IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 468
5323912

	BETWEEN	MARIANNE SNELL Applicant
	AND	NEW ZEALAND INSTITUTE OF SCIENCE AND TECHNOLOGY LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Julia Chung for Respondent
Investigation Meeting:	27 October 2011
Determination:	28 October 2011

DETERMINATION OF THE AUTHORITY

A. The dismissal of Marianne Snell was unjustified as New Zealand Institute of Science and Technology Limited (the Institute) failed to consult her about the prospect of, and alternatives to, redundancy and it did not properly consider redeploying her to an available alternative position.

B. In settlement of her personal grievance the Institute must pay Ms Snell the following amounts within 28 days of the date of this determination:

- **(i) $2400 in lost wages; and**
- **(ii) $3000 as compensation for humiliation, loss of dignity and injury to feelings; and**
- **(iii) $71.56 in reimbursement of the fee she paid to lodge her application in the Authority.**

C. In settlement of wage arrears owed to Ms Snell, the Institute must also pay her the following amounts within 28 days of the date of this determination:

(i) $956 in wages; and

(ii) $360 for three days holiday pay.

D. As a result of the orders made, the Institute must also pay to IRD further amounts as employer contributions for the benefit of Ms Snell's Kiwisaver account being:

(i) $48 (based on the amount awarded in lost wages); and

(ii) $19.12 (based on the amount awarded in wage arrears).

Employment relationship problem

[1] Marianne Snell worked as a teacher of English for New Zealand Institute of Science and Technology Limited (the Institute) from 14 September 2009 to 13 August 2010. In late July 2010 she was given two weeks notice. When she asked why, Institute centre manager Julia Chung told her it was a senior management decision. After the end of the notice period Ms Snell asked for the reason for her dismissal to be put in writing to her. Institute administration manager Steven Jiang replied by email:

> *Previously we have 4 Intermediate classes and the reason why we have to stop your class is mainly due to the decrease (sic) number of intermediate students. It was indeed a management decision because it is not financially feasible to have another intermediate class.*

[2] In her eleven months of service with the Institute Ms Snell had taught classes at other levels and believed there were classes she could have taught rather than being laid off. Consequently she raised a personal grievance about her dismissal. She sought remedies of lost wages (including the Kiwisaver contribution) and distress compensation. She said there was no consultation with her about the end of her job or consideration of alternatives to her dismissal. She also sought wage arrears because she found out after her dismissal that she was paid $29 an hour, rather than the $30 she thought was agreed. She had not received a written employment agreement although she said she had asked for one.

[3] The matter was not resolved in mediation and Ms Snell lodged an application

in the Authority. In its statement of reply the Institute said Ms Snell was told from the outset she was a relief teacher and was told in July she would get two weeks notice when her services were no longer needed. It said her dismissal was due to low student numbers, not any inability to carry out her duties. The Institute said there was no employment agreement because Ms Snell's position was not permanent. It denied a $30 hourly rate was agreed.

The investigation

[4] For the purposes of the Authority investigation written witness statements were lodged by Ms Snell, Ms Chung and Mr Jiang. At the investigation meeting each witness, under oath or affirmation, confirmed their statement and answered questions from the Authority. Each party had an opportunity to ask additional questions and provide an oral closing submission.

[5] As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received but states the Authority's findings of facts and law and expresses conclusions on the matters requiring determination.

[6] The issues for determination were:

(i) the nature of Ms Snell's position; and

(ii) whether there were genuine reasons for the disestablishment of the teaching position she held or filled; and

(iii) whether the Institute acted fairly in telling Ms Snell of its decision to disestablish that position and properly considered alternatives to dismissing her for redundancy; and

(iv) whether Ms Snell was owed any wages, holiday pay and Kiwisaver contributions; and

(v) if there were unjustified actions by the Institute, what remedies should be awarded.

Ms Snell's position and rights

[7] Ms Snell was employed by the Institute after she responded to a newspaper

advertisement seeking a relief tutor for an advanced English class for a six week period. She was not initially selected for the role but Ms Chung contacted her a few weeks later and Ms Snell then took the class for three weeks. During that time a teacher of an elementary class left the Institute and Ms Snell asked to be considered for that position. She then taught that class for the remainder of the year. In January 2010 Ms Chung asked Ms Snell to teach an Intermediate class. She taught classes at that level until she was dismissed.

[8] Ms Snell's evidence was that she understood her role was permanent from the last quarter of 2009 once she took over a class from a permanent teacher. Ms Chung's evidence was that Ms Snell remained a relief teacher only. However it is a distinction which, I find, had no impact on Ms Snell's rights as an employee or the Institute's obligations as her employer.

[9] A full-time teaching role at the Institute was said to comprise 20 hours a week. Ms Snell worked at least 20 hours every week of her employment, except for during the Institute's three week summer break, one week Easter break and one week Winter break – and she was paid through those breaks. If the Institute had intended that she was to be a casual relief teacher for a short period only, her status changed by the end of 2009. The regularity of the work and the continuity of the employment relationship indicated ongoing rather than casual employment.[1]

[10] Regardless of her status Ms Snell should have been provided with a written employment agreement. She was not. This was a breach of the requirements of s65 of the Act. Ms Snell insisted she did ask for a written agreement. Ms Chung cannot recall that but says if she were asked, she would have said no because the Institute only provided written agreements to permanent employees.

[11] In the absence of a written agreement Ms Snell nevertheless had certain rights and the Institute had certain duties under statute and common law if her position was in jeopardy and her employment might be terminated. The Institute's duties included giving Ms Snell reasonable notice, information about the future of her job, and the opportunity to comment on that information before it made any decision likely to adversely affect her continued employment.

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[1] *Jinkinson v Oceana Gold (NZ) Limited* EC, CC9/09, 13 August 2009 at [42].

Was the redundancy genuine?

[12] The Institute is a private training establishment registered with the Qualifications Authority. It is owned by Ms Chung and Mr Jiang. It offers English and business courses to international students from its premises in downtown Auckland. It presently has around 220 students, down from around 300 at the time of Ms Snell's dismissal last year.

[13] There is no real issue with the Institute's decision to drop the Intermediate English class taught by Ms Snell and continue the other three classes at that level taught by other teachers. Ms Snell accepted in her evidence that as the number of students in her class had dropped to four, the class was no longer financially viable. She had inquired about whether students could be shifted from oversubscribed classes at other levels or whether she could assist with those classes.

[14] The Institute had, I find, made a genuine business decision about the number of classes and the disestablishment of the position as a teacher of Intermediate English held by Ms Snell. However it is at the next step that there is a flaw in the genuineness of its decision to dismiss Ms Snell for redundancy.

[15] The Institute had a pre-Intermediate English class for which it needed a teacher. Ms Snell had taught at that level previously. While Ms Chung considered Ms Snell was best suited to teaching at the Intermediate level, there was no concern about the quality of Ms Snell's teaching generally or her ability to teach at a lower level if needed. Despite this Ms Snell was dismissed and the Institute employed another teacher to take the pre-Intermediate class. Ms Snell was not asked if she was able and willing to take that role or given an opportunity to apply for it.

Was Ms Snell fairly treated?

[16] In late July Ms Chung told Ms Snell that her employment would end on 13 August 2010. It was a little over two weeks notice. Ms Snell was given no prior warning of that prospect or an opportunity to comment on it. She was not told the reason at the time but returned to ask Ms Chung later and was told only that it was a

senior management decision. The cancellation of the fourth class was not fully explained to her until after her employment ended and she asked for the reason for her dismissal to be put in writing.

[17] The Institute's failure to meet its statutory duty, under s4(1A) of the Act, to provide her with information and an opportunity to comment denied Ms Snell the real prospect that her employment need not have ended when or in the way that it did. If the Institute had consulted her, and properly considered alternatives to her dismissal, Ms Snell most likely would have been reassigned to teach the pre-Intermediate class. She had moved class levels in the Institute before (from advanced to elementary to intermediate) and in a previous job she had taught at all levels. Given the opportunity there is little doubt Ms Snell would have said yes. I am satisfied that a fair and reasonable employer in all the circumstances at the time would have provided Ms Snell with information about that prospect, discussed it with her and, most likely, have redeployed her to that role. The Institute's failure to do so meant its actions, assessed on that objective standard required by s103A of the Act, were not justified. Those actions resulted from the Institute managers' mistaken notions that Ms Snell was a relief teacher who it was not obliged to consult or consider alternatives to her dismissal for redundancy and that her rights were limited to notice.

Arrears due

[18] I accept Ms Snell is entitled to an order for arrears of wages for the difference of $1 an hour between what she was paid and what she said she understood was the agreed hourly rate.

[19] Ms Chung denied $30 an hour was agreed while Ms Snell insisted it was agreed prior to her employment. I prefer Ms Snell's account, largely because the Institute failed to provide her with an employment agreement. Had it met its statutory obligation, such an argument would not have arisen as the hourly rate would have been included in the agreement. In the circumstance of a conflict of evidence, and an absence of other compelling evidence, the benefit of the doubt goes to the employee.

[20] I do not accept Ms Chung's submission that Ms Snell should have known or realised much earlier that she was being paid $29 an hour and then said something

about that if it was not right. The Institute did not provide Ms Snell with a weekly or fortnightly payslip. She did not get a record of earnings until she asked for it around the time of her dismissal. From this information Ms Snell said she realised she was paid $29 an hour, not the $30 she understood was agreed prior to her employment. Previously she had only seen the net amount for wages credited to her bank account and assumed this was the correct amount after PAYE was deducted. Ms Snell had seen a form in January 2010 which stated her usual weekly hours of 20 and a gross weekly wage of $580. From those figures she could have worked out the gross hourly rate but I accept she had no suspicion about the need to do so at that time.

[21] The Institute's record shows it paid Ms Snell for 956 hours during her entire employment. On that basis she is awarded $956 gross in wage arrears.

[22] In January 2010 Ms Snell had joined Kiwisaver, making a four per cent contribution. As a result of being underpaid by the Institute, its compulsory two per cent employer contribution was not paid at the proper amount. To correct that omission, the Institute must pay two per cent of the value of the arrears, which is $19.12, to the IRD for the benefit of Ms Snell's Kiwisaver account.

[23] During the Authority investigation a shortfall of three days was identified in what Ms Snell was entitled to have been paid for holiday entitlements. She is awarded a further $360 gross for those three outstanding holidays.

Remedies

[24] Ms Snell is entitled to remedies for the Institute's unjustified actions in dismissing her for redundancy when a position was available to which, most likely, she would have been redeployed if it had acted fairly and reasonably.

[25] As another position was available but denied to Ms Snell she is eligible for an award of lost wages. That differs from the situation of a genuine redundancy where lost wages cannot be awarded as the wages would not otherwise have been earned.

[26] Ms Snell's evidence was that she obtained new employment by 13 September 2010. The period of lost wages is therefore limited to four weeks. I am satisfied Ms

Snell made reasonable endeavours to mitigate her loss by actively seeking a new job in that period (and which proved successful). Accordingly, under s123(1)(b) of the Act, she is awarded lost wages for the full four week period at the rate of $600 gross per week, that is $2400. As a result of the grievance Ms Snell also lost four weeks' of employer contributions to her Kiwisaver account, worth $48. The Institute must also pay that amount to the IRD for the benefit of Ms Snell's Kiwisaver account.

[27] Ms Snell received an unemployment benefit for some of the period for which she has now received an award of lost wages. That is a matter for her to address with the Work and Income service of the Ministry of Social Development.

[28] Ms Snell found the experience of being dismissed for redundancy distressing. Not knowing the full reason at the time and learning there was an alternative position to which she was not appointed, she felt she was being dismissed for some fault. Although Ms Chung subsequently made clear, on behalf of the Institute, that there were no problems with Ms Snell's performance as a teacher, Ms Snell was distressed by the doubt caused and the unfairness of her treatment. In those circumstances, and considering the general range of awards in similar cases, I consider the Institute should pay Ms Snell $3000 in compensation for the humiliation and loss of dignity caused to her by its actions.

[29] The Institute terminated Ms Snell's employment on a no fault redundancy basis and I find no evidence of any contributory conduct on her part which would require a reduction of the remedies under s124 of the Act.

Costs

[30] There is no order for legal costs. Ms Snell represented herself. She is entitled to reimbursement from the Institute for the expense of the fee for lodging her application in the Authority. That amount is $71.56

Robin Arthur
Member of the Employment Relations Authority