

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Dorothy Merle Mullay (Applicant)  
**AND** Southern Institute of Technology (Respondent)  
**REPRESENTATIVES** Mary-Jane Thomas, Counsel for Applicant  
Christine French, Counsel for Respondent  
**MEMBER OF AUTHORITY** Helen Doyle  
**INVESTIGATION MEETING** 6 September 2005  
**SUBMISSIONS RECEIVED** 28 September 2005 from the applicant  
6 October 2005 from the respondent  
**DATE OF DETERMINATION** 15 November 2005

DETERMINATION OF THE AUTHORITY

*The Employment Relationship Problem*

[1] The applicant, Dorothy Mullay, was employed full time as a tutor by the respondent in its photography department in January 2003. The most significant part of her work involved teaching the first year diploma course in photography. She also taught some of the second year diploma course students in her area of speciality, landscape modules and some STAR courses for high school students in their final two years of school.

[2] The respondent is the Southern Institute of Technology (“the Institute”). The Chief Executive Officer of the respondent is Penelope Simmonds who has held the chief executive position for eight and a half years.

[3] Ms Mullay was a member of the Association of Staff and Tertiary Education (“the union”). Her work was covered by the Tutorial Collective Employment Agreement between the Southern Institute of Technology and the union (“the collective agreement”).

[4] Ms Mullay says that she was unjustifiably dismissed from the Institute on 23 December 2003 when she was advised that her position as photography tutor was redundant. Ms Mullay seeks compensation of \$20,000.00 together with lost wages based on a salary of \$42,414.00 per annum.

[5] The Institute says that Ms Mullay’s claim is without merit. It says that the redundancy dismissal was genuine and implemented in accordance with the terms of the collective agreement and the rules of procedural fairness.

### *The Issues*

[6] The issues that require consideration in this case are:

Was the redundancy genuine?

Was the dismissal carried out in a procedurally fair manner and in accordance with the relevant provisions of the collective agreement and particularly:

- Did the Institute fail to ensure an environment where partial redundancy could be properly considered by Ms Mullay in light of the altercation between her and the programme manager Karl Buckley on 8 December 2003.
- Was Ms Mullay promised a partial redundancy at the meeting on 8 December 2003?
- Should the Institute have dealt with the investigation of Ms Mullay's complaint before making the redundancy decision?
- Did Ms Simmonds promise or offer Ms Mullay at the meeting on 8 December 2003 part time/casual hours of work so as to create an expectation that hours would be available or that she would be advised by Ms Simmonds about them?

### *Was the redundancy genuine?*

[7] The Institute intended to offer a Bachelor of Professional Photography from either 2004 or 2005. In accordance with recommendations from the New Zealand Qualifications Authority for such a degree, the Institute recognised there would have to be development of delivery materials, resources and equipment. To enable this to take place the Institute intended not to offer the diploma in professional photography year one in 2004 and to simply teach out year two in the diploma for 2004.

[8] There was going to be a potential impact on staffing arrangements, with the reduction in students and teaching hours in 2004. A review was initiated by the Institute in accordance with the review provisions in the collective agreement, clause 3.6, in November 2003.

[9] Following the review certain decisions were made about the future direction of the Department. They were that the diploma in professional photography year one would not be offered for 2004, that year two in the diploma must be taught substantially by a person with first degree level or higher qualifications and that a number of hours in the year two diploma course in professional photography should be taught by someone with a professional photography business background. The decisions were implemented. There was a reduction in one full time tutor position in the photography department, Ms Mullay's.

[10] Ms Mullay was not replaced and in September 2004 there was a further review of the photography department and a decision not to offer the diploma in professional photography in 2005 or for the foreseeable future. The entire Department was then disestablished.

[11] Ms Mullay accepted that the redundancy was genuine during the investigation meeting and there was no submission to the contrary in the applicant's final submission.

[12] In conclusion I am satisfied that Ms Mullay's redundancy was genuine.

***Was the redundancy dismissal carried out in a procedurally fair manner?***

***Was the dismissal implemented in accordance with the relevant collective agreement?***

[13] The applicant who was not represented by the union for her employment relationship problem made no reference in evidence or submission to clause 3.6 in the collective agreement that applied to all formal reviews. I am satisfied from the evidence, documentation and answers to my own questions that the process for the review was undertaken in accordance with the provisions in clause 3.6 of the collective agreement. No unfairness in terms of the process set out in that clause was alleged or indeed could be substantiated. Kris Smith, the assistant secretary for the union who was involved during the review, provided a written statement to the Authority. It was agreed that it was not necessary to hear from her but the documentation supports that no issue was taken by the union with respect to the process adopted by the Institute. The union was fully involved and consulted throughout the review by the Institute.

[14] I am satisfied that the dismissal was implemented in accordance with the provisions of the collective agreement.

***What happened at the meeting on 8 December 2003?***

[15] The nature of the applicant's claim was not entirely clear. Final submissions from the applicant confirm that failure to ensure an environment where partial redundancy could be considered by Ms Mullay is still part of the claim. This is inconsistent with another claim that Ms Mullay was promised a partial redundancy at the meeting on 8 December 2003 which she did not turn down but which did not eventuate. Both have to be seen in light of what became clear at the investigation meeting, that there was in fact no partial redundancy available for Ms Mullay when the redundancy decision was made, as all extra hours had been absorbed by the technician role to make it a full time position. There is also an issue as to promise/expectation of part time/casual hours as a result of a discussion on 8 December with Ms Simmonds.

[16] The union initially raised the possibility of a partial redundancy for its members in the photography department during the review process with Ms Simmonds. Ms Simmonds indicated that she would consider partial redundancy if staff were interested but that it could not be more than 0.6 of a full time position and it was unlikely to be that high a proportion of a full time job. I have used the terms partial and proportional in terms of redundancy interchangeably as the parties themselves did in evidence and correspondence. A proportional or partial redundancy is where there is a permanent part time position available so an employee who accepts such proportional redundancy is only compensated for part of the loss of a full time position.

[17] Ms Smith in her role as union representative asked Ms Mullay whether she wished to consider partial redundancy. Ms Mullay said at the investigation meeting that she told Ms Smith she did not wish to accept partial redundancy. Ms Mullay said that she *was hoping that she would have a full time job and that Karl Buckley who was at that time programme manager would no longer have that role*. Ms Smith in a letter dated 9 December advised Ms Simmonds with respect to Ms Mullay *at this stage she has indicated that she is unable to offer herself for a proportional redundancy and recognises that in the event of only one full time staff member remaining that the Programme Manager will be the obvious staff member to retain their position*.

[18] Ms Mullay did not agree with the paragraph in Ms Smith's letter in its entirety but accepted that Mr Buckley had higher level teaching qualifications than she did. This influenced the selection for redundancy because the decision from the review was that the year two diploma must be taught

substantially by a person of degree level or higher and Ms Mullay was the least qualified of the teaching staff.

### **8 December 2003**

[19] On 8 December 2003 Ms Mullay had an upsetting incident with Mr Buckley about her performance appraisal. Ms Mullay said she was sworn at and physically prevented from leaving the building. The incident left her badly shaken.

[20] Ms Mullay, with the help of a support person, Bernice De Bono, organised a meeting with Ms Simmonds to complain about Mr Buckley. There was a dispute about whether the meeting took place on 8 or 9 December 2003. Nothing significant turns on that and I will accept Ms Mullay and Ms De Bono's evidence that the meeting was on 8 December 2003.

[21] Ms Mullay made a formal complaint about Mr Buckley to Ms Simmonds. Ms Simmonds was concerned about the matter and she explained the formal complaint process to Ms Mullay and took notes of the incident. The discussion about the incident occupied most of the meeting which was about 45 minutes long. There was some brief discussion about the review and discussion about a STAR course which would not place her in direct contact with Mr Buckley.

[22] I found Ms De Bono to be a reliable witness in terms of a general overview of the meeting. I have treated her evidence about specific details with some caution as she was not asked about her recollection of the meeting until about May 2005.

[23] Ms Simmonds was adamant and 100% sure that she spoke to Ms Mullay about a proportional redundancy at the start of the meeting and that Ms Mullay said she could not afford that financially. Ms De Bono did not recall any discussion about partial redundancy and said that the discussion was about a STAR course away from Mr Buckley. Ms De Bono said that roughly eight hours per week was discussed. Ms Mullay denied ever making a comment about not wanting partial redundancy because of her financial situation. The notes taken by Ms Simmonds did not record any discussion about the review except that it was a different process to the formal complaint process. I am fortunate in being able to rely on other evidence both in terms of later conduct and correspondence close to the time to determine the reliability of the different accounts which I will set out shortly.

[24] I want to consider firstly the discussion about the STAR course. It was probably not clear to Ms De Bono but, I am satisfied, quite clear to Ms Mullay that the discussion with respect to this STAR course was not about a tenured proportional part time position as defined under the collective agreement but rather a part time casual position for a few hours per week tutoring. STAR courses are five hours per week. Ms Mullay had had two casual appointments to tutor STAR courses in 2002. Both were in writing. Although the word casual was not used during the conversation I am of the view that it was clear, to at least Ms Simmonds and Ms Mullay, that the discussion was not about a proportional redundancy. In any event the hours discussed would not have satisfied the requirements in the collective agreement for a proportional part time position of 0.3 of a full time position.

[25] This conclusion is further strengthened by a letter dated 12 December 2003 sent from Ms Simmonds to the union and copied to Ms Mullay and other staff in the photography department. Ms Mullay accepted that she had received the letter. (document R in the respondents bundle). That letter from Ms Simmonds said amongst other matters that:

*Staffing numbers will be affected and as no staff member is wanting to take proportional redundancy a full redundancy seems inevitable.*

[26] There was no reason advanced by Ms Mulla y why Ms Simmonds would have simply disregarded her wishes if she wanted the possibility of a partial redundancy explored as part of the review. It is quite implausible that Ms Simmonds would promise Ms Mulla y a partial redundancy at the meeting on 8 December 2003 and then a few days later record in a letter to the union which was copied to Ms Mulla y that no staff member wanted to take proportional redundancy. Ms Mulla y made no challenge to that letter when she received it which would have been a natural reaction if there had been a promise of proportional redundancy. At this time the union was involved in the review.

[27] It is also very significant that Ms Mulla y did not, when advised by Ms Simmonds that her position was redundant on 23 December 2003, state that she had been promised proportional redundancy. There was no mention of a promise of proportional redundancy when Ms Mulla y wrote to Ms Simmonds in February 2004 and asked about the formal complaint outcome. I also place reliance on the fact that after Ms Mulla y instructed Ms Thomas there was no reference to a promise of hours in the early correspondence which focussed instead on an unsafe environment preventing consideration of proportional redundancy. Indeed it was not until early 2005 that there was any suggestion of promised hours.

[28] I take all this into account in concluding that Ms Mulla y knew the discussion about STAR hours on 8 December 2003 was not about proportional redundancy but about part time casual tutor hours. The correspondence and subsequent conduct of the parties is more consistent with Ms Simmonds' evidence that she believed Ms Mulla y did not want proportional redundancy. It is consistent with the raising of hours in a STAR course as another option and with the discussion about Ms Mulla y checking with WINZ about any impact on her benefit as a result of performing the hours. It is also consistent with Ms Simmonds talking to Ms Mulla y again on 23 December 2003 after Ms Mulla y was advised her position was redundant about the possibility of some part time casual work in the New Year.

[29] Ms Simmonds belief that the reason Ms Mulla y did not want proportional redundancy was financial is consistent with her instructions to Ms French who wrote to Ms Thomas on 20 May 2004 and said:

*At no stage did Ms Mulla y ever advise the Institute that the reason she was not interested in partial redundancy was because she felt her working environment was unsafe. What she told both the Union and the CEO was that for financial reasons a partial redundancy was not an option for her. At no stage did she ever indicate that she would have accepted a partial redundancy if certain conditions had been satisfied.*

[30] I find that Ms Simmonds did not promise Ms Mulla y proportional redundancy on 8 December 2003. I am satisfied Ms Simmonds held a genuine view, whether as a result of a conversation on 8 December 2003 with Ms Mulla y and/or because of conversations with Ms Smith from the union, that the reason Ms Mulla y did not want proportional redundancy was financial. I am further satisfied that there was no reason for Ms Simmonds during the review process to believe otherwise.

[31] The availability of any STAR hours would not have been known until after the review and after January 2004. In any event Ms Mulla y has never said her claim was about those part time/casual hours even in final submissions following my discussion with counsel as to whether the claim was in fact about a promise or a legitimate expectation in terms of those hours.

[32] I have considered the matter anyway in light of the evidence. I find that the facts do not satisfy that there was an unequivocal representation of the availability of specific part time/casual tutor hours to Ms Mullay on 8 December 2003. There couldn't have been as it would not be known until the New Year whether there would be hours available because they were dependent on enrolments.

[33] Even if there had been a representation, Ms Mullay's subsequent conduct for reasons I have set out does not support that she relied on a representation about casual hours. She made no enquiry of the Institute at any time about the part time/casual STAR hours in any specific way either directly or through Ms Thomas. The focus I find was on proportional redundancy.

[34] In terms of detriment I conclude Ms Mullay's concern and stress was not related to the hours for a STAR course but about her full time position being redundant. At all times throughout the review I find that Ms Mullay held on to the hope that she would not be made redundant and would retain a full time position. Although this is understandable I am of the view it influenced the way she considered and responded to any alternative options including proportional redundancy. As it turned out though there was no proportional redundancy available as all the extra hours were allocated to the technician to make up a full time role. I do not find that there was a promise about the STAR hours or that Ms Mullay had a legitimate expectation with respect to the hours that can be relied on.

[35] That leaves the issue then about how the Institute dealt with the complaint against Mr Buckley and whether there was an unsafe environment for Ms Mullay. The difference between the process of complaint and the process of review was discussed with Ms Mullay at the meeting on 8 December 2003. They were two different processes. The Institute would be open to criticism if it linked the processes or rushed the complaint investigation against Mr Buckley. The outcome of the investigation process into the complaint fell short of dismissal. The outcome of the review was that Mr Buckley taught the year two diploma course. The outcome for Ms Mullay from the review process would not have been any different therefore regardless of the complaint. Ms Simmonds appropriately gave Ms Mullay special leave from 8 December 2003 to 23 December 2003 when the outcome of the review was available. This supports that Ms Simmonds was concerned about Ms Mullay's wellbeing during the meeting. I do not find that Ms Mullay can have a grievance against the Institute that the environment was such that she could not properly consider or tell Ms Simmonds that she wanted partial redundancy explored as part of the review.

[36] On 23 December 2003 Ms Mullay was advised that her position was redundant. She was paid her full redundancy compensation in accordance with the collective agreement, offered the assistance of the employee assistance programme and in developing a curriculum vitae. She did not take up these options at the time because she was quite shocked and disappointed by the redundancy.

### ***Determination***

[37] Ms Mullay lost what she described as her *dream job*. It was through no fault of her own but because the Institute wanted to take steps to offer a degree in photography and teach out the diploma. Unfortunately during the review process Ms Mullay had to formally complain about an incident involving the programme manager.

[38] I have found that Ms Mullay's redundancy was genuine and that her position no longer exists. The Institute dealt with the review and subsequent decision in accordance with the process in the collective agreement. It was regrettable that Ms Mullay was kept waiting on 23 December 2003 but that of itself is not sufficient to vitiate an otherwise justified dismissal.

[39] I have found that there was no promise of a partial redundancy to Ms Mullay and that there can be no criticism of how the Institute handled the complaint about Mr Buckley. There was in fact no proportional redundancy available. The discussion about STAR hours on 8 December 2003 clearly concerned part time/casual tutor hours of about five hours per week and was unrelated to any proportional redundancy. That discussion, which I view as Ms Simmonds attempting to be helpful to Ms Mullay, has I find been misconstrued in terms of the claim of a promise of proportional redundancy. I have not found Ms Mullay can have a claim based on those STAR hours. I am quite sure if this matter had been properly analysed on the basis of what the discussion was actually about it would never had got as far as an investigation meeting.

[40] I do not find that Ms Mullay has a personal grievance against the Institute that she was unjustifiably dismissed.

### *Costs*

[41] I reserve the issue of costs. Ms Mullay is legally aided. I do want to record that the applicant's case changed significantly since the statement of problem was first lodged and then amended twice. The respondent has been subjected to significant cost because it was required to cover the wide issues by the applicant in statements of evidence before it became clear that the evidence would be more limited at the investigation meeting.

Helen Doyle  
Member of Employment Relations Authority