

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 46/10  
5276071

BETWEEN                      DEAN WILLIAMSON  
   Applicant  
  
AND                                VICTORIA INSTITUTE (NZ)  
   LIMITED  
   Respondent

Member of Authority:        Alastair Dumbleton  
  
Representatives:              Applicant in person  
   Peter Meng, advocate for Respondent  
  
Investigation Meeting:        25 November and 18 December 2009, 3 February 2010  
  
Determination:                5 February 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The employment problems of the applicant Mr Dean Williamson investigated by the Authority and now to be determined, are to do with;

- The lawfulness of his fixed term employment by the respondent Victoria Institute (NZ) Ltd (VINZ).
- The justification for his dismissal by VINZ on the grounds of redundancy.

[2]     Before investigating the problems the Authority directed Mr Williamson and VINZ to try and resolve them through mediation.

[3]     The employment relationship was formed in April 2009 when Mr Williamson and VINZ, an English language school, signed an individual employment agreement for a position described as part-time ESOL/IELTS tutor or teacher.

[4] The term of employment was expressed to be limited to a period beginning on 20 April 2009 and ending on 17 July 2009. “*The seasonal and irregular nature of student enrolments*” was stated to be the reason for the fixed term.

[5] The Agreement also contained a redundancy provision, as follows exactly:

***Redundancy***

*To enable the employer to employ the employee, there must have sufficient student number in the employee’s class. The employer is endeavoured in maximising student enrolments. However, if the class does not have sufficient number of students (7 students are the minimum number), in foreseeable period of time the employer can not recruit enough students into this class and the employer has to stop running this class or merge this class with others, the employer may terminate the contract as redundancy.*

*The employer will follow the redundancy regulations set up by the Department of Labour. The employer will consult with the employee regarding the possibility of redundancy and any alternatives to dismissal, give the employee 2 weeks notice in writing.*

[6] After the specified contract expiry date had been reached Mr Williamson remained employed by VINZ to do the same work. He continued to receive pay at the same rate of \$25 per hour as provided in the employment agreement.

[7] Although there was discussion about a new agreement the parties did not enter into one, at least not formally. Mr Williamson requested a permanent position at \$25 per hour but this was rejected by VINZ through its General Manager, Mr William Wang, who made two offers of further employment.

[8] Both were for the position of English teacher. The first was described as permanent part time and was at an hourly rate of \$20 excluding holiday pay. The second was expressed to be “*Fixed Term Part Time*” at an hourly rate of \$25 including holiday pay.

[9] The fixed term position, the second of the two offered Mr Williamson, was for about five months, from 28 July to 18 December 2009. It was described by Mr Wang in a letter of 6 August 2009, as follows:

*This is exactly the same terms and conditions as your previous employment contract with the Institute. Again this is based on the uncertainty of the student enrolments. After the Christmas and Chinese New Year holiday, it is really an uncertainty of how many new students we can get enrolled.*

*If you take this option, your contract will be terminated on 18 December 2009. However, the Institute and you will discuss the possibility of signing a new contract.*

[10] No agreement had been reached from these discussions by 24 September 2009, when Mr Williamson was advised by letter from Mr Wang that his employment was to be terminated with effect from Friday 9 October 2009.

[11] Mr Wang advised in his letter that “*it becomes no choice but let this position redundant.*” He expressed his frustration at the attempts he said he had made to communicate with Mr Williamson and get his response to the two offers of further employment. He said in his letter that redundancy was not what VINZ and Mr Williamson wished to happen. Mr Wang also offered Mr Williamson a further opportunity to talk to VINZ and raise his concerns or anything else, by Friday 25 September 2009.

[12] In response Mr Williamson sent VINZ an email advising of his resignation with effect from 29 September. He said:

*You have tried everything in your power to get rid of me including this unjustified redundancy, as well as the issues mentioned above [“intolerable working conditions”]. I feel I have been forced out of my employment which is in effect constructive dismissal.*

[13] At the beginning of September while he was still employed, Mr Williamson had lodged a statement of problem with the Authority to challenge the lawfulness of his fixed term agreement, as well as the pay-as-you-go holiday pay (\$2 per hour) he had been receiving as a component of the \$25 per hour pay rate under it. Mr Williamson also challenged a warning he had been given as being unjustifiable. He claimed compensation for hurt feelings and loss of dignity, and also to recover holiday pay at 8% of his gross earnings, relying on an express term of the April employment agreement.

[14] Upon leaving VINZ on 29 September, Mr Williamson lodged an amended statement of problem in which he alleged that his employment had not been genuinely under a fixed term and that his redundancy was unjustified. He maintained his earlier challenge against the warning he had received.

[15] As remedies he sought compensation and reimbursement of lost wages, as well as reinstatement to “*permanent part time*” employment.

[16] I conclude that a genuine redundancy situation was not present to justify the decision of VINZ to terminate Mr Williamson’s employment on the grounds of redundancy. Mr Williamson was notified of the redundancy on 24 September 2009. Only a week earlier, on 17 September, as the log of activities and discussions kept by VINZ shows, an email had been sent to Mr Williamson by Mr Peter Meng, the Principal of VINZ, in which he advised of several things that the school needed to discuss immediately. They were listed as follows:

1. *Your employment agreement;*

*The offer is clear which are fixed term contract with same hourly rate and permanent contract with a little bit lower hourly rate. If you’d like to take one of them, we’d solve this issue immediately. However, if you do not agree with any of them, we have to discuss about it again.*

2. *The redundancy of Advanced Level class position.*

*As we discussed at the meeting on the 8th September, because the Advanced Level class has had less than 7 students (only 5 students since the 7th September) and will be getting less in the foreseeable period of time (this class will have only 2 students by the end of 2009). The school has to make this position redundant.*

[17] As Mr Meng confirmed in his evidence to the Authority, a week before Mr Williamson was notified of his redundancy he had been offered further employment either on a fixed term basis or permanent basis. For the fixed term employment the offered rate was \$25 per hour which included \$2 pay-as-you-go holiday pay, whereas for the permanent employment the rate offered was \$20 per hour not including holiday pay. Both offers of employment were in relation to the same work or position that Mr Williamson had been originally employed in, as an ESOL/IELTS teacher, and was still performing when the offers were made.

[18] VINZ appeared to have contradicted itself by saying that Mr Williamson was redundant while at the same time offering him further employment in the same position he had commenced in. The reason for dismissal appears to be that Mr Williamson would not accept either of the particular rates of pay VINZ had proposed for continued employment.

[19] In his amended statement of problem Mr Williamson described his redundancy as a “*sham*.” He referred to a pattern of events showing that VINZ “*are just trying to get rid of me*.” It was reasonable for Mr Williamson to view redundancy as merely a pretext for dismissal on other grounds. It seems more than just circumstantial that Mr Williamson had challenged the lawfulness of his fixed term agreement. Shortly before being notified of redundancy he advised VINZ that if it did not agree to attend mediation over the issue of fixed term employment he would ask the Authority to investigate. One outcome of the mediation was agreement by VINZ to withdraw the “*written warning*” which had apparently been given without justification in response to Mr Williamson complaining about his working conditions.

[20] In any event the purported disciplinary warning as such was arguably ineffective, because there was nothing expressly warned of as a consequence to be visited for not heeding the warning.

[21] A further event occurred on 4 September, the day after the mediation, when VINZ asked Mr Williamson to meet and discuss four specific issues. They were listed by Mr Meng in an email as being VINZ’s offers of a new employment agreement, the classroom air-conditioning system (which Mr Williamson had complained about), the written warning he had recently been given, and student feedback. Redundancy was not listed as an issue for discussion, yet on 8 September when Mr Williamson attended the requested meeting Mr Meng raised redundancy as a further issue and did so to the extent that it became the major issue discussed. At the beginning of that meeting Mr Meng had again asked Mr Williamson whether he would accept either of the offers previously made for continued employment, an issue that was one of the four notified for discussion.

[22] As to matters of procedural fairness, when asked how VINZ had selected Mr Williamson for redundancy the evidence of Mr Meng was that he had asked all the teachers for their views, and had sought those of students and enrolment agents as well. He said he had also talked to Mr Williamson’s previous employer who had provided an unflattering account of his performance while working at that particular language school. Mr Williamson was not told about the existence of that information or the consultation with his former employer, whose alleged account is contradicted by its own written reference which contains nothing unfavourable about Mr

Williamson. Mr Meng thought this consultation might have occurred after the redundancy had been implemented, and not before as he at first suggested, in which case it would seem to be a reversal of the proper sequence in which consultation should take place.

[23] It is clear that Mr Williamson had been assertive in bringing up issues he had about his workplace and his employer, in particular by insisting that the fixed term contract he had started on was not lawful and that he should be employed on a permanent part time basis at the same hourly rate of \$25 including holiday pay.

[24] It is also clear that VINZ resisted employing him on that basis. I do not consider there were economic grounds to justify the dismissal, being the additional cost of employing Mr Williamson at a higher rate on a permanent instead of temporary basis. It is clear to the Authority that his position of employment as an English teacher had not become surplus to the requirements of VINZ.

[25] Although VINZ referred to “*uncertainty over student enrolments*” in conjunction with its two offers of employment, and although this was also expressed to be a consideration in the redundancy provisions of the April employment agreement, I find that phrase was simply one habitually used by VINZ management to try and justify various rates of pay offered to Mr Williamson. That pay was for the performance of work that remained available in his position as a teacher and for which \$25 per hour had been agreed as the rate in April 2009.

### **Determination**

[26] Applying the statutory test of justification under s 103A of the Employment Relations Act 2000, viewed objectively I find that the actions of VINZ and how VINZ acted were not what a fair and reasonable employer would have done in all the circumstances at the time it decided to make Mr Williamson redundant. His dismissal was not justifiable.

[27] Although Mr Williamson purported to resign from 29 September, he had already been dismissed on two weeks notice. In the circumstances it was reasonable for him to leave immediately without working out the notice, as he could see there had been a serious breach by VINZ of the employment agreement.

[28] Mr Williamson has a personal grievance, for which he is entitled to remedies.

[29] Having regard to s 124 of the Act, I find there was no contributing behaviour on the part of Mr Williamson to the situation that gave rise to his unjustified dismissal. He was entitled at least to negotiate for terms of employment he hoped VINZ would agree to. Accordingly, no reduction of remedies is required to give effect to s 124.

[30] The Authority must also conclude that there was no genuine reason based on reasonable grounds, as required under s 66 of the Employment Relations Act, for VINZ specifying that Mr Williamson's employment was for a fixed term.

[31] Mr Meng's email of 17 September to Mr Williamson juxtaposed offers of a fixed term contract and a permanent contract. Mr Meng advised that if Mr Williamson took either "*we would solve this issue immediately.*" The availability of the latter as acknowledged by VINZ, completely undermined any claim that the former was for a genuine reason.

[32] I find that the cost of the position to the employer was not a genuine reason based on reasonable grounds for specifying the employment to be fixed term. At the commencement of employment, when the employment agreement was being negotiated, it had been open to VINZ to offer the hourly rate it thought it could afford and it was a matter for Mr Williamson whether he accepted or not on a permanent basis. The pay rate was not something to be controlled by the measure of having a succession of fixed term contracts, in the absence of a genuine reason for them.

[33] The employment agreements of five other VINZ teachers obtained by the Authority show that VINZ from 2007 had in four cases out of five commenced the employment of its teachers on a fixed term basis. There was no standard period. Initial terms were variously of two, three, six and seven months, and upon expiry they were usually rolled over for a further 12 months. The rates of wages also vary but are usually \$25 per hour, expressed to include \$2 as holiday pay.

[34] Curiously, the one agreement of the five that was for permanent employment from the start became fixed term for that employee six months later. The continuity of both were expressed to be subject to student enrolments.

[35] Section 66(3)(b) of the Act expressly provides that establishing the suitability of an employee for permanent employment is not a genuine reason for having a fixed term employment agreement. Whether that was the employer's motive in having

fixed term arrangements for Mr Williamson is not a matter that the Authority has to decide, as I am satisfied that in the circumstances where Mr Williamson was able to be offered permanent employment in August/September 2009 there was no genuine reason for the alternative offer of fixed term employment.

[36] I find there had also been no genuine reason for that same arrangement at the commencement of his employment in April 2009.

### **Reinstatement**

[37] Mr Williamson confirmed to the Authority that he was resolved to resuming employment with VINZ if reinstated. I accept he is sincere about that. Mr Meng for VINZ opposed reinstatement, on the basis that student enrolments had fallen since Mr Williamson's departure.

[38] The Authority finds that reinstatement, the primary remedy, will not be impracticable and accordingly orders VINZ to immediately reinstate Mr Williamson to the position of ESOL/IELTS teacher, or English teacher. His terms and conditions are to be the same as those provided in the agreement he entered into in April 2009, except that his employment will not be for a fixed term but is permanent and is to be regarded as having been such since the commencement of that agreement.

[39] Mr Williamson is therefore to resume being employed at \$25 per hour for 20 hours a week.

[40] He is entitled to be reimbursed wages lost as a result of his unjustified dismissal in September 2009. Pursuant to s 128(2) of the Act, VINZ is ordered to pay him for 20 hours a week at \$25 per hour for 13 weeks. He is to be paid interest on the total \$6,500 at the rate of 5% per annum from 9 January 2010 until paid in full. Mr Williamson is also to be paid for all time he worked and was paid for up to 29 September 2009, and also for the remainder of the VINZ notice period expiring on 9 October 2009.

[41] In the result of this determination the question of his annual holiday pay entitlements does not arise, because the anniversary of Mr Williamson's employment will not occur until April 2010. At that time he will be entitled to four weeks annual leave in accordance with the Holidays Act. His holiday pay then will be at the rate

of his ordinary weekly pay at the commencement of the holiday, as provided by s 21 of the Act.

[42] I am satisfied that Mr Williamson is entitled to compensation for his unjustified dismissal. He claimed \$5,000 as appropriate then sought to increase the amount to \$10,000. In the circumstances I consider \$4,000 is a reasonable figure in a situation where Mr Williamson could see that his employment was unlawful on the basis of a fixed term agreement and that his redundancy was, as he put it, a sham. The effect of his dismissal was to render him unemployed for the rest of 2009 and up to now.

[43] In setting a figure below that sought by Mr Williamson, I have taken into account the primary remedy of reinstatement that has been awarded to him and also the reimbursement of 3 months lost pay. VINZ is ordered to pay the \$4,000 compensation pursuant to s 123(1)(c)(i) of the Act.

[44] Even if Mr Williamson was disadvantaged by the unjustified written warning, which seems unlikely given its short life, an award of compensation is not required as VINZ withdrew the warning after mediation.

[45] There is no issue as to costs, as the parties represented themselves, but VINZ is to reimburse the \$70 application fee paid by Mr Williamson to commence his claims in the Authority.

[46] The Authority recommends that VINZ reviews the fixed term basis on which several of its employees have been and are currently employed.

