

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Murray Hill (Applicant)  
**AND** Wellington Institute of Technology (Respondent)  
**REPRESENTATIVES** Graeme Ogilvie for Applicant  
Geoff Davenport for Respondent  
**MEMBER OF AUTHORITY** G J Wood  
**INVESTIGATION MEETING** 2 December 2004  
**SUBMISSIONS RECEIVED BY** 22 December 2004  
**DATE OF DETERMINATION** 21 January 2005

**DETERMINATION OF THE AUTHORITY**

**Introduction**

1. Mr Murray Hill claims that he was unfairly treated and denied pay he was entitled to during the course of his employment at the Wellington Institute of Technology (Weltec). Weltec, on the other hand, claims that Mr Hill was properly paid and fairly treated throughout the course of his employment.

**The Facts**

2. Mr Hill worked for Weltec as a casual Computing Made Easy (CME) tutorial assistant between August 2002 and February 2004. His job was to assist members of the public in how to use computers as part of a free computer training course. As a scheme with variable enrolments and a "work at your own pace" philosophy, Weltec determined to employ tutorial assistants on a casual basis.
3. An offer of employment was made to Mr Hill, which he accepted. This offer made it clear that he would only be offered work on an "as and when required" basis, with no



guarantee or expectation of ongoing employment. He was to be paid \$15 per hour. In practice, the arrangement operated on the basis that Mr Hill, like the other tutors, would be offered three, but sometimes two, shifts per week. The flexibility for both parties inherent in this arrangement can be demonstrated by Mr Hill's email of 22 September 2003 where he advised that he would not be available to work either Fridays or Saturdays until further notice because of other commitments.

4. Mr Hill was a keen and dedicated member of staff. He was also pursuing options to try and become a more permanent member of staff. After about nine months of employment he presented a written proposal to his Programme Coordinator, Mr Graham McLauchlan, suggesting enhancements to the course, which would have resulted in him being appointed to a new fixed term position. Mr McLauchlan's boss did not agree to the proposal and Mr Hill was so informed.
5. Mr Hill also volunteered to promote the CME course by undertaking poster and drop-box deliveries, as well as conduct promotional displays in malls. This offer was taken up by Mr McLauchlan. Finders' fees were offered to the tutorial assistants such as Mr McLauchlan on the basis of a \$5 flat enrolment fee plus \$2 for each module taken, but no advertising or promotional activity was to be done without reference to Mr McLauchlan. Such work was undertaken on the basis that it was a trial only.
6. During the period July to September 2003, three trial mall promotions took place involving Mr Hill. This loose arrangement caused complications and Mr McLauchlan was told by his boss that no further promotional work should be conducted in the interim, of which Mr Hill was duly advised. This was because the whole future of the tutorial support function was being assessed, which in fact led to it being contracted out in February 2004.
7. Mr Hill makes claim for payment for Anzac Day and Queen's Birthday 2003. Rosters were initially sent out to tutorial assistants requiring Mr Hill to work on both Anzac Day and Queen's Birthday. However, as soon as the mistake of putting on classes on a public holiday was discovered, the rosters were properly amended and no classes were held on those days. Mr Hill accordingly did not have to work on those days and he is not entitled to benefit in the way that he claims from Weltec's mistakes.

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8. As mentioned above, Mr Hill's enthusiasm and commitment to his job extended to him seeking more permanent employment with Weltec. In respect of the promotional work, for instance, he prepared a detailed proposal for the development of that work, which envisaged him being paid for at least 12 months. However, Mr McLauchlan's boss declined to accept the proposal.
9. The rate of payment for this work related to the type of work done, involving poster distribution, drop boxes and signing up enrolees. However, the money was claimed from Weltec by the volunteers as if ordinary hours were worked at the rate of \$15 per hour.
10. Mr McLauchlan had to have a meeting with Mr Hill and the person with whom he had done most of the promotional work, because they could no longer work together. They agreed on a system for splitting the work between them. Mr McLauchlan sought to have a formal contract drawn up between the parties. At that time it was clearly understood that the future of the programme was being reassessed and its future was therefore uncertain.
11. Mr McLauchlan wanted agreement that this work was being done by Mr Hill and others as independent contractors as a way of effecting the agreement for splitting up the promotional work. He proposed sending a letter to both parties to this effect for them to sign. Mr Hill advised Mr McLauchlan in writing that he would be seeking advice over this matter. He did not refer to the threats of dismissal against him if he did not sign that he now says occurred. I do not accept that Mr Hill was threatened by Mr McLauchlan with the loss of all or part of his job if he did not agree to this proposal, which was never in fact implemented.
12. As part of his meetings over this point, Mr McLauchlan met with Mr Hill, who accepted that his conduct which led to the problems with his colleague over the promotional work was inappropriate and that he would apologise. In fact Mr Hill never provided any apology to his co-worker.
13. Unfortunately for Mr Hill, Mr McLauchlan's boss' response to the potential for separate contracts for the promotional work was negative. He wanted no further promotional work to be done until the wider issue of the future of how the course was

run was determined. As a result, Mr McLauchlan sent an email on 22 September to Mr Hill advising him that any promotional work would have to be put on hold until further notice.

14. Mr Hill, however, in the anticipation of getting payment for enrolments under the more promotion work, had already done some preparatory work. Because the scheme never went any further, he has never been paid for this work. He claims to have done 91 hours without payment, including work in relation to his proposal (not accepted) that would have led to him obtaining more permanent employment, at least for some time, with Weltec. I do not accept that anything like this amount of work was done for which Weltec should be liable. As a fair and reasonable employer it is incumbent, I hold, on Weltec to pay Mr Hill for work that it had asked him to do, but then denied him the opportunity to obtain payment for by way of enrollee bounties. The issue is rather the amount of work that Mr Hill did at the direct/indirect request of Weltec and which was reasonably incurred for the benefit of Weltec. On my assessment of the evidence, excluding development work for which Mr Hill has never sought payment; 10 hours work is an appropriate assessment.
15. Mr Hill was finding all of this process stressful and during September and October he attended to his doctor with symptoms of anxiety and stress (that had been increasing over the preceding five weeks), which affected his daily functioning at work and at home. These feelings continued throughout the period of Mr Hill's employment with Weltec. No doubt they had an effect on his behaviour and how he felt about his treatment by Weltec.
16. By October, at the latest, Mr Hill had become extremely dissatisfied with Mr McLauchlan's management of both the project and himself personally, and he sought an appointment with the Head of School of Information Technology. When asked for details about the reasons for this, Mr Hill talked about a suspension that had occurred to him, threats made to terminate his employment, work that he had done on the development of marketing of the course for which he had not been paid (which he said he did not begrudge) and that because of the termination threats, the erosion of trust and the suspension, he was suffering from extreme stress.

17. A confidential meeting occurred on 13 October. He raised the points set out above at the meeting, along with claims that Mr McLauchlan avoided problems, had problems with his memory, cancelled promotions without any consultation, used the roster as a disciplinary measure, made comments about non-work matters inappropriately and had frozen him out of communications. Mr Hill wanted to not have to work for Mr McLauchlan any more, be provided with a new contract and the withdrawal of the letters that he believed he and the other worker were required to sign.
18. Mr Hill's co-worker on promotion work was approached on the basis that Mr Hill had told Weltec (at the meeting described above) that she had also been threatened and bullied by Mr McLauchlan. This led to that worker raising complaints instead about Mr Hill and disclosing that other tutorial assistants were also concerned about Mr Hill's behaviour. These people were all interviewed.
19. In the meantime, Mr Hill hired his present representative, Mr Ogilvie, who raised a personal grievance on his behalf and some other tutorial assistants, which related again to Mr McLauchlan's management. None of those other workers gave evidence at the investigation meeting. The core of Mr Hill's and the others' grievances was Mr McLauchlan's alleged management style and the alleged threats to their casual employment agreement terms and conditions.
20. In the meantime, Mr Hill raised a complaint regarding him not getting three shifts per week. Mr McLauchlan responded indicating that there was no contractual minimum or maximum number of shifts.
21. Mr McLauchlan became concerned about all of the above issues and told all staff that if they had any concerns with him they could approach him directly.
22. During the course of the investigation over matters, Mr Hill also emailed Mr McLauchlan, accusing him of bullying behaviour, including defamation.
23. On 20 November Mr Hill provided a sickness certificate covering the matters outlined above and went on sick leave. There was initially also a dispute over whether Mr Hill was entitled to sick pay over the period he was ill, but he was eventually paid for five days leave.



24. Matters actually reached the point where a number of staff had written to the Chief Executive of Weltec indicating their support for Mr McLauchlan. On the other hand, there were a number of tutors who, as described above, had taken a personal grievance against Weltec on the basis of McLauchlan's treatment of them.
25. As a result of all their interviews Weltec determined that it would institute disciplinary proceedings against both Mr McLauchlan and Mr Hill. The disciplinary process resulted, in Mr McLauchlan's case, in the issuing of a warning. A different manager took over responsibility for investigation into the complaints against Mr Hill.
26. In its letter dated 21 November to Mr Hill, it was noted that Mr Hill's complaint that Mr McLauchlan had been seeking to generate complaints against him would be dealt with separately. Weltec made the point that
- "... As the employer of the staff who have made the complaints, it is Weltec's responsibility to treat these matters seriously and to provide you with an opportunity to respond before making any decision as to the substance of the complaints and whether any disciplinary action is warranted."*
27. Mr Hill was also told that he was entitled to bring a representative. The letter also stated
- "... Once the meeting has taken place, I will determine what action, if any, is appropriate. This may involve no further action and your continuation as a casual Tutorial Assistant through to your casual Employment Agreement being terminated."*
28. The essence of the complaints about Mr Hill was that his behaviour was unpredictable and aggressive, that he solicited complaints against Mr McLauchlan and that some staff were frightened of him.
29. It took a long time before the meeting with Mr Hill actually took place on 9 December. This was due largely to the unavailability of Mr Ogilvie. I do not accept that Weltec was not entitled to conduct the meeting on 9 December, even though it knew that Mr Ogilvie would not be available then, because so much time had already passed. Mr Ogilvie had been offered three or four different dates for meetings and all had had to

be re-scheduled. Mr Hill was well able to prepare for the meeting and he had in fact support people in attendance.

30. While the proposed meeting was being re-scheduled, one of Mr Hill's co-workers raised health and safety concerns about Mr Hill and requested that Mr Hill be instructed not to have any contact with him. As matters had now basically been put in the hands of representatives on both sides, Mr Davenport wrote to Mr Ogilvie on behalf of Weltec on 5 December requesting Mr Hill not to have any contact with the other tutor.
31. Mr Ogilvie explained the problems that had arisen and that both parties had tried to serve trespass orders on the other. I accept that Weltec acted appropriately in passing on one tutor's concerns about another, i.e. Mr Hill, in the context of its health and safety obligations to its employees. There was no unequal treatment because Mr Hill did not seek any such action from Weltec in respect of the other tutor.
32. At the meeting, five complaints against Mr Hill were raised, two of which had not been formally raised before. Mr Hill indicated that he was happy with the process suggested, which involved putting the complaints and then seeking a response, then forwarding the notes of the meeting to him and giving him an opportunity to respond to those, before Weltec reached any conclusions.
33. Each complaint was read out to Mr Hill and he was given an opportunity to respond. The complaints related to intimidating another staff member, leaving work early, passing himself off as the marketing coordinator, soliciting complaints against Mr McLauchlan and contacting Mr McLauchlan directly when told not to do so. Mr Hill also provided a detailed written statement about matters, including supporting material from other staff. Mr Hill referred to a number of emails he had in a folder which supported his written submissions and asked the investigator whether he wished to read them. However, at no stage were such documents formally tabled and Mr Hill had given a full verbal and written explanation to the investigator. In that context, I accept that it was not unfair of Weltec to not take the initiative and collect the information from Mr Hill.



38. On 10 February Weltec confirmed its preliminary decision to issue an oral warning in written form. The warning was to last for 12 months. It rejected Mr Hill's concerns, including that of bias.
39. In the meantime, Mr Hill had returned to work, but in February this work ended when the work that Mr Hill was employed to do was contracted out.
40. The parties have attended mediation. They have had further discussions in the course of the investigation meeting to try and resolve matters between them. Unfortunately, this has not been possible and the Authority is required to make a determination.

### **Credibility**

41. I have had to determine matters on the balance of probabilities as there can be no certainty over events. However, in all matters where there is inconsistency between the evidence of Mr Hill and Mr McLauchlan, I have preferred the evidence of Mr McLauchlan. Mr McLauchlan was not as definitive a witness as Mr Hill, but certainty in a witness is not the same thing as reliability.
42. I do so in particular reliance on the written documentation. Mr Hill committed a lot of matters to writing. Three particular examples can serve to illustrate why I have preferred Mr McLauchlan and Weltec's evidence to that of Mr Hill. First, Mr Hill accused Mr McLauchlan of continually threatening him, yet in evidence before the Authority he described Mr McLauchlan's behaviour as that of a person who avoids responsibility and avoids confrontation. Second, Mr Hill claimed an agreement that he would be rostered on three shifts a week, yet could not provide any written evidence in support of that claim. Also, he amended his claim in the course of the investigation meeting to being entitled to three shifts on most weeks and two shifts on other weeks. Third, the general tone of correspondence from Mr Hill shows that he is a person who uses strong language against others, whereas there is no documentary evidence of others writing in a similar vein about him.
43. In addition, Mr Hill claimed to be threatened with dismissal as a result of the disciplinary process. However, the documents clearly show that Mr Hill was subject to a formal disciplinary process and that one of the outcomes was potentially



dismissal. This does not constitute a threat of dismissal, even although Mr Hill describes it in this way.

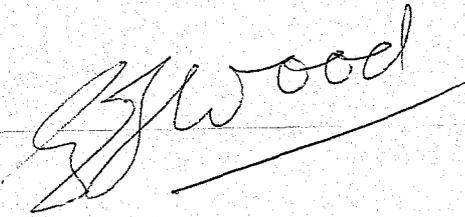
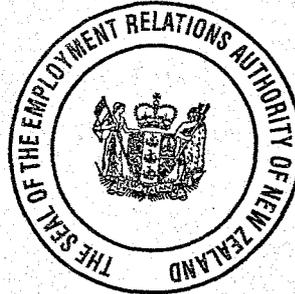
### **Determination**

44. Clearly, the running of the Computing Made Easy course was not as smooth as it should have been. Mr McLauchlan ended up receiving a warning for his part in the way the course operated, as did other tutors. With one exception, however, I do not consider that Mr Hill has been subject to management decisions that were not open to a fair and reasonable employer. That relates to his work done preparing promotional material for which he was denied the opportunity to earn any money from. A fair and reasonable employer would, as I have determined above, have paid Mr Hill for 10 hours of this work, constituting \$150 gross.
45. On the other hand, Mr Hill was a casual worker, not a part time worker employed on three shifts a week. Mr Hill was not unfairly treated by Mr McLauchlan as the facts section demonstrates. Furthermore, Weltec did provide for counselling to Mr Hill over the stress he was suffering and asked for his input into any further assistance that might be provided.
46. I do not accept that Mr Hill was pressured into signing the letter stating that he was an independent contractor, rather payment continued for the work that Mr Hill did and Weltec went about trying to put the arrangements on a more formal footing, until it was determined by management that the work would cease altogether. This was a decision which was always open to it.
47. I do not accept either, for reasons set out above, that Mr McLauchlan threatened Mr Hill in any other way.
48. I have already dealt with the promotional work. I do not accept that any notice was required to be given for this work, as with all of Mr Hill's work it was done on a casual basis.
49. There is also no ground for Mr Hill to claim work for public holidays which he never worked. Here he is simply trying to take unfair advantage of a clerical error which was remedied almost immediately.

50. The disciplinary process commenced by Weltec against Mr Hill was fairly conducted. Weltec was entitled to start its disciplinary proceedings without Mr Ogilvie, given the time that had elapsed and the number of efforts there had been to include him. Weltec was also entitled to accept (in part at least) that some of the concerns raised by Mr Hill's co-worker on promotional issues were genuine (*Peterson v. Board of Trustees of Buller High School* [2002] 1 ERNZ 139 applied). There was no evidence to support any claim of bias by the decision-maker, who had little direct involvement in Mr Hill's employment before the disciplinary processes commenced. Weltec's conclusions were thus ones that were open to a fair and reasonable employer (*W&H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 applied).
51. Weltec was also justified in following up a concern of one of its employees on health and safety grounds, seeking that Mr Hill not contact that worker. This was not entirely a non-work matter.
52. The Authority has no jurisdiction over the issue of defamation, but I do not accept that the email in question disadvantaged Mr Hill in his employment. The thrust of the email is that people could approach Mr McLauchlan without repercussions and that their behaviour in the lab should be beyond reproach. There is nothing wrong with a manager making such statements.
53. Finally, I accept that Weltec properly investigated Mr Hill's complaints against Mr McLauchlan. He was involved in a formal disciplinary process and indeed received a warning as a result of Mr Hill's complaints, albeit that the warning did not result from any conclusion that Mr McLauchlan in any way treated Mr Hill unfairly - rather the warning, as I understand it, related to some deficiencies in administrative aspects of the course.
54. I therefore dismiss all Mr Hill's claims against Weltec except for payment for preparatory work done promoting the CMA course for which a fair and reasonable employer would have reimbursed him. I therefore order the respondent, Wellington Institute of Technology, to pay to the applicant, Murray Hill, the sum of \$150 gross in lost remuneration.

**Costs**

55. Costs are reserved. Weltec may make an application for costs if it wishes, but account will be need to be taken of the fact that Mr Hill is legally aided.

A handwritten signature in cursive script, appearing to read "G J Wood", written over a horizontal line.

**G J Wood**  
**Member of Employment Relations Authority**