

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 495
5468340

BETWEEN DEAN WILLIAMSON
Applicant

A N D NEW ZEALAND INSTITUTE
OF STUDIES LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: The Applicant in person
Jennifer West, representative for the Respondent

Investigation Meeting: 26 November 2014 at Auckland

Date of Determination: 03 December 2014

DETERMINATION OF THE AUTHORITY

- A. New Zealand Institute of Studies Limited (the Institute) acted unjustifiably in removing Mr Dean Williamson from teaching classes during his two week trial period. Mr Williamson was unjustifiably disadvantaged in his employment by the Institute's actions.**
- B. The Institute acted unjustifiably in dismissing Mr Williamson in reliance on a trial period. Mr Williamson was unjustifiably dismissed by the Institute.**
- C. Taking contribution in to account, within 28 days of the date of this determination the Institute must settle Mr Williamson's personal grievance claims by paying him:**
- (i) \$450 gross as reimbursement of lost wages;**

- (ii) **\$500.00 as compensation for humiliation, loss of dignity and injury to his feelings in respect of his unjustifiable dismissal;**
- (iii) **No award of compensation in respect of the unjustifiable disadvantage claim.**

D. The Institute is ordered to reimburse Mr Williamson the Authority's filing fee of \$71.56.

Employment relationship problem

[1] Mr Williamson is an English language teacher and for approximately 12 years has held a number of teaching positions primarily at language schools in Auckland. In the last 6 years Mr Williamson has successfully brought claims against 3 of his former employers. Each of those former employers is a private language institution. Issues traversed in those cases brought by Mr Williamson to the Authority included the validity of fixed term employment agreements, employment status and constructive dismissal.

[2] The Institute is registered with the New Zealand Qualifications Authority and the New Zealand Ministry of Education. The Institute is a private organisation offering courses in business, travel, tourism and the English language.¹

[3] Subject to the successful completion of a 2 week trial period, Mr Williamson was offered part time employment as an English teacher at the Institute in June 2014.

[4] The trial did not go well and prior to its completion, Mr Williamson had his afternoon classes removed and was subsequently dismissed by the Institute. Mr Williamson says the "trial period" was unlawful and could not be relied upon by the Institute to dismiss him. Mr Williamson says his dismissal was both substantively and procedurally unfair.

[5] The Institute says Mr Williamson performed poorly during the trial period, it received serious complaints from students about him and it had no option but to terminate his employment. The Institute says it was able to rely on the trial period to terminate Mr Williamson's employment.

¹ www.nzios.co.nz

Issues

- [6] The issues for resolution, as they emerged in the investigation, were:
- (a) Whether Mr Williamson was employed by the Institute on a trial period;
 - (b) Was the Institute entitled to dismiss Mr Williamson pursuant to the trial period;
 - (c) If so, was the dismissal justified;
 - (d) Whether Mr Williamson was unjustifiably disadvantaged by how the Institute dealt with concerns about his performance, including not requiring him to continue teaching afternoon classes during the second week of the trial period;
 - (e) What remedies, if any, are due to Mr Williamson; and
 - (f) Whether Mr Williamson contributed to his dismissal?

Relevant Facts

[7] Mr Williamson saw an advertisement for a teacher of English as a second language (ESOL teacher) placed by the Institute on the SEEK website in early June 2014. Ms Jennifer West, the Institute's ESOL and NCEA team leader says the Institute needed a short term replacement for its ESOL teacher who was in Mongolia until mid-August 2014. Mr Williamson sent his application for the position together with his resumé to the Institute.

[8] On 3 June, Ms West emailed Mr Williamson asking whether he would be available to come in for an informal chat about his application. Following an exchange of emails between Mr Williamson and Ms West, Mr Williamson attended an informal interview with Ms West on 4 June. Mr Williamson and Ms West met and discussed Mr Williamson's experience and capabilities to do the job. No offer of employment was made at that time.

[9] On 9 June, Ms West sent an email to Mr Williamson thanking him for meeting with her and asking if he was able to teach one trial class under observation by teachers from the Institute. Mr Williamson agreed to do so.

[10] Prior to the trial class, Ms West emailed Mr Williamson stating:

The position we have available currently is an ESOL teacher for pre-intermediate from 9-1 and EAP level 1 from 1.40-3.30pm – 30 hours teacher per week until August 15th but expect it to continue depending upon the candidate. Let us know as soon as you can whether you are still interested in this position. Thanks.

[11] Mr Williamson responded that he was interested in the position. On 11 June Mr Williamson took the trial class as agreed.

[12] Ms West says Mr Williamson did not perform particularly well and she told him that the trial class had been “okay”. Ms West says that Mr Williamson was poorly prepared and his presentation to the class was not professional. However, Ms West says she was aware that taking a trial class under observation could be stressful. Ms West felt Mr Williamson may perform better in different circumstances.

[13] Ms West says that after observing Mr Williamson, she decided that she wanted to employ him on a trial basis to see whether in fact he was appropriate for the position being offered.

[14] On 13 June Ms West sent an email to Mr Williamson as follows:

... We would like for you to come and work here for us, potentially on a 30 hour contract. To be up front before you consider the post, I would like you to be fully aware of the fact that the hourly rate would be \$30 and there would be a two week trial period (from June 16th 2014 – June 27th 2014), after which we would then issue a contract all being well. For these two weeks you would be teaching the pre-intermediate class (that you worked with on Wednesday) from 9 to 1pm and a level 1 EAP class from 1.40 to 3.30pm –totalling 30 hours contact time per week. If you agree to both of these conditions, please let me know asap and then we can arrange a time for you to come in to get the books and class materials for next week. I look forward to hearing from you soon.

[15] Mr Williamson was not offered a written employment agreement nor did he ask for one. Mr Williamson agreed to the trial and went in to the Institute on Saturday 14 June to get the materials needed to teach on Monday 16 June.

[16] The trial period did not go well and Ms West became increasingly concerned about Mr Williamson. Ms West says she was concerned about the number and nature of student complaints, Mr Williamson’s inability to work as part of a team, his attitude and his irregular hours of work.

[17] On 16 and 17 June, Ms West provided Mr Williamson with support, in particular with one student who Mr Williamson complained was being rude.

[18] On 19 June Mr Williamson left his afternoon class looking angry and flustered and Ms West asked if everything was okay. Mr Williamson's response was that he needed to "*sleep on it*" and then left.

[19] Ms West was very surprised by this response and sent an email to Mr Williamson as follows:

Hi Dean,

I think we probably need to talk about your classes as I get the impression all is not well. Could you pop into my office in the morning before class. Thanks.

Best regards, Jennifer A West

[20] Ms West says she did not receive a reply to her email and Mr Williamson did not come and see her in the morning. Ms West says she believed that Mr Williamson was not going to report for work and take the class that he was scheduled to take. Ms West went to the class Mr Williamson was to take on the morning of 20 June and prepared to take it herself. Mr Williamson was due to attend the class at 8.40am, but Ms West says he did not arrive until just before 9am. Mr Williamson denied this saying he arrived at work at 8.45am.

[21] On the morning of 20 June, Ms West and Mr Williamson met. Ms West raised with Mr Williamson issues around his performance and some student complaints that she had received. Mr Williamson denied there were any issues. Ms West offered Mr Williamson support including that she teach his afternoon class. Mr Williamson became belligerent and refused to discuss matters further.

[22] Ms West received further student complaints during the day from the Student advisor. The nature of the complaints concerned Ms West so much that she referred them to Mr Peter Chou, the Operations Manager.

[23] Mr Chou and Ms West felt they could not offer Mr Williamson the contract role and felt they should not continue his employment when his trial period expired.

[24] At approximately 3.30pm that afternoon Ms West met again with Mr Williamson. Ms West explained to Mr Williamson that he would not be needed for the afternoon classes for the rest of his trial period because of a holiday arrangement the Institute had come to with its students. In fact, Ms West was not happy with Mr Williamson's work and that was the underlying reason for her decision. Mr Williamson was informed he would be paid as usual.

[25] Mr Williamson emailed Ms West on 24 June, after the meeting as follows:

Hi Jennifer,

I do not agree with your decision to cancel my afternoon class for this week. In addition I wish to make a complaint about Melanie the Chinese student in my class. She is continuing to be not complying with my reasonable instructions in class even after I discussed the issue with you last week.

[26] Ms West responded shortly after receiving Mr Williamson's email as follows:

Hi Dean,

As I agreed, you will be paid for the 30 hours both last week and this. I will place Melanie in the other G2 class from tomorrow. However, after review, I must inform you that the position that you are trialling for will not be available after this week.

[27] On 25 June, Mr Williamson was spoken to by Mr Peter Chou and Mr Robert Davies, the academic quality manager. Mr Williamson was requested to attend a meeting with them in the boardroom. Mr Chou and Mr Davies informed Mr Williamson that he was not required to complete the work trial which was due to finish on 27 June.

[28] Mr Williamson claims his dismissal was unjustified. The Institute claims it was entitled to dismiss Mr Williamson as he was on a trial and was not performing.

First Issue

Was Mr Williamson employed by the Institute on a trial period?

[29] I refer to the decision of Chief Judge Colgan in *The Salad Bowl Ltd v. Amberleigh Howe-Thornley*². The Employment Court in that decision considers trial

² NZEmpC 152

work periods and their relationship with other provisions in the Employment Relations Act 2000 (the Act), including ss.66, 67 and 67A.

[30] It is clear that the trial period relied upon by the Institute was not included as a clause in a written employment agreement because Mr Williamson was never provided with a written employment agreement. Mr Chou who was responsible for the preparation of employment agreements for staff says he relies on the particular department recruiting staff to provide him with details so that he can prepare employment agreements. In fact, Mr Chou simply filled in employment agreement templates for staff. No request was made of Mr Chou to prepare an employment agreement for Mr Williamson.

[31] Mr Williamson received an email offering him employment for a trial period at a rate of \$30 per hour for 30 hours a week. The Institute appeared to believe that because the email said Mr Williamson was on a trial that it could dismiss him during the course of that trial without giving reasons. In effect, the Institute had offered Mr Williamson a two week trial in order to assess his suitability for a fixed term period of employment.

[32] As found in *The Salad Bowl*, employers cannot use fixed term employment agreements for the purpose of establishing an employee's suitability for ongoing employment. If employers are tempted to do so, "*such arrangements lose their fixed term advantages for employers*". In effect, the two week trial was, in my view, a fixed term employment agreement to establish Mr Williamson's suitability to undertake a teaching role for the period in which the usual teacher taking the classes was away until 15 August. I find the Institute did not employ Mr Williamson on a trial period in accordance with the trial provisions contained in the Act, rather it employed Mr Williamson on a fixed term trial basis to establish his suitability to perform the role.

Second Issue

Was the Institute entitled to dismiss Mr Williamson pursuant to the "trial period"?

[33] In this instance, I find the use of a fixed term trial period to be unlawful and in breach of the Act. Mr Williamson was able to, and did, treat the fixed term as ineffective.

[34] Judge Colgan in *The Salad Bowl* commented on issues arising out of the use of “pre-permanent employment trials”. At para.[106] he stated:

... the enactment by Parliament of sections 67A and 67B of the Act, together with the prohibition on suitability of employment being a valid ground for a fixed term agreement under section 66, may mean that if a potential employer wants to “try out” a potential employee, that person may have to be engaged as an employee on a trial period of appropriate duration under s.67A. Although this would require greater compliance costs on the part of both parties, such an arrangement would offer some protections to the employee during the trial period but would also enable the employer to conclude that the employee is unsuitable for the position and to terminate the arrangement without the risk of an unjustified dismissal personal grievance.

[35] This is an approach that could have been taken by the Institute. Such an approach would have meant that the Institute should have offered Mr Williamson a written employment agreement which included a trial period provision in accordance with s.67A of the Act. Such an approach would have allowed the Institute time to conclude whether Mr Williamson was suitable for the role and if not, terminate the relationship without the risk of Mr Williamson raising a personal grievance, as has occurred.

[36] Probationary arrangements are allowed under s.67 of the Act. However, there are strict obligations imposed on employers seeking to rely on such arrangements. These obligations include specifying the probationary period in writing in the employment agreement. Mr Williamson was not provided with a written employment agreement. The email from Ms West to Mr Williamson on 13 June did set out certain terms and conditions of employment in writing but did not provide the information required under s.65 of the Act.

[37] In my view, these failures by the Institute meant that it was unable to rely on the trial period when terminating Mr Williamson’s employment.

Third Issue

Was the dismissal justified?

[38] Given my finding in relation to the Second Issue, the Institute must satisfy the test in s.103A of the Act that in dismissing Mr Williamson it acted fairly and reasonably in the circumstances.

[39] Performance issues and student complaints were raised with Mr Williamson but the Institute did not allow Mr Williamson a proper opportunity to respond to the allegations. The Institute was under the false impression it could rely on the trial and not investigate the concerns and complaints about Mr Williamson. Ms West did try and discuss issues with Mr Williamson but Mr Williamson was not prepared to engage in my view. Even so, more should have been done by the Institute before deciding Mr Williamson was to be dismissed.

[40] I find Mr Williamson's dismissal to have been unjustified both substantively and procedurally.

Fourth Issue

Was Mr Williamson unjustifiably disadvantaged by how the Institute dealt with concerns about his performance, including not requiring him to continue teaching afternoon classes during the second week of the trial period?

[41] For reasons similar to those given in relation to Mr Williamson's dismissal I find Mr Williamson was unjustifiably disadvantaged. The Institute did not fully and fairly investigate the concerns and complaints about Mr Williamson and allow him the opportunity to respond prior to deciding to remove the afternoon class from him.

Fifth Issue

What remedies, if any, are due to Mr Williamson?

[42] Mr Williamson, in my view, did not perform adequately and the Institute received a number of complaints by students which were of great concern to it and its reputation. Ms West unsuccessfully attempted to discuss these matters with Mr Williamson.

[43] Mr Williamson found another role on 7 July 2014, one week after his dismissal. The new role paid a higher hourly rate of \$55 gross. Mr Williamson was employed for 7 weeks in the 5 month period from the date of his dismissal down to the date of the investigation meeting. Mr Williamson provided no evidence of his attempts to find work and did not sufficiently mitigate his loss in my view.

[44] Pursuant to s.128 of the Act, I order payment to Mr Williamson of the sum of \$900 gross being the period of one week from the date of dismissal until he obtained his new role on 7 July 2014.

[45] Mr Williamson seeks compensation for hurt and humiliation he says he suffered as a result of the dismissal. Mr Williamson provided insufficient evidence in support of this claim. I award \$1,000 in distress compensation pursuant to s.123(1)(c)(i) of the Act in respect of the unjustified dismissal.

[46] Mr Williamson seeks compensation for hurt and humiliation he says he suffered as a result of the unjustified disadvantage. Again, Mr Williamson failed to provide sufficient evidence to support the claim. Mr Williamson was paid for the afternoon classes even though he was not required to teach. I do not believe an award of compensation is justified in the circumstances.

Sixth Issue

If remedies are payable, did Mr Williamson contribute to his dismissal?

[47] I am required under s.124 of the Act to consider whether Mr Williamson's actions contributed towards the situation that gave rise to the personal grievance.

[48] Ms West sought to discuss issues with Mr Williamson but was unable to because Mr Williamson became belligerent and refused to engage with her. Ms West could not address the performance matters with Mr Williamson because of his actions.

[49] It is my finding that Mr Williamson's actions did contribute to the situation and the order for remedies will therefore be reduced. I consider a reduction of 50% appropriate in the circumstances. The above remedies are accordingly reduced by 50%.

[50] Further, by way of comment to both parties, it is my view that Mr Williamson is well aware of the requirements of New Zealand's employment law. Mr Williamson is aware of the requirements to provide employees with written employment agreements and of the requirements if an employer wishes to include a trial period in the employment agreement. Mr Williamson made no request for an employment agreement and sought no information about the trial period. These actions were not constructive.

[51] Nothing that I have said in paragraph 50 excuses the Institute from its failure to take responsibility as an employer for providing prospective employees with suitable employment agreements, not simply templates, and from taking steps to ensure the employee takes independent advice before signing the employment

agreement. These are basic obligations required of employers under New Zealand's employment law.

[52] It appears the Institute and some other private learning institutions, particularly English language institutions, in Auckland would benefit from taking legal advice to ensure they are fully aware of their obligations when seeking to employ staff on fixed term, casual, permanent employment agreements or employment agreements containing trial periods.

Costs

[53] The Institute is ordered to reimburse Mr Williamson the Authority's filing fee of \$71.56.

Anna Fitzgibbon
Member of the Employment Relations Authority