

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 282/08  
5101988**

BETWEEN      DEAN WILLIAMSON  
                         Applicant

AND              NEW ZEALAND INSTITUTE OF  
                         SCIENCE & TECHNOLOGY LIMITED  
                         Respondent

Member of Authority:      Leon Robinson

Representatives:              Applicant In Person  
   Maurice Coughlan, Counsel for Respondent

Investigation Meeting:      25 March 2008  
   23 April 2008

Further Information:        13 May 2008

Determination:                7 August 2008

---

**DETERMINATION OF THE AUTHORITY**

---

**The problem**

[1] The applicant Mr Dean Williamson ("Mr Williamson") applies to the Authority for an investigation of the termination of his employment with the respondent New Zealand Institute of Science & Technology Limited ("the Institute"). In his statement of problem he describes the problem he wishes resolved as "a personal grievance in relation to unfounded allegations made against me including being labelled a racist and work performance". He indicates the resolution sought as compensation "for wrongful allegations" and "defamation of character (called a racist, amongst others)".

[2] The parties were unable to resolve the problem between them by the use of mediation.

## The facts

[3] The Institute offers courses teaching English to fee paying students.

[4] Mr Williamson commenced employment as a Tutor with the Institute on 30 July 2007. The terms of the employment were recorded in a written individual employment agreement signed by the parties on 24 July 2007. One of the terms expresses the employment to run from 30 July 2007 until 19 September 2007.

[5] On 31 August 2007 the Institute's Centre Manager Ms Julia Chung ("Ms Chung") says that a student approached her unhappy about Mr Williamson's tutoring. Ms Chung also says further students similarly unhappy with Mr Williamson's tutoring approached her on 6 September 2007. Ms Chung made typed notes of the complaints from each student.

[6] That same day on 6 September 2007, Ms Chung called Mr Williamson to meet with her. She did not identify to Mr Williamson the students who had complained to her but she did advise him that she had received complaints about his tutoring. She told him there were four areas of complaint, that he was not teaching grammar in class, that he was playing too many games, that students felt racially discriminated against and lastly, that students felt they were being treated unfairly. Ms Chung told Mr Williamson not to approach the students about the complaints.

[7] The four areas of complaint were set out in a letter Ms Chung wrote to Mr Williamson dated 6 September 2007 and given to him after work the following day on 7 September 2007. The letter also "suggested ways to resolve the comments", comments meaning the areas of complaint.

[8] As a result of Ms Chung's advice dated 6 September 2007 which she calls "a suggestion letter", Mr Williamson wrote to her by letter dated 11 September 2007 as follows:-

*Dear Julia,*

*In reply to your written warning dated 6-09-07, I wish to refute allegations against me and I am filing a personal grievance against you on a number of*

*grounds stated in your written warning. You have 30 days to reply from the date of this notification.*

*Yours sincerely*

*Dean Williamson*

[9] Ms Chung replied by a letter dated 12 September 2007 which she gave to Mr Williamson on 13 September 2007. She wrote:-

*We have received a number of complaints from your Pre-Intermediate class students and we note the number of students attending your class has reduced over the past few days.*

*In response to our concern, we invite you to attend a meeting at 1.30pm on 14th September 2007 (Friday) to respond to these allegations.*

*We view the allegations (if correct) and class number deterioration as serious, reflecting on the integrity of the Institute.*

*You are entitled to bring a legal advisor if you so wish to this meeting.*

*Yours sincerely*

*Julia Chung*

*Centre Manager*

[10] The Authority accepts Mr Williamson's evidence that he immediately approached Ms Chung and protested that he did not have sufficient time to arrange a representative. Ms Chung insisted that the meeting the following day would still proceed.

[11] The following day on Friday 14 September 2007, Mr Williamson attended the meeting with Ms Chung, Mr Steven Jiang and the Institute's lawyer Mr Maurice Coughlan ("the lawyer").

[12] The Authority accepts Mr Williamson's evidence that he immediately repeated his earlier protest that he had not been given sufficient time to arrange representation. He asked for a further two days to enlist support.

[13] The Authority prefers Mr Williamson's evidence that the lawyer then presented Mr Williamson with a document entitled "Deed of Indemnity". The lawyer proceeded to explain to Mr Williamson each of the clauses in the document. The operative parts of the document are these:-

*1.1 accepts that problems have arisen in relation to the execution of the contract with regard to performance of skill and diligence and student satisfaction which reflect on the ability of the employee to undertake the duties and responsibilities set out in the contract of employment satisfactorily and the employer to maintain scholastic integrity.*

*The Employee:*

*1.2 Agrees to accept termination of the contract subject to the conditions herein.*

*1.3 Accepts payment in the sum of \$3328.00 payable weekly after deduction of your PAYE as if the contract had continued to its normal conclusion in October 2007.*

*1.4 Such acceptance (Clause 1.3) shall operate as a settlement in full and final satisfaction of all or any obligations under the original agreement of employment and hereby indemnifies the employer against all or any matters arising from the said agreement whatsoever.*

*1.5 In consideration of the forgoing the employee undertakes not to take any steps or actions against the employer whether litigation or otherwise in respect of the agreement or any issues arising therefrom.*

*4. Employee's Acknowledgement*

*The employee acknowledges that before entering into this agreement he or she was given a copy of the agreement in draft, was advised of the right to seek independent advice on its terms, and was given reasonable opportunity to take such advice and declined to do so.*

[14] The Authority accepts Mr Williamson's evidence that Mr Coughlin advised "our aim is to end the contract as of today". The Authority also accepts that Mr Williamson asked about the disciplinary issues raised but was told he was simply requested to listen to what the Institute had to say, in relation to the Deed of Indemnity.

[15] Once the lawyer had concluded explaining the Deed of Indemnity, Mr Williamson was handed his own copy. He was informed he should take the document away with him, read it, take advice about it and get back to the Institute the following Monday or Tuesday as to whether its terms were acceptable to him. Mr Williamson undertook to do so and the session ended.

[16] Mr Williamson took advice about the document and by letter dated 17 September 2007 he advised the Institute he would accept the terms of the Deed of Indemnity if he was also paid for afternoon classes for the period from 13 September

to 30 October, as well as given a reference "describing [him] as a professional, diligent employee of high integrity". He further wrote that he would not proceed with the personal grievance he had given notice of on 11 September 2007.

[17] Ms Chung responded by a letter dated 21 September 2007 but which was not provided to Mr Williamson until 1 October 2007. She wrote:-

*The proposals in your letter dated 17 September are not acceptable. There have been allegations which need to be withdrawn and nor reference available in the glowing terms you suggested. We are obliged to raise with you the concerns of the students, indeed it is our duty to do so. We believe the problem requires an effort on your part to improve teaching in areas subject to complaint such as grammar and serious attention to materials supplied to students. We require copies of course structure and materials used as "handouts".*

*Your blanket denial of responsibility is not helpful in the face of students complaints. Your performance will be monitored and an assessment carried out as necessary and at the end of your contract on 30th October 2007. If the situation deteriorates we reserve the right to issue disciplinary procedures which could result in termination of the contract.*

*We trust that you will ensure an observable improvement to the quality and delivery standard of instruction and significant improvement in teacher/student relations to the end of your contract on 30th October 2007.*

*Yours sincerely*

*Julia Chung*

*Centre Manager*

[18] Mr Williams wrote to Ms Chung by letter dated 3 October 2007 as follows:-

*Dear Julia*

*I request you to attend a mediation hearing. I look forward to your reply by Friday 05, October. If no response by this date, I take it you don't want to attend, therefore I will inform the labour department and they will be in contact with you.*

[19] Ms Chung responded by letter of the same date as follows:-

*We have your letter dated 3rd October 2007. There are no details of terms conditions of the proposed mediation hearing. Please let us know the terms conditions of the proposed mediation hearing. What is the nature of the meeting and have you had any document from the department of labour which might assist us in determining what to do ?*

*Please refer to our letter to you dated 6th September 2007 and the suggestions that we proposed on how to improve your teaching skills. We believe in quality teaching and we hope you understand the seriousness of the students' complaints.*

*Yours sincerely*

*Julia Chung*

*Centre Manager*

[20] Mr Williamson resigned by letter dated 5 October 2007. He wrote:-

*I hereby tender my resignation, effective from today, because of the false allegations made against me in particular being called a racist. Furthermore, the working conditions have become intolerable.*

### The merits

[21] Mr Williamson says he has "a personal grievance in relation to unfounded allegations made against [him] including being labelled a racist and work performance". He seeks resolution in the form of compensation "for wrongful allegations" and "defamation of character (called a racist, amongst others)". This Authority has no jurisdiction in relation to "defamation of character". As for "wrongful allegations", that claim for compensation can be addressed as a personal grievance for unjustifiable dismissal or disadvantage.

[22] Mr Williamson purported to produce to the Authority by way of his statement of problem, copies of letters he wrote to the Institute. However, these copies were not identical. The Authority accepts the Institute has provided true copies of the letters Mr Williamson actually wrote as annexed to its statement in reply.

[23] So Mr Williamson raised an employment relationship problem with his employer in the form of the copy letter provided by the institute and not by him, dated 11 September 2007. He wrote:-

*In reply to your written warning dated 6-09-07, I wish to refute allegations against me and I am filing a personal grievance against you on a number of grounds stated in your written warning. You have 30 days to reply from the date of this notification.*

[24] I am doubtful whether that advice would have been sufficient to constitute raising of a personal grievance. It is quite imprecise and ordinarily fatally so in my view. However, having regard to all the circumstances, I conclude that the Institute by its subsequent conduct did not take any issue with the form of the notification to it and nor does it now, and also, by virtue of its participation in the dispute resolution

process including mediation, it cannot properly disengage from the dispute resolution process. To its credit it has never sought to do so on such a basis.

[25] But there is also one further dimension that sways the balance in Mr Williamson's favour. The individual employment agreement does not contain a reference to the 90 day period in which grievances are to be raised. I am also doubtful as to the legitimacy of the purported fixed term nature of the employment. The result is that I find there can be no issue taken in relation to the raising of a personal grievance by Mr Williamson.

[26] It may not be fatal for an employee to incorrectly label their grievance, or where they do not know the legal description of it. The Legislature does not expect complications from such technicalities to constrain the Authority or to deny such employees from an entitlement to resolution. The Authority is not prevented from finding a personal grievance is of a type other than that alleged<sup>1</sup>. This may mean the Authority may find a personal grievance that was not raised by the employee or even contemplated by them. Further, the Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however it is described<sup>2</sup>.

[27] Mr Williamson's description of his employment relationship problem is inelegant and stark. The Institute has no difficulty comprehending the essence of it. I consider the true situation in this problem is that Mr Williamson's employment came to an end without his concurrence. He resigned and he did not wish to do so. He blames his employer for the way his employment ended. Is he right to do so? This is the problem I concentrate on resolving.

[28] I refer to my Minute to the parties of 21 May 2008. I reminded the parties of the Authority's licence to find a grievance other than that which is alleged. I advised that I was considering whether Mr Williamson had a claim for unjustifiable

---

<sup>1</sup> Section 122 *Employment Relations Act 2000*

<sup>2</sup> Section 160(3) *Employment Relations Act 2000*

constructive dismissal and/or unjustifiable disadvantage and I invited submissions from the parties. I have received and considered their respective submissions.

[29] On 5 October 2007 Mr Williamson wrote that he resigned immediately "because of the false allegations made against [him] in particular being called a racist. Furthermore the working conditions have become intolerable". I suspect that what he meant by the intolerable working conditions is the additional words in his 'inaccurate' purported copy he supplied with his statement of problem, i.e. *"any changes made in regard to my class are not discussed with me nor am I told about any meetings"*.

[30] So was Mr Williamson unjustifiably constructively dismissed? The well settled tests for constructive dismissal are:-

- (i) Did the employee resign?
- (ii) Was the resignation caused by a breach of duty on the part of the employer?
- (iii) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[31] It is not disputed that Mr Williamson did resign.

[32] Mr Williamson says he was called a racist. The Institute denies labelling Mr Williamson a racist. Ms Chung's "suggestion letter" presented Mr Williamson with four "summary of the feedbacks from students" one of which was "3. Students feel racial discrimination." The letter then proceeded "suggested ways to resolve the comments above". The suggestions in relation to the students feeling racial discrimination were these:-

5. *As an English teacher working in a multi-cultural environment, you must understand the background and culture as these students are fragile in certain areas. They are not sure about the culture of other classmates as well as New Zealand cultures. As their teacher, you must be culturally sensitive and when talking to these students, must be careful not to overly comment their culture or country. We suggest all our English teachers to pose a friendly disposition and not defensive towards others. These are the basic criteria as English teachers who are teaching foreign students.*

6. *Take care of your behaviour and response when talking to students or answer students questions as this might cause the students to feel that you are racial discriminating against them. Some students are very sensitive in this matter and they feel that. We believe that you are not causing this racial discrimination among the students but maybe the way you act or the language use might have them feel the way.*

[33] But I find that he was never called a racist. There is no evidence of that statement being made to him. But I agree that Mr Williamson objected to the suggestion that he was responsible for the students feeling "racial discrimination".

[34] Naturally Mr Williamson was very sensitive about such an allegation. I consider the Institute ought to have put to Mr Williamson the specific statements made by the students about him. Mr Williamson was entitled to know those precise statements. He could then have offered an explanation or a response. Because he was not he could not respond in any meaningful way. But I find that the Institute never intended him to offer an explanation. It simply took for granted that the students felt they had been "racially discriminated" against. It was not interested in what Mr Williamson had to say about the matter. It simply took for granted that he had conducted himself in such a way as to make the students feel "racial discrimination". The only input it wanted from him was in relation to how to resolve the situation. A situation he denied but was not permitted to deny. This is the basis upon which Ms Chung wrote to Mr Williamson in her "suggestion letter" of 6 September 2007.

[35] The Institute suggested the allegation of Mr Williamson but did not verify it. Mr Williamson was entitled to have it verified and investigated properly. I find it was not. I regard the situation I have just outlined constituted a breach of duty owed to Mr Williamson. It was not in accordance with the statutory duty of good faith owed to Mr Williamson.

[36] An allegation that one is racist or discriminates against others is a very serious allegation. It should not be made lightly. Failing to investigate such a serious allegation fully and fairly was a very serious breach. I consider that a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

### The determination

[37] I determine that Mr Williamson was unjustifiably constructively dismissed. I find that he has a personal grievance and he is entitled to remedies in settlement of that personal grievance.

### The resolution

[38] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Employment Relations Act 2000 to consider the extent to which Mr Williamson's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I find no blameworthy conduct on Mr Williamson's part.

[39] Mr Williamson secured alternative work without suffering loss of income. There will be no orders for reimbursement.

[40] Mr Williamson seeks compensation for "wrongful allegations" and "defamation of character". I have determined he was unjustifiably constructively dismissed. Mr Williamson does not give evidence of significant loss of dignity, hurt and humiliation and injury to his feelings. But I have no doubt that it must have been distressing for him to be accused, unfairly I have found, of having "racially discriminated" against students. I propose therefore to award a modest sum to Mr Williamson as compensation. **I order New Zealand Institute of Science & Technology Limited to pay to Dean Williamson the sum of \$2,000.00 as compensation.**

### Costs

[41] As Mr Williamson was not represented by professional advocate, there will be no orders as to costs.

Leon Robinson  
**Member of Employment Relations Authority**