

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ian Alsop (Applicant)
AND Waiariki Institute of Technology (Respondent)
REPRESENTATIVES Stephanie Dyhrberg, for the Applicant
Richard Harrison, for the Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 18 October 2004
19 October 2004
DATE OF DETERMINATION 4 February 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] Mr Alsop claims that his departure from the employment of the Waiariki Institute of Technology, in April 2003, was a constructive dismissal. Mr Alsop seeks that the Authority finds that he has a personal grievance and award him various remedies. The alternative position of Mr Alsop is that his position was redundant and that he should have received redundancy compensation. Mr Alsop also has a further claim. He says that prior to his departure from the Institute, he had reached an agreement to teach on a contract basis and that this agreement was unilaterally revoked. Mr Alsop seeks to be paid the sum that he would have earned had the agreement proceeded as he had envisaged.
- [2] However, the Waiariki Institute of Technology (“the Institute”) says that while it is regrettable that Mr Alsop chose to resign from his position, the resignation was not a constructive dismissal. The Institute denies that the position of Mr Alsop was redundant or that there was a completed agreement for Mr Alsop to teach on a contract basis as he claims.

Background Facts and Evidence

- [3] Mr Alsop commenced his employment as a full-time mathematics tutor at the Institute in May 1979 with a teaching commitment of 25 to 30 hours each week with the School of Forestry and Technology. The teaching duties were spread across four venues. Mr Alsop was required to travel to two of the venues, Kawerau Mill and Kinleith Mill.
- [4] Mr Alsop taught New Zealand Certificate of Engineering (NZCE) mathematics at levels 2, 3 and 4, and NZCE Mechanics at levels 2 and 3. He also taught Diploma of Forestry statistical mathematics, Diploma of Business Management quantitative business methods, and various apprenticeship block courses.

- [5] Mr Alsop told the Authority that “sometime around 1989”, the Institute decided that his position was to change somewhat. However, it appears that following a discussion with the Chief Executive Officer at the time, Mr Alsop continued his teaching role without any substantial change.
- [6] However, in February 1996, due to a drop in student enrolments, the Institute ceased to offer the NZCE subjects that Mr Alsop had been teaching. The evidence of Mr Alsop is that the result was that he lost 12 hours of teaching time. Mr Alsop says that he also lost a further 4 hours of teaching time because he was no longer required to teach Diploma of Business related subjects. On the other hand, Mr Alsop replaced those 4 hours by teaching student nurses and teaching basic mechanical engineering trade skills.
- [7] In February 1997, because the Kinleith Mill decided not to continue allowing apprentices time away during the working day to take maths courses, Mr Alsop lost 4 hours of teaching time. However, this was replaced with 2-3 hours teaching basic maths to other apprentices. It seems that in February 1998, Mr Alsop lost further teaching hours, due to the Kawerau Mill following the Kinleith example. Mr Alsop says that sometime during 1999/2000, he was no longer required to teach the student nurses and hence his average teaching time had by then reduced to 5 hours a week, albeit block courses from time to time increased his teaching hours.

Dissatisfaction Arises

- [8] The evidence of Mr Alsop is that he was experiencing general dissatisfaction with his position, particularly the reduced teaching role. On 19 September 2001, Mr Alsop wrote to his immediate manager, Mr Gordon Acres, the Head of School, Forestry and Technology, and expressed three specific employment concerns:
1. That his current role had considerably departed from his original job description.
 2. The reduction in his teaching hours.
 3. The inadequate nature of the performance assessment process.
- [9] Mr Alsop indicated in his letter to Mr Acres that he was open to discussing different ways to address his concerns but he recommended that his position should be made redundant and that his employment should be terminated, and that he should receive an appropriate severance package.
- [10] As Mr Alsop had not received a written response from Mr Acres, on 26 October 2001 he emailed Mr Acres seeking one. The brief response from Mr Acres was that he was not intending to “retrench any staff at this stage” and that Mr Alsop could be effectively utilised during the 2002 year. Via a further email dated 29 October 2001, Mr Acres apologised for the earlier brief response and then conveyed that he had “sent a request to other heads of School to assess the needs for Maths and similar tutoring requirements” and that he had also given the information that Mr Alsop had provided some attention relative to the 2002 budget. Mr Acres also indicated that he wanted to discuss Mr Alsop’s proposal with the new programme leader and concluded: “I believe you are under selling yourself and that you have many skills that can be well utilised by Waiariki.”
- [11] Mr Alsop and Mr Acres met on 1 November 2001 and it appears that there was some discussion about Mr Alsop’s reduced work load. It was the view of Mr Alsop that nothing was gained from the discussion but he also acknowledges that Mr Acres informed him that there would be several new courses beginning in 2002 and that there “*was an enormous amount of work on offer in 2002.*”

- [12] Through the period April 2002 to July 2002, Mr Alsop had some discussions with the Institute's Human Resources Manager and the Academic Director, but he remained dissatisfied with the response of the Institute to his concerns. The evidence of Mr Alsop is that the situation was affecting him and his family and that he was unhappy, "losing all job satisfaction and feeling despondent."
- [13] Mr Alsop sought legal advice. His lawyer wrote to Mr Acres on 5 August 2002 conveying that Mr Alsop had only averaged 6.6 teaching hours per week for the academic year to date and that this was untenable to him. It was also suggested that the meeting set down for 8 August 2002 would be a "suitable time" to address the matters raised in Mr Alsop's letter of 19 September 2001.

A New Performance Appraisal – Job Description

- [14] At the material times, Ms van der Werff was the Programme Leader for Engineering and Rural Studies for the Institute. Ms van der Werff commenced her employment at the Institute in December 2001. Her evidence is that she came to realise in 2002 that there had been no performance appraisals carried out within her department since 1996 and so she set about undertaking appraisals for a the staff concerned. Hence, on 8 August 2002, Mr Alsop had a performance appraisal meeting with her. The process also included updating Mr Alsop's job description.
- [15] The evidence is that Mr Acres and Ms van der Werff were aware that Mr Alsop was under utilised and that there was a need to provide other work options for him. As a consequence, the "draft" performance appraisal document, and the new job description, reflected a wider role for Mr Alsop than simply teaching maths and related subjects. In effect, the performance appraisal document (Section 5), listed eight "objectives" or areas of work, where it was felt the Institute could utilise Mr Alsop's skills and experience.
- [16] It subsequently transpired that some of the opportunities that were envisaged did not come to fruition and there were other areas that Mr Alsop did not appear to be interested in or willing to attempt, albeit the work envisaged appears to have been within his skills and experience base.
- [17] Some interaction between Mr Alsop and Ms van der Werff continued with the outcome being that a new job description was presented to Mr Alsop for his acceptance. However, on 7 October 2002, Mr Alsop notified Mr Acres that he still had the concerns that he had communicated in his letter of 19 September 2001 and that: "..... I find it unsatisfactory that I have not received a written response from you within a year. In light of the time that has elapsed since I sent you the letter and your undertaking to respond to it, I think it is reasonable for me to defer considering the new job description, as well as the new objectives which have been inserted into my performance appraisal, until you address my concerns through a formal written response."
- [18] In another email dated 17 October 2002, Mr Alsop drew the attention of Mr Acres to an article in the local newspaper that referred to redundancies and "negotiated separations" at the Institute because of a reduction in enrolments. Essentially, Mr Alsop was suggesting that there was some similarity between his circumstances and other staff that had been made redundant.
- [19] On 28 November 2002, the Chief Executive Officer of the Institute, Dr Reynold Macpherson, via a memorandum to the School of Forestry and Technology staff, conveyed that there was to be a review of the School and that he intended to investigate all aspects of its operations, management, finances and staffing. Dr Macpherson invited input from staff. Mr Alsop provided Dr Macpherson with a copy of the letter he had written to Mr Acres on 19

September 2001. The response from Dr Macpherson was that he saw the matters that Mr Alsop had raised with Mr Acres as distinct from the review that he intended to carry out. Nonetheless, a meeting took place on 12 December 2002 between Mr Alsop and Dr Macpherson. Mr Alsop expressed his concerns about not receiving what he perceived to be an adequate response to his letter to Mr Acres, and confirmed his proposal to accept the termination of his employment and accept a severance payment.

- [20] The outcome of the meeting was that on the same day, Dr Macpherson sent an email to Ms van der Werff with copies to Mr Acres, Mr Alsop and Mr Jack Best, the Human Resources Manager then. The content of this email largely summarises where the parties had got to at that time. The substance follows:

“I met with Ian this morning as part of the School Review.

This is to ensure that issues concerning his performance and workload for 2003 are both attended to promptly.

Helen, please meet with Ian as his line manager and discuss your workload expectations of him for the next year. Those expectations should be written using the standard job profile template. Ian has every right to indicate what he believes to be reasonable. On the other hand, I understand that he already regards the proposed workload as unreasonable. Under current legislation the employer retains the right to determine what a reasonable workload is. The employee retains the right to appeal.

Hence, Ian, you are invited to bring a representative to the meeting. Jack, please also attend to ensure due process and if need be explain rights to appeal processes. It may be that at the end of the discussion, if there is no agreement, Waiariki has the right to insist that it is a reasonable workload for 2003. And evaluate Ian’s performance in terms of the new job profile in 2003.

Gordon, as a separate process, I understand from Neville that you have conducted a performance appraisal of Ian but have not provided a written report. You need to share it with Ian and have him certify that he has seen it. Please copy that certified report to Neville, Jack and I as soon as possible please, but certainly before the end of the year as indicated in your job profile. Thank you.

Finally, Ian, Gordon does not need to reply in writing along the lines you insist. Due process is adequately served and is more likely to be effective using the processes directed above. I trust that you can assist me now by helping me facilitate matters along the lines directed. Please give me that assurance. Thanks. Again, thank you for meeting with me this morning.”

- [21] Mr Alsop wrote to Dr Macpherson on 13 December 2002 indicating that it was “pleasing” to see some “urgency” in attending to the issues he had raised.

Mr Alsop also said that he was happy to meet with Ms van der Werff to discuss the workload expectations for 2003 and conveyed that: “in discussing my workload, I will want to feel comfortable it is consistent with my existing position description. This is the current basis of our working relationship and reasonableness of workload must be measured against that.”

- [22] In regard to the details of his performance appraisal, Mr Alsop indicated that he was happy to sign off on it, “provided it accurately reflects my performance and I am happy with the new performance objectives. As indicated above, I will need to feel satisfied these objectives are consistent with my existing position description.”

Mr Alsop also continued to maintain that he was entitled a written response to his letter of 19 September 2001 albeit some 14 months had now elapsed.

- [23] Mr Alsop met with Ms van der Werff, Mr Acres and Mr Best on 18 December 2002 to discuss his performance appraisal and job expectations. Mr Alsop says that he made it clear that he had concerns that the tasks envisaged for him were inconsistent his current job description. Mr

Alsop also maintained that he did not want to sign his performance review without a formal reply to his letter of 19 September 2001. The evidence of Mr Alsop is that Mr Acres gave an undertaking to provide a written reply to that letter and this is confirmed in the minutes of the meeting taken by Mr Best.

[24] Via an email dated 19 December 2002, Mr Alsop conveyed to Ms van der Werff that he was: "...pleased we're getting some traction on these issues." He also indicated that he was awaiting notification of the Institute's intention to move him onto a new job description and sought reasons why a change was required and why such a change would be mutually beneficial. Mr Alsop says: "*I was actually happy with my job description as it was. I was happy teaching maths. Although I could accept doing additional tasks consistent with my role, that wasn't what Helen and Gordon were doing.*"

[25] Ms van der Werff provided a new performance appraisal document and a new job description to Mr Alsop on 20 December 2002. This was accompanied by a memorandum explaining that as Mr Alsop's existing job description was written in 1996 there was a need to update the format and the job description to be "in line" with other tutors.

Section 5 of the "objectives" for the performance review contained the following areas:

- To develop the mathematics curriculum and resource material required for the level 5 and 6
- Diploma in Wood Processing with Mark Stevenson
- To continue updating and writing class resources (stand alone, self paced) for all mathematics unit standards taught in the school
- To liaise with Don Hunt regarding curriculum development and delivery of the mathematics for the bridging programme and liaise with Manakau Institute of Technology regarding bridging mathematics to ensure consistency with their programme
- To provide support to the working party on marketing regarding statistical analysis
- To be a member of ASC (Academic Students Committee)
- To teach more subject areas on the National Diploma of Forestry (Forestry Management) eg valuation and inventory
- To conduct peer reviews of staff on the Mokoia Campus of the School as required

[26] On 21 December 2002, in response to Ms van der Werff's memorandum, Mr Alsop replied by email. He raised the following matters:

- (a) He wanted to know why he should consider accepting a new job description as he was not unhappy with the current one – just unhappy that it did not reflect his role.
- (b) Why would it be beneficial to change to a new job description?
- (c) He did not think that a change in format and bringing things into line with other tutors were reasons to change his job description.
- (d) In regard to the objectives, he was of the view that some of them were not specific and measurable.
- (e) He conveyed that he had already indicated his unwillingness to serve on the ASC committee.
- (f) He was still not happy to conduct mass peer reviews.
- (j) He thought that it was a good idea that there should be criteria to assist with the objective measurement of the objectives.

[27] Mr Alsop concluded his email message: "Given the short time frame we were left with at the end of the year, and no date to respond by, I take it that sometime in the New Year is acceptable to meet

with you to finalise my performance appraisal. I will give the materials more consideration before then.”

- [28] However, there is no evidence of any further progress being made towards finalising Mr Alsop’s job description and performance analysis criteria. On 4 February 2003, Mr Alsop attended a meeting where the draft analysis and recommendations for the future of the Forestry and Technology School was presented. The evidence of Mr Alsop is that he noted that the proposed recommendations showed that he would retain his position as Maths Lecturer but with a programme that did not provide for any increase in mathematics teaching hours over his existing allocation.

Resignation

- [29] On 28 February 2003, Mr Alsop provided a comprehensive written resignation to Mr Acres giving two month’s notice. Mr Alsop told the Authority:

“I had had a guts full. I had tried for an extraordinary period of time to sort the situation out. WIT had treated me with contempt. I had hung on, hoping for a genuine resolution and then in the hope that the review would produce an outcome. I was bitterly disappointed when it became obvious there was nothing for me. I could see no future, no solution and no hope. I had to resign because there was no other alternative and WIT was never going to acknowledge it.”

- [30] It seems that Mr Acres and Ms van der Werff were prepared to meet with Mr Alsop to discuss his resignation but he informed them that nothing that they could say to him would change his mind about resigning, hence, Mr Alsop ceased his employment with the Institute on 27 April 2003.

Alternative Contract Work

- [31] The evidence of Mr Alsop is that in early April 2003, prior to ceasing his employment, he was teaching at the Forestry Training Centre (FTC). He says that he spoke with Mr Mark Cleland, a Programme Leader at the FTC, and Mr Cleland asked if Mr Alsop would consider being contracted back to the FTC later in the year - September/ October 2003.
- [32] The further evidence of Mr Alsop is that he met with Mr Acres on 10 April 2003 to discuss entering into a contract for the provision of teaching services. Mr Alsop says that an agreement was reached that he would perform 65 hours of work and be paid \$60 per hour. The rate of pay and the total hours in question appear to be verified by the content of an email dated 10 April 2003, from Mr Cleland to Brita Spears, an administration assistant employed by the Institute. The email also refers to the units to be taught, (Maths and Forest Inventory) and the dates that the teaching was to occur.
- [33] Mr Alsop wrote to Ms van der Werff on 19 May 2003, (she was the Acting Head of School at that time), and he confirmed his understanding regarding the contract work. Mr Alsop also conveyed that he believed that his position had been made redundant. Mr Alsop, apparently referring to the contract position, said that: “I also wish to use the offer process as an opportunity to formally raise a personal grievance in the hope that the issue of my redundancy can be resolved and that both matters can be addressed simultaneously without recourse to litigation.”
- [34] However, the contract position was not as confirmed as Mr Alsop perceived, as evidenced by two other emails dated 5 June 2003, the authors being Mr Acres and Ms Spears. Firstly, Ms Spears writes that she had not been asked to draw up a “Position Authorisation” or a “Contract for Service” and that as far as she was aware, the only approach to Mr Alsop had been from

Mark Cleland. Mr Acres's email confirms that he had some discussion with Mr Alsop but also records that: "HR would not pay \$65/hour for his services so we have not signed anything." Nonetheless, it appears that none of this had been conveyed to Mr Alsop, who by this time, was on a trip overseas.

- [35] The evidence of Mr Acres is that the rate of pay that he had discussed with Mr Alsop was based on Mr Alsop's salary but this rate was not approved by the Human Resources people. It is the evidence of Mr Acres that the hourly rate had to come back to \$40 per hour. Mr Acres says that he had no further involvement at that point and that he did not agree to any contract with Mr Alsop and that any such agreement had to be approved at director level.
- [36] While Mr Alsop was overseas, he exchanged emails with Mr Cleland, who confirmed to Mr Alsop that "complications" had arisen regarding the contract that Mr Alsop believed had been agreed to and that there would no be work available. This was also confirmed by Mr Huntley, the new Director – Human Resources, in a letter dated 31 July 2003

Analysis and Conclusions

(a) The Claim of Constructive Dismissal

- [37] The substance of Mr Alsop's claim is that the Institute failed to recognise that his position had become superfluous. Furthermore, Mr Alsop says that the Institute failed to treat him appropriately in terms of the general obligations of trust and confidence, and failed to meet its contractual obligations to such an extent that Mr Alsop had no option but to resign.
- [38] The law relating to constructive dismissal is well established. The onus of showing that a constructive dismissal has occurred rests on the employee. In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd (1985) ERNZ Sel Cas 136*, the Court of Appeal held that a constructive dismissal could include cases where a breach of duty by the employer causes an employee to resign. That appears to be what Mr Alsop is claiming.
- [39] The matter of a breach of duty on the part of the employer was expounded upon further by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW [1994] 1 ERNZ 168*. The Court held that:
- "In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach."
- [40] Applying the above findings of the Court of Appeal to the circumstances surrounding Mr Alsop, the first question to ask is: Was his resignation caused by a breach of duty on the part of his employer?
- [41] The submission for Mr Alsop is that the Institute failed to follow fair procedures in relation to the substantial reduction in his teaching hours that occurred from approximately 1996. It is further argued for Mr Alsop that the Institute attempted to unilaterally vary his job

description, and the associated performance appraisal criteria, and that such actions were breaches of his employment agreement of such degree that Mr Alsop's trust and confidence was eroded, thereby, forcing his resignation.

- [42] Having closely analysed the overall evidence pertaining to the resignation of Mr Alsop, I conclude that there was not a breach of duty on the part of the Institute that could be seen to effectively convert Mr Alsop's resignation into a constructive dismissal. Rather, I find that the circumstances leading up to Mr Alsop's resignation reflected a number of changes that occurred within the Institute from approximately 1996. Some of those changes appear to be consistent with those faced by many other institutions in the education/training sector, directly related to student enrolment variances. And others, appear to be directly related to the need for substantial changes specifically related to the operations and management of the Institute, as evidenced by the content of the *Organisational Review Draft Discussion Report* prepared by Deloitte Touche Tohmatsu in 2001, and subsequent audit reports, and the more recent review conducted by Dr Macpherson.
- [43] It is not difficult to empathise with Mr Alsop in regard to frustrations experienced by him, particularly given that the management of the Institute were initially reticent to address the concerns that Mr Alsop expressed in September 2001. However, it also appears that Mr Alsop did not, or could not, adapt to the changing circumstances that not only affected him, but also other tutors too. On the one hand, Mr Alsop was unhappy about the reduction in his teaching role, but on the other hand, he appears to have been reluctant to enter into any meaningful dialogue, or co-operate in a constructive manner towards improving his circumstances.
- [44] For example, when Ms van der Werff, Mr Acres and Dr Macpherson attempted to address his concerns, while Mr Alsop gave the impression that he wished to participate in a meaningful process to address his reduced workload, he kept coming back to his letter of 19 September 2001, albeit it was obvious to all that time and circumstances had moved on considerably since then and that he had long ago received a reasonable, if not complete, response, albeit somewhat belatedly.
- [45] Then, as recently as 21 December 2002, while Mr Alsop indicated that he was still willing to participate in the process of establishing a new job description and performance appraisal, he then subsequently resigned. Therefore, it is simply not credible for Mr Alsop to claim that the Institute unilaterally changed his conditions of employment. Unfortunately, Mr Alsop appeared to be firmly attached to the past and could not, or would not, accept that the Institute, and his role as a tutor, needed to adapt, to some extent, to meet the requirements of a continually changing environment.
- [46] In saying that, I would not want to be seen to be critical of Mr Alsop, as the implementation of change can often be frustrating and difficult, and it appears that the change process was not managed as well as it could have been by his employer. I also accept that it may have subsequently transpired, that some of what was proposed by the Institute, in order to provide Mr Alsop with more meaningful work, would eventually be proven not to be entirely realistic, and Mr Alsop was entitled to take issue about that with his employer. Nonetheless, while it is most unfortunate that Mr Alsop was so frustrated that he saw fit to resign from his employment, taking into account all of the circumstances pertaining to the resignation, I find that it was not brought about by any breach of his employment agreement by his employer, hence, I conclude that there was not a constructive dismissal.

(b) **The Redundancy Issue**

[47] The alternative or possibly subsidiary claim, presented by Mr Alsop is that his position had become superfluous and that in terms of his employment agreement, he was redundant. Mr Alsop points to the applicable employment agreement, the *Waiariki Institute of Technology Tutors' Collective Employment Agreement* ("the CEC") – Part 11: Surplus Staffing Provisions. It is submitted for Mr Alsop that his circumstances fell within those provisions and that his position should have been declared redundant and that he should have received a severance payment accordingly.

[48] Clause 11.3 of the CEC provides a definition. That is:

"A surplus staffing situation exists when, as a result of the processes described in 11.1 above, the employer requires a reduction in the number of employees, or employees can no longer be employed in their current position, at their current grade (ie. the terms of appointment to their present position), then the options in Clause 11.5 below shall apply."

[49] Clause 11.1 provides for consultation with the union, ASTE. Clause 11.5 provides for various options that are to be applied in staff surplus situations. That is: Attrition, redeployment, enhanced early retirement, retraining and severance. The clause also provides that: "The aim is to minimise the use of severance. Where the other options are inappropriate, to discharge the surplus the option of severance will be made available. Employees who are offered a position within the Institute which is directly comparable to their existing position, which does not require a change in residential location, and who decline reappointment, will not have access to severance."

[50] It seems to me that Mr Alsop's position regarding his claim that his position was redundant is not sustainable. Firstly, because under the provisions of Clause 11.3, it is the employer who decides if there is a requirement for a reduction in the number of employees. In Mr Alsop's case, his employer did not perceive his position to be surplus. Secondly, even if the Institute had decided that Mr Alsop's position was superfluous, there were four other options that had to be examined before severance became the final option.

It may well have eventuated, given the review process that was being implemented by the Institute, that Mr Alsop's position became surplus to requirements, but that was not the perception of the Institute at the time he resigned. Indeed, the view of the Institute was that apart from continuing to teach maths, Mr Alsop had other skills and experience that they wished to utilise. The Institute may or may not have been proven correct as to that view, but we will never know, as Mr Alsop precipitated any such analysis by tendering his resignation.

(c) **The Alternative Contract Work**

[51] While I have no doubt that Mr Alsop had a reasonable perception that an agreement had been reached in regard to being provided with some alternative contract work, the overall evidence shows that a final agreement was never concluded. I have to say that the Institute was most remiss in not being more forthcoming in regard to their intentions pertaining to the actual terms that could be offered to Mr Alsop to carry out the work that was discussed. Unfortunately, it seems that this was another example of the dysfunction that appears to have existed within the organisation at the time, albeit it appears that upon the appointment of a new Human Resources Director, the handling of such matters became more effective.

[52] I am also unsure of what to make of the fact that in his letter of 19 May 2003, to Ms van der Werff, Mr Alsop appeared to be suggesting that the offer and acceptance of alternative work was in some way linked to the Institute recognising that his previous position was redundant

and that he had a sustainable personal grievance. On the one hand, Mr Alsop appears to be happy to accept the alternative work, whereas on the other, there appears to be a condition attached. But in any event, it is my conclusion that the terms and conditions of Mr Alsop returning to teach at the Institute were never concluded. However, even if they had been concluded, it is clear that the parties intended that the arrangement would have been a contract for services and not an employment agreement, hence, the Authority does not have jurisdiction to decide if a breach of that agreement occurred or otherwise.

Determination

[53] In summary, my findings, for the reasons as set out above, are:

1. I find that the resignation of Mr Alsop was not a constructive dismissal. He does not have a personal grievance, hence, the remedies that he seeks are not available to him.
2. I find that the position held by Mr Alsop was not superfluous to the requirements of the Institute and therefore he was not redundant in terms of his employment agreement.
3. I find that there was not a concluded agreement reached between Mr Alsop and the Institute regarding alternative work being available, but even if there was a concluded agreement, the Authority does not have jurisdiction pertaining to a matter concerning a contract for services.

Costs

[54] Costs are reserved. The parties are invited to attempt to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order.

Ken Anderson
Member
Employment Relations Authority