

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2011] NZERA Auckland 445  
5329745**

BETWEEN                      BAHRAM NAFISSI  
   Applicant  
  
AND                                NEW ZEALAND SCHOOL OF  
   EDUCATION LTD  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Diana Christensen Advocate for Applicant  
   Marie Wisker, Counsel for Respondent  
  
Investigation Meeting:        9 August 2011 at Auckland  
  
Submissions received:        16 August 2011 from Applicant and from Respondent  
  
Determination:                14 October 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Mr Bahram Nafissi, claims that he was unjustifiably dismissed. Specifically Mr Nafissi claims that the restructuring exercise undertaken by the Respondent, the New Zealand School of Education Limited (“NZSE”), which resulted in the termination of his employment on the grounds of redundancy was not genuine, was flawed and a sham.

[2]     NZSE denies that Mr Nafissi was unjustifiably dismissed and claims that it had genuine reasons for the restructuring exercise, and that it followed a fair and proper process in relation to the restructure and the subsequent selection process.

**Issues**

[3]     The following issues require determination:

1. Whether NZSE had genuine reasons for the restructuring exercise
2. Whether NZSE followed a fair and proper process

### 3. Whether the Selection Criteria were fair and reasonable

#### **Background Facts**

[4] Mr Bahram commenced employment at NZSE in November 2007 as a Senior IT Tutor on a fixed term employment agreement. On 1 January 2010 Mr Nafissi was appointed on a permanent basis and issued with a permanent employee employment agreement.

[5] NZSE prior to the conclusion of the restructuring process in October 2010 employed 18 employees, of whom 8 were tutors. Apart from Mr Nafissi, the tutors were on fixed-term employment agreements. All the employment agreements identified the positions as being those of tutors, but did not specify at which level the tutor was appointed to teach. Mrs Parker, Operations Manager for NZSE, said that in practice 2 of the 8 tutors had only taught at level 5, whereas the remaining tutors had predominantly taught at level 7.

[6] The students attending NZSE comprised both domestic and international students, the majority of domestic students undertaking Level 5 courses and the international students undertaking courses at Level 7.

[7] Mr Nafissi said that in early 2010 he experienced problems with his workload, and felt pressurised by NZSE to pass students whom he had identified as not meeting the requisite academic standards. On 4 June 2010 Mr Nafissi had emailed Mr Brennan, Academic Manager of NZSE, raising concerns about two of the students whom he considered had been cheating, following which he had left their essays in Mr Brennan's work tray for his consideration.

[8] Mr Brennan replied to this email on 30 June 2010 confirming the results of his investigation into the incidents raised by Mr Nafissi and the decisions he had made. The email concluded by Mr Brennan informing Mr Nafissi that:

*The policy and procedure for dealing with these issues will now be typed out by Dipti and posted to the policies folder for the whole team to review and follow.*

*This will include the making of appointments and issuing of warnings, what the tutors role and responsibility is and when withdrawal might occur.*

[9] In June 2010 Mr Nafissi was informed that he would not be paid a proportion of his bonus because of 'poor' student feedback. Mr Brennan explained that the tutor bonus entitlement was dependent on a number of criteria. Until the end of 2009 the tutors were

entitled to 'Academic Performance' bonuses for up to 10% of their gross salary. The bonus was paid on tutor performance and the objectives were centred on student retention, course and qualification completion, and 'pathwaying' to higher studies or employment. Under these criteria Mr Nafissi had received a full bonus entitlement for every quarter he was employed at NZSE until July 2009.

[10] From mid-July 2009 NZSE started to include student feedback and attendance criteria in the Academic Performance bonus scheme. Mr Berry, CEO of NZSE, explained that while there was no real science to student recruitment numbers, it had become apparent that student satisfaction lead to recommendations, which in turn assisted student recruitment.

[11] In the revised bonus scheme there were 4 categories, each with a 25% weighting, and in each category the KPI had to be achieved in order to receive the allocated bonus percentage. To achieve the student evaluation component of the bonus, the tutor needed to obtain 80% of the student feedback in the 'excellent to good' range.

[12] Mr Nafissi was paid 72.5% of his 2010 first quarter bonus, the shortfall being attributable to his not having met the administrative requirements or the required level of student feedback. Mr Nafissi was paid 75% of his 2010 second quarter bonus, the shortfall being attributable to his not having met the required level of student feedback. Mr Nafissi had been informed of the reasons for the shortfall on each occasion.

[13] Mr Nafissi said that the issues continued and that on or about the end of August 2010 there was a meeting with Mr Brennan in which Mr Brennan had informed him that unless he changed, he might not have a job the following year. Mr Brennan said that he had advised Mr Nafissi, in respect of whom the student feedback was worsening, that he should follow the guidelines for marking which had been agreed with the tutors. Mr Brennan agreed that he had commented to Mr Nafissi that the CEO expected better performance from the tutors but denied that he had threatened Mr Nafissi with the loss of his job

*Events prior to the restructuring exercise*

[14] Mr Berry stated that just prior to his commencing employment with NZSE in January 2010, Immigration New Zealand changed the level 7 immigration policies, which had up to that point given students additional immigration benefits, including extra immigration points and the ability to come to New Zealand with their spouse, for completing a level 7 IT course.

[15] Mr Berry said that the policy changes which had removed these benefits had had a devastating effect on NZSE. Mr Berry explained that in 2009 NZSE had a staff structure for

850 students; however following changes to the level 7 immigration policies, the NZSE recruitment team initially forecast a decrease to 509 students for 2010. This forecast was subsequently revised to 362, a reduction of almost 60% in year on year total student numbers.

[16] Mr Berry said that NZSE had tried throughout the first half of 2010 to manage the situation without affecting employee retention by reducing costs and trying new initiatives. Mr Berry said that he had been given explicit instructions by the Directors to reduce costs in NZSE, but only to the level that ensured external financial obligations such as bank loans, GST and tax requirements could be met.

[17] During this period Mr Berry said that two staff members had resigned and were not replaced. Additionally the Directors did not receive any dividend payments, and the management team including the CEO, Operations Manager, Academic Manager and Recruitment Manager, had all accepted a 20% reduction pay decrease and given up the opportunity to earn bonuses.

[18] Mr Berry explained that a level 6 Information Technology Diploma course was devised to supplement the level 7 courses, and a further option which might have had the dual effect of preserving tutor numbers and gaining more business for NZSE was to deliver business courses at level 6 and 7. Accordingly in early 2010 NZSE had applied to deliver NZSE business courses but this application had been declined. By 17 August 2010 Mr Berry said that it was apparent that NZSE was facing a crisis and that a restructure was necessary.

[19] Mr Berry said that on or about late August or early September 2010 he had sought advice from the Employers and Manufacturing Association (“EMA”) on the process NZSE should adopt in relation to the restructuring. Mr Berry said a member of the EMA had met with him in his office, and had provided advice on the process and the timeline to be adopted. The EMA adviser had also examined all the individual tutor agreements which were in place and had advised that all the employees on fixed term agreements should be treated as permanent employees.

[20] Mrs Parker explained that until the beginning of 2010, NZSE had a number of employees on fixed term contracts. Ms Parker said that advice from the EMA at that time was that the existing fixed term agreements did not meet the legal requirements for fixed term agreements in that they did not specify a reason for the fixed term, and all leave and other payments had been accrued and paid to employees on the same basis as it was paid to permanent employees.

[21] It was subsequently clarified by way of an email dated 23 September 2011 that the advice from the EMA at the beginning of 2010 referred to by Ms Parker, had been ascertained from Ms Parker's attendance at a one day training session held by the EMA in 2009, and that as a result of her knowledge attained at this training session, it had been decided by the Directors of NZSE at a management meeting to move all staff who had started employment at NZSE in 2007 or earlier to a permanent contract, and to place all other staff members on a revised fixed term agreement.

[22] As a result, in early 2010 NZSE changed the template fixed term agreement ('A') to incorporate a reason for the fixed term, this being: "*this role is dependent on student numbers which fluctuate depending on government policy and funding which is reviewed annually.*" The revised template ('B') also incorporated wording specifically addressing a redundancy situation:

#### **14. REDUNDANCY**

*In the event that you are declared redundant during the fixed term, you shall be given **four weeks'** notice of termination of your employment or at the discretion of the employer, be paid in lieu thereof. The notice period specified in this clause shall be inclusive of the notice period specified in the Termination clause above.*

*You will not have any entitlement to redundancy compensation.*

[23] Mrs Parker explained that staff who had commenced employment with NZSE during or before 2007 either moved to a permanent employment agreement, this included Mr Nafissi, or onto the fixed term agreement referred to as Template 'B'.

[24] Mrs Parker said she had also telephoned the EMA advice line on or about the same time as Mr Berry in late August, or early September 2010, and had received the same advice as he had, this being that all employees should be treated as permanent employees. Mrs Parker said she had additionally telephoned the Department of Labour ("DoL"), whose advice had concurred with that of the EMA.

[25] The written advice contained in an email sent by the EMA to Mr Berry on 15 September 2010 and provided to the Authority on 10 October 2011, whilst it addresses the procedural matters regarding the proposed restructuring, does not address the situation regarding the treatment of the fixed term employees.

[26] Mrs Parker was also unable to supply written confirmation of the advice received, but explained that the factors influencing the decision to treat the fixed term employees as if they were permanent were:

1. A number of the fixed term agreements had been rolled over two or three times;
2. None of the agreements had a stated reason for the fixed term in them, until it had been added earlier in 2010; and
3. All leave and other payments had been accrued and paid to staff as if they were all permanent employees.

[27] On 17 September 2010, Mr Brennan held a team meeting at which Mr Nafissi was present. Mr Nafissi said that Mr Brennan had informed the meeting that NZSE revenue was declining due to the forecasted reduction in student numbers, primarily in international students as a result of the NZ Immigration policy changes, and had invited ideas on how to improve the business.

#### *Initial Consultation Meeting*

[28] On 24 September 2010 Mr Brennan called a meeting of the academic staff to inform them of the situation NZSE was facing, and of the proposed restructuring of the team, which could result in some redundancies amongst the academic team. Mrs Parker was also present at this meeting and explained that Mr Brennan had been distressed at the meeting to the extent of having to leave it at one point.

[29] Mr Brennan provided detailed information on the reasons for undertaking a restructuring process. Mr Nafissi said that he did not recall being informed that measures already undertaken to try and alleviate the financial situation affecting NZSE included the directors having agreed to forego any dividend payments and the management team having all agreed to a reduction in their salaries and to forgo bonus payments. However the Consultation Process document from which Mr Brennan read when addressing the meeting, and a copy of which was given to each attendee, clearly itemised these two points.

[30] Mrs Parker said that the staff at the meeting were also provided with charts detailing the current and proposed structure, which showed a decrease in tutor numbers from 8 to 6, but that there was no discussion at this initial meeting about how the tutor roles would be split.

[31] Mrs Parker said that the employees were asked to consider voluntary redundancy, job-sharing or becoming part-time employees, and that she and Mr Brennan made it clear that redundancies would be the last resort. The staff members were asked to provide feedback by 29 September 2010. Mrs Parker said that Mr Brennan also told members of staff to come to see him and discuss their ideas, or to email him with their feedback.

[32] Mr Brennan said that some members of staff emailed feedback to him, and others came to see him and discussed their feedback. Mr Brennan collated all the feedback into table form for consideration by the management team at a meeting held on 1 October 2010.

[33] Mr Nafissi said that the feedback which he had provided consisted of two principle suggestions, one being the promoting of NZSE to high schools to attempt to increase the local student numbers, and the other that of providing additional IT services such as consultancy and software development.

[34] Following the management team meeting on 1 October 2010, Mr Brennan added into the table the comments of the management team resulting from their consideration, including the decision reached, against each feedback suggestion. The table records that Mr Nafissi's suggestion about promoting NZSE to high schools, a suggestion also made by other staff members, was considered a good idea. However Mr Brennan explained that because the number of domestic students NZSE could enrol annually was capped and NZSE attained this number, there was a limit to the additional number of local students NZSE could enrol.

[35] In regards to Mr Nafissi's other suggestion concerning an IT consultancy service, the minutes of the management meeting on 1 October 2010 record that the suggestion was discussed, but had been rejected due to the financial outlay which would be required, together with the fact that there was not a sufficiently stable student base to support the suggested structure.

[36] Mr Brennan stated that although the feedback provided had been interesting, it had not produced viable considerations to affect the proposed structure of NZSE. The management team had consequently reached the conclusion that there was no other option but to proceed with the proposed restructuring exercise. At this point more investigation was carried out into the forecasted student numbers and it was also concluded that the NZ Immigration policy changes would mainly impact level 7 courses.

[37] Mr Brennan explained that as the level 5 courses were not impacted by the NZ immigration changes because level 5 students were mainly domestic students, and the

domestic student numbers in 2010 were forecast to be approximately the same as in 2009, there was a continuing requirement for two tutors for level 5.

[38] Mrs Parker said that as the requirement for two level 5 tutors remained the same, it had been decided that these positions were not affected and should be excluded from the restructuring process.

#### *4 October 2010 meetings*

[39] Mr Brennan said that individual meetings were held on 4 October 2010 to inform the staff members unaffected by the restructure that they were being reconfirmed in their positions, and to inform other staff members that their positions were at risk of redundancy. This latter group included the level 7 tutor group, who were provided with a job description and the proposed Selection Criteria which would be used to determine who would fill the remaining tutor positions. Feedback on the Selection Criteria was requested by 7 October 2010.

[40] Mr Nafissi attended the meeting with Mr Brennan and Mrs Parker accompanied by Mrs Christensen as his support person. Mr Nafissi said he regarded this meeting as the end of the feedback and consultation process, and confirmed that he had been provided with the job description and the Selection Criteria and asked to provide feedback on the latter. Mr Nafissi stated that he had asked some questions about the level of the tutor roles as he had not been previously advised that these were being split into levels or that he could apply only for the level 6/7 level roles.

[41] Mr Nafissi was also offered at this time a redeployment option as a Recruitment Officer, but stated that as this role was not a tutor role, he did not consider it to be a valid option for him to consider.

[42] On 7 October 2010 Mr Nafissi submitted an Expression of Interest in the level 6/7 tutor position and provided four points of feedback on the Selection Criteria. All feedback received from the tutors on the Selection Criteria was recorded and these were considered at the management team meeting held on 8 October 2010. Mr Nafissi had particular concern at the weighting being given to Certifications as opposed to IT industry and teaching of Certification course work experience as he considered that this disadvantaged him in the selection process.

[43] As a result of Mr Nafissi's feedback Mr Brennan said that some of the Selection Criterion were altered, with more weight being given to IT industry experience in database

design and development using Transact SQL language and database administration. Mr Brennan said that the management team had also agreed to allocate points for less recent experience because some of the concepts in database design and administration were consistent.

*12 October 2010 meetings*

[44] Mr Brennan said that there were further individual meetings held with the affected staff members on 12 October 2010 at which the application of the Selection Criteria was discussed and agreement reached on how it had been done.

[45] Mr Nafissi attended the meeting on 12 October 2010 accompanied by Mr David Munro as his support person. At this meeting Mr Munro questioned Mr Brennan about whether Mr Nafissi had been informed of NZSE's desirability for certification, and Mr Brennan had confirmed that this had been made clear to Mr Nafissi in his performance reviews. Mr Nafissi said that he had signed a form and accepted the revised Selection Criteria, but had made it clear that he was agreeing to how the Selection Criteria should be applied, but was not agreeing to the actual Selection Criteria themselves.

[46] On 14 October 2010 Mr Nafissi attended a meeting with Mrs Christensen as his support person. At this meeting Mr Nafissi was informed of the outcome of the consultations and the restructure process, the outcome for Mr Nafissi being that his score under the revised Selection Criteria had not placed him in the top four of those tutors applying for the available level 7 tutor places and that consequently he had been selected for redundancy. Mr Brennan confirmed that Mr Nafissi was redundant with effect from that date and that Mr Nafissi would be paid four weeks pay in lieu of notice.

[47] The letter dated 14 October 2010 confirming these details further confirmed the offer made at the meeting to provide assistance with career guidance to Mr Nafissi. This assistance was to be in the form of a meeting with the NZSE Careers Advisor to provide assistance with writing a CV and preparation for interviews, and additionally for a payment to be made by NZSE to Workplace New Zealand in respect of emotional impact counselling and career coaching to be provided to Mr Nafissi.

[48] The following day there was a farewell lunch for those members of staff who had been made redundant, which Mr Nafissi attended. Mr Nafissi was presented with a gift at this lunch.

[49] Since leaving the employment of NZSE Mr Nafissi stated that he had laid complaints against NZSE with NZQA and the NZ Immigration department.

## **Determination**

### **Did NZSE have a genuine reason for the restructuring exercise?**

[50] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*<sup>1</sup> clarified that:

*An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.*

[51] It is not in dispute that the change in New Zealand Immigration policies in November 2009 which had previously provided overseas students with additional immigration benefits, impacted NZSE student numbers. The final forecasted impact in mid-2010 was an almost 60% reduction in student numbers, with the Level 7 predicted student numbers most heavily impacted.

[52] The strategies of the Directors foregoing dividend payments and the counterpart management team acceptance of a pay decrease and cancellation of bonus payments, undertaken by the Directors and management team of NZSE to contain and/or reduce costs and thereby provide an ability to maintain the number of tutors employed, were not effective in resolving the situation.

[53] An attempt by the management team to gain more business and preserve tutor numbers by delivering an additional business course was equally unsuccessful. A policy of not replacing members of staff that left NZSE's employment during the period also failed to avert the need to reduce staff numbers due to the deteriorating financial situation.

[54] The failure of the various strategies considered and attempted resulted in NZSE reaching the conclusion by August 2010 that a restructure of the organisation was necessary.

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<sup>1</sup> [1991] 1 NZLR 151

[55] I determine that NZSE had genuine commercial reasons for undertaking a restructuring exercise.

**Did NZSE follow a fair and proper process during the selection process?**

[56] Section 103A of the Employment Relations Act 2000 (“the Act”) sets out the test of justification:

*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.*

[57] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to the employee affected:

*“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and*

*(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).*

*Was the exclusion of the Level 5 Tutors from the selection pool by NZSE fair and reasonable?*

[58] Mrs Parker explained that there were two tutors who had always and only taught at level 5. There was no forecast change to the level 5 student numbers as these students were predominantly domestic students and unaffected by the NZ Immigration policy changes. The decision had therefore been taken to exclude these positions from the restructure.

[59] The commonly accepted definition of redundancy is that found in the Labour Relations Act 1987, which at s 184(5) defined redundancy as:

*...a situation where ...[a] worker’s employment is terminated by the employer, the termination being attributable, wholly or mainly, to the*

*fact that the position filled by that worker is, or will become, superfluous to the needs of the employer ...*

[60] The emphasis in this definition is, and has remained in case law since that time, on the position rather than the employee who occupies the position.

[61] Ms Nafissi had taught at level 5 in 2008, however he had taught at level 7 consistently throughout 2007, 2009 and 2010, apart from occasionally providing cover for level 5 tutor absence. The level 5 tutors had consistently and only taught at level 5. The forecast level 5 student numbers and consequently the requirement for the two tutor positions at that level remained unaltered for 2010.

[62] The level 5 positions were not affected by the restructuring exercise; the level 7 tutor positions were affected. Ms Nafissi was considered to be a level 7 tutor whose position was affected by the restructuring exercise.

[63] Mr Nafissi taught at level 7. As such he could be considered as in a senior position to the level 5 tutors. The UK concept of “*redundancy bumping*” whereby a more senior employee is prepared to take on a more junior role to avoid redundancy, is not a feature of New Zealand Employment Law. I find that there was no right on the part of NZSE to ‘bump’ a level 5 tutor from his or her position which was unaffected by the restructuring exercise, in order to accommodate Mr Nafissi.

[64] I conclude that there was a genuine reason to exclude the level 5 tutors from the selection pool, their positions were unaffected by the restructure. I find that such exclusion was fair and reasonable on the part of NZSE.

*Did NZSE conduct a fair and reasonable consultation process?*

[65] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*<sup>2</sup> noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”<sup>3</sup>

[66] Mr Nafissi had been present at the team meeting on 17 February 2010 at which Mr Brennan had informed those present of the declining NZSE revenue due to the forecasted

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<sup>2</sup> [2006] ERNZ 825,842

<sup>3</sup> Ibid at para [40]

reduction in student numbers. Whilst providing information, I do not consider this meeting to have been in the nature of a formal consultation meeting.

[67] However the meeting on 24 September 2010 had been a formal consultation meeting at which full information about the reasons for the proposed restructuring had been provided to the employees. The employees were informed that the existing 18 employee positions could reduce to 13, and were provided with copies of the then current structure and the proposed new structure.

[68] The employees were requested to provide feedback, and a time-line was set for this and for the various stages in the process at this first meeting, each employee being supplied with individual copies of the supporting documentation.

[69] All the employees provided feedback in various forms. Mr Brennan collated all the suggestions into table form and these had been considered at the management meeting on 1 October 2010. These considerations were added to the table.

[70] Mr Nafissi's suggestions had been considered but had not been accepted. I find that the reasons for the management team not accepting Mr Nafissi's suggestions were valid reasons made on genuine grounds.

[71] At the next stage on 4 October 2010, Mr Nafissi and the other level 7 tutors had been informed that their positions were at risk of redundancy, and had been provided with the relevant proposed job description and the proposed Selection Criteria to be applied. The tutors were requested to provide their feedback on the proposed Selection Criteria by 7 October 2010.

[72] Mr Nafissi had provided feedback on the Selection Criteria. All the feedback on the Selection Criteria had been considered at the 8 October 2010 management meeting. In respect of the feedback made by Mr Nafissi, some adjustments had been made to the Selection Criteria.

[73] There were further individual meetings with the affected level 7 tutors on 12 October 2010, including Mr Nafissi, at which the application of the Selection Criteria was discussed.

[74] Mr Nafissi claimed that there had not been genuine consultation in that he had not been provided with access to information relevant to the continuation of his employment as he was unaware until his individual meeting with Mr Brennan and Mrs Parker on 4 October 2010

that the tutor roles were being split into levels or that he could only apply for level 6/7 tutor roles.

[75] I consider that Mr Nafissi had been provided with detailed information at the meeting on 24 September 2010. It was not until after the management meeting on 1 October 2010 that further investigation into the forecasted student numbers had taken place and it had been determined that the main impact would be on level 7 student numbers. The decision to exclude the level 5 tutors from the restructuring exercise was, I have found, a decision open to NZSE to make.

[76] The information to exclude the level 5 tutors was conveyed to Mr Nafissi in what I consider to be a timely manner on Monday 4 October 2010, the first meeting with the affected level 7 tutors after the management meeting on Friday 1 October 2010.

[77] I find that there was genuine consultation in accordance with the principles as outlined in *Simpsons Farms Limited v Aberhart*<sup>4</sup>. There is no requirement that the consent of Mr Nafissi was necessary following a proper consultation, which I find this was, and there was no need that there be an agreement between NZSE and Mr Nafissi as stated by the Employment Court in *Cammish v Parliamentary Service*:<sup>5</sup>

*Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the person consulted is not necessary in the action taken following proper consultation.*

[78] I find that NZSE followed a fair and proper process during the selection process.

#### *Support post-redundancy decision*

[79] NZSE offered Mr Nafissi, and the other employees whose positions were made redundant as a result of the restructure exercise assistance with career guidance, career coaching and emotional impact counselling. Mr Nafissi chose not to pursue these offers. Mr Brennan said that the other employees who did do so were able to find alternative employment in a timely manner, mainly as a result of the assistance provided by the NZSE Careers Advisor.

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<sup>4</sup> at para [62]

<sup>5</sup> [1996] 1 ERNZ 404, per Goddard CJ at p417

*Was it fair and reasonable to treat all tutors as permanent employees?*

[80] Mr Berry and Mrs Parker explained that they had taken advice from the EMA and in Mrs Parker's case also from the DoL, on or about late August or early September 2010, prior to the commencement of the restructuring process, with the objective of ensuring that the procedure to be adopted in relation to the proposed restructuring process was appropriate.

[81] In particular Mrs Parker explained that NZSE was anxious to treat all employees fairly, and in this context the advice received was to treat all employees as permanent employees.

[82] The six level 7 tutors had all, apart from one, been appointed on fixed term agreement referred to as Template 'A', which did not include a genuine reason based on reasonable grounds<sup>6</sup> for the contract being of a fixed term nature. All five of this group of tutors had had their fixed term employment agreements renewed two or three times before the restructuring exercise, this included Mr Nafissi.

[83] All the tutors were involved in carrying out the same job role and responsibilities. Mr Nafissi confirmed at the Investigation Meeting that his job had not changed when he had moved from a fixed term to a permanent employment agreement.

[84] It had been decided to move Mr Nafissi on to a permanent employment agreement at the beginning of 2010; however two of the remaining tutors who had commenced employment in early 2008, only months after Mr Nafissi had commenced employment, were moved on to a fixed term employment agreement referred to as Template 'B' rather than on to a permanent agreement. These two tutors had had their Template 'A' fixed term employment agreements rolled over three times. All but one of the remaining tutors had also had their fixed term employment agreements Template 'A' changed to fixed term employment agreement Template 'B', and all but one had had their previous fixed term employment agreements rolled over.

[85] Fixed term employment agreement Template 'B' provides a reason for the fixed term nature of the agreement, this being attributable to fluctuating student numbers. However this does not explain the reason for the other tutors being treated less advantageously than Mr Nafissi in that they were not offered permanent employment contracts when they were performing similar roles and, in terms of roll-over, had previously been treated in a similar fashion to Mr Nafissi. It could equally well be considered that Mr Nafissi had been treated

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<sup>6</sup> Pursuant to s 66(2)(a) of the Act

more favourably than the others with the only reason being advanced as one of length of service. However I consider it was open to NZSE to have made the decision to offer Mr Nafissi a permanent employment agreement.

[86] The remaining tutors had been offered Template ‘B’ fixed term employment agreements at the beginning of 2010. Template ‘B’ fixed term employment agreement makes reference to the fixed term nature of the employment agreement at clause 1.1 which states:

**1.1**

*The position is for a fixed term. The reason for the fixed term is the need for this role is dependent on student numbers which fluctuates depending on government policy and funding which is reviewed annually. The fixed term will start on        and will end on        .*

*There shall be no expectation of employment continuing beyond the end date and employment may end earlier if for some reason the work is no longer available or if terminated by reason of another term of this agreement. Employment will end automatically and no further termination notice will be given.*

*To meet the requirements of s66 of the Employment Relations Act 2000 NZSE confirms the following:*

- (A) This fixed term agreement will terminate once the period is completed or earlier as set out in 1.1 above;*
- (B) The reason the employment will end is to allow the company to reassess the need for this role based on student numbers.*

[87] *ASTE v Central Institute of Technology*<sup>7</sup> was a case concerned with the entitlement of an employee on a fixed term contract to a redundancy payment. In that case the employee claimed to be excluded from redundancy entitlement due to the fixed term nature of her employment. The then Chief Judge Goddard held that the employee had an “*ongoing expectation of employment*” thus that she should not be excluded from the redundancy provisions applicable to permanent employees.

[88] Mr Berry’s evidence was that during the first half of 2010 the Directors of NZSE had been committed to retaining as many of the employees as possible and he had been instructed to attempt to reduce costs through the use of other strategies in order to avoid redundancies.

[89] At the time of signing the new fixed term agreements at the beginning of 2010 and for the ensuing period until the beginning of September 2010 I consider that in the circumstances

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<sup>7</sup> [1991] 2 ERNZ 464

in which the employees were effectively being buffered from the financial realities of the situation facing NZSE, it is probable that the employees on fixed term contracts maintained an expectation of continued employment within the terms of their employment agreements.

[90] Indeed, at the initial consultation meeting on 24 September 2010, Mr Brennan and Mrs Parker had made it clear that redundancy would be a last resort, and Mr Nafissi had said that the news of “*forced redundancies*” had come as a surprise to him.

[91] From the evidence it is clear that prior to and during the restructuring process the employees on fixed term contracts had been treated as permanent employees in respect of leave payment and other entitlements. The job responsibilities of the fixed term tutors were the same of those of Mr Nafissi as a permanent tutor. Significantly, following the restructuring, all tutors were moved to permanent employment agreements.

[92] At the Investigation Meeting Mrs Parker said that all the fixed term employees had an expectation that their employment would not be terminated at the end of the fixed term. I find this to be a credible observation only in the circumstances up to 1 January 2010 when renewal had been the norm rather than the exception, especially in the case of those five tutors whose original engagement had pre-dated the fixed term employment agreement Template ‘B’. The sixth tutor had been engaged under fixed term employment agreement Template ‘B’ on 6 April 2010, and in these circumstances I find it more likely than not that he or she would not have held the common expectation of renewal.

[93] I have considered whether the change from Template ‘A’ fixed term employment agreements to Template ‘B’ with the specific reference in Template ‘B’ to continuation of the role being dependent on fluctuating student numbers and the introduction of a redundancy clause would have had the effect of displacing that expectation of automatic renewal, especially in the circumstances in which the changes in NZ Immigration policy in November 2009 were known to the Directors, management and employees of NZSE.

[94] In this consideration, I find the wording of clause 1.1 to be highly relevant in that the clause specifically states that “*There should be no expectation of employment continuing beyond the end date*” and further that “*employment may end earlier if for some reason the work is no longer available...*”.

[95] I find that the wording of clause 1.1 of the Template ‘B’ fixed term employment agreement displaces any reasonable expectation of automatic renewal, especially when coupled with the inclusion of a redundancy clause which the Template ‘A’ fixed term

employment agreements had not included, and the fact that clause 22 of the Template 'B' fixed term employment agreement clarifies the employee's right to seek independent advice and makes reference to reasonable time being allowed for this purpose.

[96] NZSE sought advice on how to treat the fixed term tutors during the restructuring exercise from what it considered to be reliable sources. That advice, based on grounds arrived at after examination of the employment agreements by an independent third party, was to treat the fixed term tutors as permanent employees.

[97] Whilst I consider that in general it would be imprudent of a fair and reasonable employer to have acted otherwise than in accordance with advice from professional and well-regarded sources; I find in these circumstances that NZSE, having made the changes from Template "A" to Template 'B' fixed term employment agreements at the beginning of 2010, had created a situation in which the reduction in staff numbers could appropriately have been made in accordance with the terms of those agreements.

[98] In the circumstances I find that NZSE's decision to treat all employees as permanent employees was, whilst laudably motivated by a desire to act fairly and reasonably, not the correct decision, and that the tutors who had accepted and were employed on the Template 'B' fixed term employment agreements at time of the restructuring exercise should have been selected for redundancy prior to Mr Nafissi being considered for redundancy.

[99] In respect of the overall process followed, I determine that the decision to treat all level 7 tutors as permanent employees resulted in the process followed not being a fair and proper process.

#### **Were the Selection Criteria used by NZSE fair and reasonable?**

[100] The ICT Tutor job description stated under the section headed 'Education and Experience Requirements' that the following was 'Essential': *"Must hold current IT industry certifications or have recent IT industry work experience in areas of software development and/or network administration."*

[101] The Selection Criteria used by NZSE were divided into 6 categories and weighted accordingly. The categories were:

1. Length of service
2. Qualifications

3. Certifications (current)
4. Work experience – teaching ICT to Adults in NZ
5. Software Development Skills specific to DipIT6
6. Work Experience – ICT industry past 10 years (excluding teaching ICT)

[102] Application of Selection Criteria falls within an employer's exclusive management prerogative. However it is appropriate that the Authority should investigate whether NZSE applied the Selection Criteria in a fair and reasonable manner, whether it acted in good faith during the selection process, and whether it acted without regard to irrelevant criteria.

[103] Mr Brennan explained that in drafting up the proposed Selection Criteria, he had accessed the EMA and Department of Labour websites and spoken to the management team and the programme leader for the Level 6 course. In view of the fact that technology changed rapidly, Mr Brennan said that it had been decided to place particular emphasis on holding international certifications.

[104] Mr Brennan explained that these international certifications were reviewed annually by a panel of international experts which ensured that they were the recognised current global standard. Consequently NZSE had decided to include weighting in the Selection Criteria for the international certifications as they provided NZSE with a clear industry recognised measure of knowledge in a particular area.

[105] Mr Brennan further explained that NZSE was an Authorised Prometric Examination Centre delivering computer based international certifications such as CompTIA, Microsoft, Cisco, Oracle, SUN and IBM. As a consequence of being a Prometric testing facility, Mr Brennan said NZSE provided ongoing opportunities for staff and students to achieve international qualifications.

[106] Mr Brennan stated that as part of the NZSE Quality Management System there was a professional development programme in which staff were encouraged to participate, and a professional development template to initiate discussion with staff concerning their training needs for the year.

[107] Mr Brennan said there was an annual professional development budget of \$750.00 available for each staff member and as a result of this, together with the fact that there was a discount available for international certification examinations due to NZSE being an Authorised Prometric Examination Centre, staff were able to take several examinations a year if they wished to do so.

[108] Mr Brennan said for these reasons NZSE had decided that international certification examinations were an acceptable, relevant, objective and fair measure of a tutor's suitability for the role. Recent IT industry experience, particularly related to the topics which were going to be taught in the new level 6 Diploma in Information Technology were considered to be a further measure of currency and relevancy.

[109] At the individual meetings on 4 October 2010 members of staff were asked to provide feedback on the Selection Criteria. Mr Nafissi had been concerned at the emphasis placed on current IT industry certifications when the ICT Tutor job description referred to "*recent IT industry work experience in areas of software development and/or network administration*". As a result of this concern, Mr Nafissi provided four points of feedback; these were considered at the management meeting on 8 October 2010.

[110] In a response to a feedback observation that no points had been allocated on the proposed Selection Criteria to IT industry experience in the areas of software development, database administration and network administration, and that by so doing the Selection Criteria would then match the ICT Tutor job description, the minutes from the management meeting on 8 October 2010 record:

*Having consulted with Course Coordinator Dipti Masarani who has an in depth knowledge of the technical skills/knowledge required for the delivery of the Diploma in Information Technology level 6 Andrew believed that this was valid feedback. He proposed to include two more items in criteria 5:*

- *Database design and development using Transact-SQL (T-SQL) language*
- *Database administration*

*The team agreed to the inclusion and then discussed whether they should broaden the scope of the criteria to include less recent experience as well because while features and tools changed some of the concepts in database design and administration remain constant. It was agreed to give more weighting to recent experience but also to acknowledge experience going back ten years.*

[111] As a result of this feedback, changes were made to the Selection Criteria regarding the IT industry experience in database.

[112] Mr Nafissi was consulted about the Selection Criteria, his feedback was given consideration, and adjustments to the Selection Criteria were made as a result of his feedback. In particular additional weighting was applied to criteria 5 to reflect relevant industry

experience and thereby to ensure the Selection Criteria matched the ICT Tutor job description.

[113] NZSE was in a position in which international student numbers were forecast to decrease dramatically. In these circumstances I consider it reasonable that NZSE chose to weight international qualifications as an objective measurement of a tutor's suitability in the on-going operation of the School in addition to relevant industry experience

[114] I consider it relevant to the application of the Selection Criteria that NZSE made funding available annually to employees for the purpose of personal development and that some of the tutors did avail themselves of this opportunity to gain international certification. Mr Nafissi could similarly have availed himself of the opportunity offered to acquire international certifications to supplement his industry experience. I consider it also relevant that Mr Nafissi had been informed by Mr Brennan at his performance reviews of NZSE view that international certifications were desirable.

[115] I find that the Selection Criteria were fair, measurable and objective and that NZSE acted in good faith in their application to the tutors.

*Did NZSE pre-determine the outcome of the restructuring process?*

[116] Mr Nafissi submitted that NZSE pre-determined the outcome of the restructuring process which resulted in the termination of his employment on grounds of redundancy.

[117] In particular Mr Nafissi claims that he was singled out because he had complained about NZSE's standards as regards the assessing of students, and/or because he was the highest paid tutor.

[118] I note in this context that NZSE had tried to avoid the need to make redundancies by pursuing alternatives such as management team salary reductions, job sharing suggestions, and the policy of not replacing employees who left the employment of NZSE. Further that a consultation feedback suggestion that salaries could be reduced had been rejected by the management team at the meeting on 1 October 2010.

[119] I have found the restructuring to have been prompted by a genuine reason. I have also found that the Selection Criteria to have been fair and objective. There is no account taken in the Selection Criteria of either performance or salary considerations.

[120] The selection of Mr Nafissi for redundancy was made based on a mistaken premise that all the level 7 tutors should be treated as permanent employees. I find that this was a fundamental error on the part of NZSE consisting of the treating of all employees as permanent when the level 7 tutors, apart from Mr Nafissi, were subject to a valid fixed term employment agreement which envisaged the employment ending when triggered by such a situation as that encountered by NZSE. Whilst I held this decision to have been incorrect, I do not find it to have been motivated by anything other than a desire to act fairly and reasonably throughout the restructuring process.

[121] I do not find that NZSE predetermined the outcome of the restructuring process.

[122] Having taken into consideration all the circumstances, I determine that Mr Nafissi has been unjustifiably dismissed, and he is entitled to remedies.

## **Remedies**

### *Reinstatement*

[123] Mr Nafissi is seeking reinstatement. Reinstatement is no longer the primary remedy, but may be provided in accordance with s125 of the Act if it is practicable and reasonable.

[124] Since leaving his employment with NZSE Mr Nafissi has made complaints to NZQA and NZ Immigration department with a view to discrediting NZSE. As a result NZSE claims that it no longer has trust and confidence in Mr Nafissi.

[125] Mutual trust and confidence are essential in an employment relationship. There is also a statutory duty that the parties to an employment relationship act in good faith pursuant to s 4 of the Act.

[126] I find that by making these complaints against NZSE, Mr Nafissi has not acted in good faith and has made it impossible for NZSE to have the requisite degree of trust and confidence in him. In these circumstances, I do not find reinstatement to be practicable.

### *Reimbursement of Lost Wages*

[127] I have found Mr Nafissi's employment to have been unjustifiably terminated by NZSE with effect from 14 October 2010. Mr Nafissi said that he tried to mitigate the effects of the loss of his employment by looking for alternative employment but I note that Mr Nafissi made no attempt to find alternative employment until December 2010 as he claimed

he was too distressed by the decision to do so, although Mr Nafissi does not claim that he required medical intervention during this period.

[128] I observe that most employees are distressed by the loss of a job, more especially so in circumstances where such job loss is considered to be unjustifiable. This does not however remove the requirement upon the affected employee to mitigate the loss.

[129] In this context, I observe that prior to his selection for redundancy; Mr Nafissi was offered a redeployment option, which he declined. NZSE had provided Mr Nafissi with the offer of careers advice and support, which Mr Nafissi had also declined. In the case of other employees who had been made redundant, their having taking advantage of the support offered had resulted in them having found alternative employment within a reasonably short period of time.

[130] Mr Nafissi stated that he had applied for two positions only during the period since the termination of his employment with NZSE, one of which was unsuccessful, and the other of which resulted in his appointment to a part-time position with effect from 7 March 2011. I am persuaded in light of the evidence of suitable job availability produced in evidence by NZSE that there were opportunities available to Mr Nafissi which he chose not to pursue.

[131] I am not convinced that Mr Nafissi made a vigorous effort to mitigate his loss during the period of his unemployment by finding suitable alternative employment.

[132] I award Mr Nafissi 3 months lost wages pursuant to s 128(2) of the Act. I note that Mr Nafissi was paid 4 weeks notice in lieu and take this into consideration.

[133] I order NZSE to pay Mr Nafissi the balance of 3 months lost wages, less the amount already paid as salary in lieu of notice. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority

*Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

[134] Mr Nafissi is also entitled to compensation for humiliation and distress. I find that in respect of his unjustifiable dismissal, Mr Nafissi has experienced humiliation, loss of dignity and injury to feelings. Mr Nafissi also stated that there has been an adverse impact on his health, although this is unsupported by medical evidence.

[135] In respect of the dismissal grievances, NZSE is to pay Mr Nafissi the sum of \$4,000.00, pursuant to s 123(1) (c) (i).

*Compensation for Loss of a Benefit under s 123 (1)(c )(ii)*

[136] Mr Nafissi is claiming compensation in respect of certification training, bonus payments and overtime.

*Certification Training*

[137] NZSE provided funding of \$750.00 to employees for the purpose of self-development. This was not a contractual entitlement but was available to employees to utilise if they wished to do so. These monies were designated for a specific purpose and the self development of employees would have the effect of enhancing the professional integrity of NZSE.

[138] Mr Nafissi chose not to take advantage of the funding despite being advised by NZSE of the desirability of certification, and I see no basis for making an award of a financial amount in respect of training which Mr Nafissi had chosen to reject during the course of his employment.

*Bonus Payment*

[139] Mr Nafissi is claiming recompense for the shortfall in his bonus entitlements. Mr Nafissi had not been paid the full bonus amounts achievable for the first and second quarter bonuses in 2010.

[140] I find that the shortfall was attributable to Mr Nafissi not having met the bonus payment conditions, a situation of which he had been informed at the relevant time, and make no order in respect of the bonus payments.

*Overtime payments*

[141] Mr Nafissi alleged that he had worked overtime for which he had not received payment. NZSE stated that all overtime had to be approved. Mr Nafissi produced no evidence to substantiate that the overtime claimed had been approved, and in these circumstances I make no award for payment in respect of the alleged overtime.

**Costs**

[142] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs

within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**