 March 2007.*

[8] The letter was not addressed to staff members personally but to "Dear Colleagues" collectively. Mr Zou's letter went on to advise staff that they could apply for positions in the newly structured organisation, and he supplied some information about the jobs available. His letter also said:

> *… depending on personal circumstance, we expect some will be able to only take up part time positions or a relief situation in the new organisation until some new programme commences.*

[9] Staff members were also advised by Mr Zou that they would need to sign a new employment contract to replace their signed employment contacts. He advised that the restructured organisation would be fully operational from 1 April 2007.

[10] The restructuring was, I find, a response by ICE to advice it had received on 12 March 2007 from the Tertiary Education Commission that the school would not be offered a new contract under the English for Migrants Scheme. Without that contract for the 2007 teaching year, the school did not have sufficient funding to continue its operations as it had done before.

[11] I am satisfied this was a genuine redundancy situation, or a restructuring carried out for proper commercial reasons.

[12] The loss of the Tertiary Education Commission contract was a possibility that had been known to teaching staff, I find, and they were aware of the possible implications to their continued employment in that event. Redundancy had been in the wind prior to 15 March, but it was not until the Commission's letter of 12 March was received that the employer had to make decisions about the continuation of employment of staff members.

[13] Mr Lu's employment contract expressly provided for notice of termination to be given on the grounds of redundancy. Clause 12.2 provided:

> *In the event the Employees employment is to be terminated by reason of redundancy, the Employee shall be provided with two weeks notice in writing. This notice is in substitution for and not in addition to the notice set out in the general termination clause.*

[14] The fixed term employment agreement was therefore a "hybrid," such as the Employment Court considered and held to be lawful in *Williams v. A-G* [1999] 2 ERNZ 457. The Court held that a fixed term contract can include provisions which allow both parties to terminate early. Such a contract can only terminate before the expiry of its term upon the happening of an event defined in the contract, which may include a redundancy situation as well as other particular events.

[15] ICE's letter of 15 March did not expressly give notice or even use the word notice, and it did not expressly refer to a period of two weeks in this regard. However two weeks was about the period between 15 March and 30 March, the date Mr Lu had been notified by ICE his employment would end.

[16] I consider that the words used in the letter of 15 March were effective in giving Mr Lu and other recipients two weeks notice of termination on the grounds of redundancy, as required by the employment agreement.

[17] In one respect the letter of 15 March arguably breached the employment agreement by purporting to vary it in relation to the express provision that the employment would last until 21 December 2007. Clause 15.1 of the agreement allowed the parties to vary the agreement, but subject to the proviso that "no variation shall be effective or binding on either party unless it is in writing and signed by both

parties". The purported variation was in writing but Mr Lu did not sign the letter of 15 March or anything else to signify consent to the variation.

[18] Clauses 12.2 and 15.1 of the employment agreement may be reconciled by interpreting them to mean that in the event of a genuine redundancy the employment could be ended early before its expressed term had elapsed in December 2007, by the employer unilaterally announcing the end of it.

[19] I am satisfied therefore that although the letter of 15 March could have been written more precisely or exactly to reflect the express provisions of the employment agreement that required two weeks notice of redundancy to be given, the letter was effective in invoking the early notice of termination on the grounds of the redundancy clause.

[20] As well as that notice provision, there was a further provision describing a "redundancy process". This was as follows:

> *12.1 In the event the Employer considers that the Employee's position of employment could be affected by redundancy or could be made redundant, the Employer shall, except in exceptional circumstances, consult with the Employee regarding the possibility of redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to dismissal (such as redeployment to another role). In the course of this consultation the Employer shall provide to the Employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the Employee with an open mind before making a decision as to whether to make the Employee's position of employment redundant.*

[21] I find that this clause was not complied with by ICE. Mr Huang for ICE contended that a consultation period had been provided for between 15 March and 30 March 2007. That however was period which only began to run after a decision had been reached to terminate the employment contract.

[22] Clause 12.1 clearly contemplates that consultation, in the normal way, will take place prior to a decision being made to proceed with redundancy. The clause actually says so.

[23] Even if in the circumstances it might have been possible to effectively consult retrospectively after giving notice, I find that there was no adequate consultation in this case.

[24] Mr Zou simply presented the decision to the staff including Mr Lu and told them that if they wished to discuss it at any time "his door was always open". In my view the employer needed to initiate consultation and actively engage in it rather than simply advise affected employees that they could speak to their employer if they wished.

[25] As held by the Court of Appeal in *Wellington International Airport Ltd v. Air New Zealand Ltd* [1993] 1 NZLR 672, and as applied by the Employment Court in *Communication and Energy Workers Union Inc v. Telecom New Zealand Ltd* [1993] 2 ERNZ 429, consultation requires more than mere prior notification. If there is a proposal to make a change and such change is required to be preceded by consultation, it must not be made until after consultation with those required to be consulted, and they must know what is proposed before they can be expected to give their views.

[26] The Courts have also held that the requirement for consultation is never to be treated perfunctorily or as a mere formality. The person or body to be consulted must be given a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties with what has been proposed. This is to be given before any final decision is made.

[27] Mr Lu did receive the information about alternative positions available and he did make application for one of those. He was notified his application had been unsuccessful, and his employment duly terminated on 30 March 2007. Later, after raising his grievance, he was offered a position by ICE, but by that time he had obtained alternative employment although only on a part time basis.

[28] The Authority must find therefore that ICE did not act as a fair and reasonable employer in all the circumstances prevailing at the time the dismissal of Mr Lu occurred. A fair and reasonable employer would have complied with the express terms of the employment agreement and consulted with Mr Lu before and not after reaching the decision to terminate his employment on the grounds of redundancy.

[29] I determine that Mr Lu has a personal grievance. Consideration must therefore be given to the remedies that he is entitled to. Clearly he did not contribute to the situation that gave rise to the grievance as the termination was entirely out of his hands. Remedies are not to be withheld or reduced on account of any fault or blame on the part of Mr Lu therefore.

[30] Consideration must be given however as to whether the failure to consult prior to the making of the decision caused any harm or loss to Mr Lu in a situation where, as I have found, the redundancy was genuine.

[31] I find that there were alternatives available ICE which are likely to have preserved Mr Lu's employment in whole or in part, if he had been properly consulted before the decision was made. There were other positions on offer, one of which Mr Lu applied for but unsuccessfully. He was also later offered employment but could not take it because by then he had obtained another job. This was by no means a case where loss of all or part of the employment was inevitable following a genuine redundancy.

[32] Mr Lu has claimed for reimbursement for wages lost for a period of four weeks after 30 March when he was dismissed by ICE. This is an amount of $2,000 in total. He also claims a further period of 12 weeks after he had become employed again although part time only. He claims the difference between his old and new salary for that period, which comes to a total of $3,000. Further, Mr Lu claims $10,000 compensation for hurt feelings, humiliation and distress caused by the manner of his dismissal, and a sum of between $500 and $800 for lost commission payments. He claims damages of $10,000 for breaches of the good faith provisions of the Employment Relations Act and costs.

[33] I consider that Mr Lu should recover the lost wages for the four weeks following his dismissal as it seems to me that consultation could have led to his continuing in employment with ICE during that time. The total is $2,000.

[34] I also order reimbursement for a further period of four weeks of the second school term at the rate of $250 per week, the shortfall in pay between the new part time work he had obtained and his full weekly pay from ICE. The total for this period is $1,000

[35] I disallow the claim for commissions, as I find there was no contractual entitlement to that payment under the 2007 employment agreement. Mr Lu was expecting payments relating to his previous term of employment with ICE in 2006. That is not a basis for continuing the obligation on the part of the employer to pay that form of remuneration beyond that period.

[36] The damages claim I consider is to be addressed by the remedies given for the personal grievance of reimbursement and compensation. No order is made.

[37] ICE is ordered to pay $750 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 as compensation for hurt feelings and humiliation.

[38] ICE must also pay Mr Lu $70 to reimburse him for the cost of applying to the Authority to have this grievance resolved in his favour. Although Mr Lu has had legal assistance from or through his wife who is in the law, he has not incurred the cost of professional advice. No costs are awarded.

[39] In summary, ICE is ordered to pay Mr Lu a total of $3,000 as reimbursement for lost wages or salary, $750 compensation and $70 expenses for the Authority filing fee.

A Dumbleton
Member of the Employment Relations Authority