

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Rory Jardine (Applicant)
AND New Zealand Institute of Studies Limited (Respondent)
REPRESENTATIVES Rory Jardine in person
Jo Douglas for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 13 July 2005
SUBMISSIONS RECEIVED 22 July 2005 from Respondent
DATE OF DETERMINATION 12 September 2005

DETERMINATION OF THE AUTHORITY

- [1] New Zealand Institute of Studies Limited (“NZIS”) is, as the name indicates, an educational institution. NZIS provide academic programs in English language, university preparatory courses, and business / management courses. In 2002, Mr Rory Jardine was employed by NZIS as a teacher, teaching computer studies.
- [2] During 2004 NZIS suffered from financial problems. Mr Jardine was made redundant. Mr Jardine says the redundancy was unlawful and that NZIS has failed to follow its own redundancy procedures.
- [3] NZIS deny the redundancy was unlawful.
- [4] The Authority is required to test the justification of the dismissal pursuant to section 103A. Section 103A states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[5] Therefore the key issue for this determination is whether, in all the circumstances the actions of NZIS and how NZIS acted was what a fair and reasonable employer would have done. The emphasis provided by s.103A is on the employer. I have considered the test for justification under the following headings:

- the circumstances known at the time the decision to dismiss was made;
- whether the redundancy was genuine;
- the process followed by NZIS;
- the decision to dismiss.

The circumstances known at the time the decision to dismiss was made

[6] NZIS ran three distinct programs:

- a general English program teaching English as a second language;
- a Foundation Studies program which prepares students for university. This is a full year course and is similar to the course offered at secondary schools in Year 13.
- the Diploma in Business Studies program which brings together two qualifications, the NZIM Certificate in Management and the NZIM Diploma in Management. The diploma is achieved by students successfully completing a requisite number of papers. Students choose the papers they wish to take, although in the first year of study students must sit 6 out of the available 7 papers. Most of the papers offered in this program can be cross credited to degree programs run at university level.

[7] Until 2003 the income from the general English program cross subsidised the Foundation Studies program. In 2003 student numbers enrolled in the general English program meant that the cross subsidising of the programs was no longer viable. As a result of the falling enrolments, two employees involved in the general English program were declared redundant.

[8] 2004 was the first year the diploma program was approved by NZQA to run at NZIS. Student numbers enrolled during 2004 were in excess of 100. Mr Jardine worked predominantly in the Foundations Studies program until July 2004, when he was moved into the diploma program to teach the computer studies paper. The move was as a result of difficulties being experienced in the timetabling of the different papers for both Foundation Studies and diploma. The timetables for the two programs was not compatible, in other words, teachers could not easily be used to teach in both programs during the same period and teachers were required to teach either in the Foundation program or the diploma program.

[9] By October 2004 the flexibility in the timetabling used for each program came under scrutiny and for the November 2004 diploma intake of students the timetabling was arranged to maximise the use of teachers across all programs. This created more flexibility and was successful. NZIS decided to continue to use the new timetable format for the March 2005 intake of students.

[10] Also, during November an NZQA audit had been undertaken which resulted in negative publicity about NZIS. The low numbers of students enrolling during December 2004 has been attributed to this negative publicity. A review of the NZQA audit resulted in a finding in favour of NZIS that the original audit comments were unwarranted. This information was not published.

[11] Due to the low enrolments NZIS began experiencing financial difficulties. By the end of November the numbers of students enrolling in the English and Foundation Studies programs were considerably lower than previous years. On 1 December 2004, Ms Joh Cogle, NZIS Principal, met with foundation studies staff and Mr Jardine and discussed the situation as it related to the Foundation Studies program.

[12] Ms Cogle was working under the misapprehension that Mr Jardine was working full time in the Foundation Studies program. Mr Jardine was, in fact, working full time in the Diploma program.

[13] In answer to questions during the investigation meeting it became clear that the situation faced by NZIS affected all staff and not just those working in the Foundation Studies program.

[14] During their first year of study in the diploma program, students choose six out of seven offered papers to study. The computer studies paper is one of these seven papers. It is the students' perception that the computer studies paper was not able to be used as a cross credit at other universities in New Zealand. Whether this perception was accurate or not, students preferred to focus on those papers which they perceived could assist them in further study outside NZIS. This impacted on the number of enrolments for the computer studies paper taught by Mr Jardine.

Was the Redundancy Genuine?

[15] In *GN Hale & Sons Ltd v Wellington, etc Caretakers, etc IUOW* [1990] 1 NZLR 151, the Court of Appeal confirmed an employer's prerogative to reorganise its business as it sees fit. The approach in Hale was reinforced by the Court of Appeal in *Aoraki Corporation Ltd v McGavin* [1998] ERNZ 601.

[16] In *Aoraki*, Richardson P, stated:

Where it is decided as a matter of commercial judgment that there are too many employees in a particular area or overall, it is for the employer as a matter of business judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy.

[17] NZIS is entitled to manage and organise its business and the Authority can not interfere with that prerogative. NZIS were struggling financially as a result of low enrolment numbers for the 2005 papers. The immediate problem for NZIS was how to pay salaries to its teachers for the period 10 January to 25 February 2005. It wasn't until 25 February 2005 that final numbers for enrolment in papers offered for 2005 would be known.

[18] I have concluded that in December 2004 NZIS was faced with a financial crises looming for the period 10 January to 25 February 2005. In order to meet its financial shortfall for that period steps needed to be taken in December. NZIS developed a strategy and embarked on a process to implement the strategy to deal with the financial difficulties.

I find the need for redundancies was as a result of a genuine commercial need for NZIS.

Process followed by NZIS

[19] Mr Jardine's employment was subject to a written employment agreement which defines redundancy as ...a condition in which the Company has staff surplus to requirements because of ... lesser numbers of students or like cause requiring a permanent reduction in the number of employees. The agreement requires four weeks notice or payment in lieu where an employee is declared redundant.

[20] Section 4 of the Employment Relations Act 2000 requires NZIS to deal with Mr Jardine, in good faith. This duty is to be exercised not only generally but in specific situations, including redundancy. The Employment Relations Amendment Act (No 2) 2004, in relation to the duty of good faith requires the parties to be:

Active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[21] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse effect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made. The requirement to consult is therefore, a statutory obligation.

[22] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court discussed the meaning of "consultation" in the context of redundancy, and listed a series of propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA). In particular, the Court noted:

- (a) Consultation requires more than mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.
- (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[23] The NZIS Operations Manual specifies the process to be followed when a surplus staffing situation exists. The process set out in the manual requires:

- staff to be told of the possible situation as soon as possible;

Mr Jardine had been informed regularly throughout the year that redundancies may result where enrolment numbers were not satisfactory. Specifically, on 1 December employees were alerted to the possibility of redundancies for 2005 and options were discussed for the period 10 January to 25 February 2005.

- temporary staff to be the first to be affected;

During the latter part of 2004, six staff were working on temporary contracts. Of those six, three retained some part-time work to teach the students who began their course in November 2004 and which finished in March 2005. Of those three, only one has retained some part-time work teaching economics.

- identification of "core staff";

Core staff are those employees who are considered to be essential to the management and operation of NZIS. Core staff are advised in writing and their status is annotated on their personal file. In early 2003, when the English program was subjected to downsizing, Mr Jardine was identified as a core staff member as a result of his involvement in the Foundation Studies program. However, in the 2004 round of

redundancies Mr Jardine was not considered to be a “core staff” member and so was not protected from being affected by redundancy;

- redundant staff to be selected based on set criteria.

The policy requires a chart to be completed with the names of all employees and the relevant information for selection. There was no evidence that Mr Jardine had ever been assessed against the criteria, nor was a chart produced.

[24] In January 2004 employees involved in the Foundation Studies program were told that as student numbers were low redundancies may occur, however no redundancies occurred at that time. In July, Foundation Studies employees were once again put on notice about possible redundancies. Once again however, no employees were affected by redundancy.

[25] In September 2004 Mr Jardine had his annual performance appraisal. Ms Cogle, says that at this meeting she raised with Mr Jardine the possibility that Foundation Studies positions could be at risk and employees should consider alternative programs which could be offered by the school. Mr Jardine initially told me that he did not recall that discussion and that the appraisal meeting only took a couple of minutes. Later, in answer to questions put to him, Mr Jardine concurred with Ms Cogle that the meeting would have taken between ½ to 1 hour, but was still unable to recall the conversation.

[26] I am satisfied that it is more likely than not that Ms Cogle did alert Mr Jardine to the difficulties being faced by NZIS during his appraisal meeting. However, the focus of the discussions was on the Foundation Studies program. At the time of his appraisal meeting Mr Jardine was not involved in teaching on that program. For that reason I have concluded Mr Jardine probably took very little notice of the discussion.

The consultation process

[27] On 1 December 2004 a meeting was held with Foundation Studies employees as a group. At this meeting concerns about the lack of numbers for the 2005 Foundation Program were discussed. Again, I have concluded that while Mr Jardine attended the meeting, it is more likely than not that Mr Jardine did not consider himself affected by the information. Mr Jardine was not teaching in the Foundation Studies Program. He was teaching full time in the Diploma program.

[28] Ms Cogle told the Authority that the management group identified at least 5 employees, including Mr Jardine, who were either involved full-time in the Diploma program, or were involved in teaching across both the Diploma program and the Foundation studies program and who were at risk of redundancy.

[29] At the 1 December meeting options for dealing with the financial problems which would be experienced for the period 10 January 2005 (the usual start date for the next year programs) and 25 February 2005 (when the next intake of students was due to commence) were discussed. There were four options identified at the meeting for employees to consider. The options included, redeployment, annual leave, leave without pay and redundancy.

[30] Ms Cogle says that at the meeting she handed to all staff a copy of a draft memo which outlined a proposal for taking leave without pay and included the three other options discussed. Ms Cogle asked employees to come back to her with alternative options. Ms Cogle was unable to provide a copy of the draft memo. Mr Jardine does not recall receiving a draft document.

[31] Ms Cogle says that the leave without pay option was being considered so that all current employees could be retained if student numbers increased suddenly. Ms Cogle says some employees did provide feedback on the options and, after some amendments, a final document was prepared.

[32] On 3 December Ms Cogle met with Mr Jardine and went through the options discussed in the meeting on 1 December 2005.

[33] Following that meeting, Mr Jardine received a copy of the final memo which was addressed to Foundation Studies staff and dated 3 December 2004. Attached to that memo was a form (dated 6 December 2004) which each employee was requested to complete and return to Ms Cogle. I have concluded that Mr Jardine received his copy of the memo on the 6 December 2004.

[34] The memo was entitled “Formal Notice of intent – January/February 2005 – Leave with Pay” and notified recipients that NZIS intended to place them on leave without pay for the period 10 January – 25 February 2005. The attachment requires staff to choose either to go on leave without pay or to be made redundant.

[35] Mr Jardine immediately sought legal advice regarding the notice. Mr Simon Laurent, a lawyer representing most of the affected employees, wrote to Ms Cogle on 7 December 2004. Ms Cogle responded to Mr Laurent and explained the reasons for the redundancies. A meeting was arranged between NZIS, the affected employees (including Mr Jardine) and Mr Laurent.

[36] Following their meeting Mr Laurent advised Ms Cogle that leave without pay was not an option for the staff and that if staff were to be given notice of redundancy, information regarding that decision was required, together with an opportunity for staff members to comment upon that information.

[37] On 14 December 2004, Mr Jardine signed the attachment to the 3 December 2004 memo selecting his preference that he be made redundant, rather than be put on leave without pay for the period 10 January – 25 February 2005. Mr Jardine stated on his election form to NZIS that he had chosen redundancy on the condition that Mr Laurent was provided with full disclosure of information relating to the reasons for the redundancy and that due process was followed.

[38] Further correspondence between Ms Cogle and Mr Laurent took place. Mr Laurent was not satisfied with the information being disclosed as to the financial particulars of the business. The information related only to the Foundation Studies program and did not include any information at all on the diploma program. Ms Cogle felt she had disclosed all the information relevant to the redundancy situation and advised that no further information would be disclosed. Ms Cogle did encourage further discussion and invited Mr Laurent and Mr Jardine to attend a meeting on 17 December 2004 at 11.00am.

[39] Mr Laurent did not receive the invitation to meet until late on 16 December 2004. As a result, the meeting did not take place. Instead Mr Laurent wrote to Ms Cogle reiterating the right for Mr Jardine to have access to the relevant information and an opportunity to comment on it before a decision relating to his redundancy was made. Mr Laurent pointed out to Ms Cogle that to date she had only provided information relating to the Foundation Studies program with no information relating to how this impacted on the diploma program. Ms Cogle refused to provide any further information.

The notice

[40] Mr Jardine was given written notice of redundancy on 20 December 2004. The letter was dated 14 December 2004 and purported to provide four weeks notice, as required by the employment agreement, from 14 December 2004. In effect, however, NZIS have only provided Mr Jardine with three weeks notice as the notice was given on 20 December.

[41] NZIS operate an annual closedown at the end of each year and over the Christmas/New Year period. It was common ground at the investigation meeting that employees use any annual leave entitlement they have left at this time and make up the remainder of the closedown period through the use of leave without pay.

[42] The closedown period commenced on 24 December 2004 and ended on 10 January 2005. Mr Jardine and NZIS had, prior to the consultation regarding the redundancy situation, agreed that Mr Jardine would take annual leave during this period. Mr Jardine was paid his holiday pay on 7 January 2005.

[43] After this matter had been filed with the Employment Relations Authority and before the investigation meeting, NZIS accepted it had not paid Mr Jardine his full entitlement to statutory holidays for this period. This has now been rectified.

The decision to dismiss

[44] The Authority finds that the decision to dismiss is not one a fair and reasonable employer would have made for the following reasons:

- The consultation process used by NZIS was flawed. NZIS failed to recognise that Mr Jardine was no longer working full time in the Foundation Studies program. Because of that it only addressed issues with Mr Jardine on the basis of enrolments and income/expenditure based on that program. After receiving valid requests for relevant information relating the diploma program to assist in the consultation process NZIS refused and therefore did not meet the requirements of the Act.

- Mr Jardine was given notice of redundancy on Monday 20 December 2004. This is contrary to the requirement to act in good faith given the fact that on Thursday 16 December, Ms Cogle had invited further discussion to be held on Friday 17 December. This meeting did not proceed due to the late notice to Mr Laurent. The decision to dismiss Mr Jardine by reason of redundancy was made before Mr Jardine had had a proper opportunity to consult on the decision. Proper consultation in the context of this matter could only occur after the relevant information has been provided. Mr Laurent was still working through that process on behalf of Mr Jardine. In deed, all the communications from Ms Cogle up to the Friday before the decision was made, indicated that discussions were still ongoing.
- NZIS failed to adhere to its own policy outlined in the Operations Manual. The policy requires NZIS to complete a chart for each employee assessing them against specific criteria. There is no evidence that this requirement was ever met. NZIS can not rely on the election made by Mr Jardine on 14 December to justify selecting him for redundancy on 20 December. Mr Jardine's election was subject to the disclosure of relevant information and due process being followed by NZIS.
- The notice provided to Mr Jardine on 20 December 2004 was inadequate as he only received three weeks notice and not the four weeks required by his employment agreement.

Remedies

Lost wages

[45] I have found that the redundancy situation faced by NZIS was genuine, therefore no lost wages will be ordered for the period beyond the notice payable.

[46] In relation to the notice provided by NZIS, Mr Jardine was entitled to receive the benefit of the full notice period. It is accepted that Mr Jardine and NZIS had agreed that the period between Christmas/New Year would be taken as annual leave. However, Mr Jardine is entitled to receive one weeks pay in lieu of notice for the fourth week of his notice period which was not provided.

Compensation

[47] Mr Jardine has asked the Authority to award him \$4,000 pursuant to section 123(c)(i) of the Act. Mr Jardine provided little evidence of the hurt and humiliation he suffered as a result of the employer's failure to follow due process. I find that the level of compensation required to remedy his grievance is at the lower end of the scale. I assess compensation to be appropriately set at \$4,000.

[48] Mr Jardine was dismissed for redundancy through no fault of his own and he was not responsible for the procedural failings of NZIS. Therefore there is no issue of any contributory conduct by Mr Jardine.

NZIS is ordered to pay to Mr Jardine the sum of \$769.25 gross (being one weeks wages) in lieu of notice pursuant to section 123(b) of the Employment Relations Act within 28 days of the date of this determination.

NZIS is ordered to pay to Mr Jardine the sum of \$4,000 pursuant to section 123(c)(1) of the Employment Relations Act within 28 days of the date of this determination.

Costs

[49] Costs are reserved.

Vicki Campbell
Member of Employment Relations Authority