Judgment Number: CC 4/06
File Number: CRC 26/04

IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY

IN THE MATTER	of a challenge to a determination of the Employment Relations Authority
BETWEEN	Fouad Kamel Abdalla
	Plaintiff
AND	Chief Executive Officer of the Southern Institute of Technology
	Defendant

Court:	Judge GL Colgan
Hearing:	Invercargill 31 October, 1 and 2 November 2005
Appearances:	Mary-Jane Thomas, Counsel for Plaintiff Christine French, Counsel for Defendant
Judgment:	5 May 2006

JUDGMENT OF JUDGE GL COLGAN

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[1] The issues for decision on this challenge by hearing de novo to the Employment Relations Authority's dismissal of personal grievance claims include:

- what were the terms and conditions of Fouad Kamel Abdalla's (Dr Kamel's) employment agreement;
- whether Dr Kamel was dismissed constructively by the Southern Institute of Technology (SIT);
- if so, whether dismissal was unjustified;
- if so, the remedies to which Dr Kamel may be entitled; and
- in relation to remedies, whether Dr Kamel was employed by the Chief Executive Officer, SIT, on a fixed term contract of employment or one of indefinite duration.

[2] Dr Kamel was head-hunted and a position at SIT created in large measure to utilise his specialised talents. Dr Kamel's employment agreement was for a fixed two-year term but in

many respects inchoate when executed and remained so for much of his employment. When agreement could not be reached on important provisions in the agreement and SIT brought matters to a head by directing unilaterally Dr Kamel to do what it wished him to, he treated this as a constructive dismissal of him and brought his personal grievance alleging that this was unjustified to the Employment Relations Authority.

The Employment Relations Authority's determination

[3] Although the Court must reach its own view on the problem (s183), especially where, as here, the challenge is by hearing de novo, a brief summary of the Authority's conclusions is nevertheless appropriate. That is for a number of reasons including that, unlike in the Authority where Dr Kamel appeared for himself, on this challenge he was represented by counsel and different emphases have no doubt been placed upon aspects of his case as a result.

[4] Under a heading *"The legal principles"* the Authority identified Dr Kamel's principal claim to unjustified constructive dismissal as being his assertion that SIT had followed a course of conduct with the deliberate and dominant purpose of coercing him to resign. The Authority recorded, also, that it considered the case against another of the constructive dismissal criteria, that SIT breached its contract with Dr Kamel causing him to resign. So far as the first category of constructive dismissal was concerned, the Authority concluded:

> *Where an applicant claims that his or her employer has followed a course of conduct with the deliberate and dominant purpose of inducing a resignation the applicant must provide compelling and cogent evidence to support such a claim. Such evidence would usually include correspondence, emails, notes of conversations or possibly board minutes in which the employer's intention to encourage a resignation are clearly made out.*

[5] As to the alternative test for constructive dismissal, the Authority continued:

> *Where the allegation is that the employer has breached its duty towards the employee and thus causes the employee to resign, the issues of causality, degree of severity of the breach and the foreseeability of the resignation must be carefully considered in weighing the applicant's right to repudiate the employment relationship.*

[6] The Authority did not subsequently consider a constructive dismissal of the second type above as it said it would. In addition, it appears to have confused the legal analysis of a constructive dismissal in the foregoing second passage. It is the employer's repudiation of the contract or the evincing of an intention not to be bound by it, that gives the employee a choice of either accepting the repudiation and electing not to continue with the contract (a constructive dismissal) or condoning the repudiation by the employer and electing to continue with the contract. For there to be a constructive dismissal, however, repudiation is something that is sheeted home to the employer, not the employee.

[7] The Authority decided that Dr Kamel's claims to unjustified constructive dismissal were largely determined on *"the documents signed by the parties"*. It concluded that his duties

and tasks were clearly established in both the employment agreement and the covering letter under which it was sent to him by SIT. The Authority found that these included the investigation and establishment of a new programme and an evaluation of whether it could attract sufficient students. The duties and tasks also included the seeking of external funding for renewable energy projects and research, and to oversee any renewable energy projects undertaken, in particular, the development of the renewable energy programme itself.

[8] The Authority concluded that in February 2004 when he resigned, Dr Kamel had recently been advised by SIT of his responsibilities for the balance of the term of the agreement and that he had been offered a full-time tutorial position thereafter. The Authority found unsustainable Dr Kamel's claim that SIT deliberately followed a course of action with the predominant purpose of having him tender his resignation.

[9] Dr Kamel had also claimed he had been unlawfully discriminated against in his employment. Because that claim is not revived on this challenge, I will not address further the Authority's rejection of it.

The employment relationship

[10] A highly qualified renewable energy engineer and recent migrant to New Zealand, Dr Kamel had been undertaking work in his field (but not as a paid employee) for the Christchurch Polytechnic. Dr Kamel holds the academic qualification of a doctorate in engineering and spent more than 30 years in both engineering research and teaching. He had been in New Zealand since about 1999. SIT, keen to develop a programme in renewable energy, heard of Dr Kamel and head-hunted him. On 6 June 2002 it flew him to Invercargill for a series of meetings with its CEO, other senior academic staff, and with representatives of relevant organisations.

[11] There he met, among others, Penny Simmonds, SIT's chief executive officer. They discussed the possibility of establishing a course in renewable energy at SIT including teaching and research programmes. At this time Dr Kamel also met Jonathon Pedley, the academic director of SIT's business incubator unit and was shown the unit's facilities. There was discussion about the development of a "green business incubator" with Dr Kamel's assistance.

[12] With a wife and seven dependent children to support, Dr Kamel was as keen, if not keener, to work in his field than SIT was to engage him. He was ready to enter an employment agreement that very day.

[13] Dr Kamel says he was offered academic employment with SIT on the date of his first visit, 6 June 2002, although nothing was then put in writing to confirm this. He says his

acceptance of the offer of employment relied on what he was told was the opportunity to be involved in research into green business enterprises and he says he emphasised in his discussions with the CEO that he was interested in both teaching and research and would require an appropriate position and suitable title.

The employment agreement

[14] Although it was clearly anxious to obtain his services, SIT said it would send him a proposed form of employment agreement which it did a few days later. By letter dated 11 June 2002, the CEO wrote to Dr Kamel formally offering employment. The letter was prominently headed *"PROPOSAL FOR 2 YEAR CONTRACT AT SIT"* and included such phrases as *"I am pleased to be able to offer you a two-year contract commencing on or about 8 July 2002"* and *"... in the first instance [you] will report to Jonathon Foster-Pedley, Academic Director and will be located within the Southland Business Incubator. An operating budget is yet to be established"*.

[15] The *"project/tasks"* were said to be the following:

- *300 teaching hours per annum – preferably in Renewable Energy Programmes but possibly required to teach in other areas.*
- *Submission of a research proposal to be agreed upon by the Institution.*
- *Research supervision of Incubator students as required by the Academic Director.*
- *Oversight of SIT's implementation of renewable energy projects.*

[16] The letter enclosed a form of individual employment agreement. The agreement had been signed by the CEO of SIT before it was posted to Dr Kamel in Christchurch. Dr Kamel was asked to sign and date a copy of SIT's letter *"as notification of your acceptance of this employment agreement"* and to return it and a signed copy of the agreement including a confirmed start date, to SIT's human resources office. He conferred only with his wife about the prospective employment and the terms and conditions of it set by SIT before signing and returning the employment agreement on the following day, 12 June 2002.

[17] The individual employment agreement also specified that the employment was to be for a term. Clause 2.1 provided that, subject to provisions for early termination, *"... the employee shall be employed for a term of two years commencing on the eighth day of July 2002 and expiring on the seventh day of July 2004."*

[18] Clause 14.4 provided:

> *This Agreement, together with Annexes, constitutes the full and entire agreement between the employer and the employee, and supersedes all previous negotiations, communication and commitments whether written or oral, with respect to the matters it contains.*

[19] Less than a month later, Dr Kamel and his family had moved to Invercargill and he took up his new job. Such was the haste with which this employment relationship was

consummated that SIT had not been able to define Dr Kamel's position or encapsulate his job description in this. The description of the job in the contract remained blank. In the covering letter SIT acknowledged that the job had no title, indicating that this would be formulated later.

[20] The employment agreement dated 11 June 2002 included the following:

- There was no description of the name of the position or the job to be done as the agreement contemplated. This was simply left blank. There was arguably no compliance with s65(2)(a)(ii) of the Employment Relations Act 2000 which requires that an individual employment agreement, dealing with work not covered by a collective agreement, must include *"a description of the work to be performed by the employee"*.
- A clause 14.4 that provided: *"This Agreement together with Annexes, constitutes the full and entire agreement between the employer and the employee, and supersedes all previous negotiations, communication and commitments whether written or oral, with respect to the matters it contains."*
- A clause 14.2 that provided: *"It is expressly recognised that the parties from time to time mutually agree to vary the terms and conditions of this Agreement. No variation of the terms and conditions of this Agreement shall have any legal effect unless all statutory requirements have been complied with and any variations are in writing and signed by both parties."*

[21] Clause 14.4, drafted by the defendant and included in its largely standard form of individual employment agreement, is tightly drawn to exclude any term or condition or representation or other contractual element not contained within the confines of the written agreement. I conclude that this excludes the content of the letter from SIT to Dr Kamel dated 11 June 2002 under cover of which the agreement, signed by SIT on that same date, was sent to him. If necessary, the "contra proferentem" rule of contractual interpretation should apply, that is SIT is not entitled to rely upon an argument that, despite the clause it drafted, other documents can have contractual effect.

[22] Even if the covering letter were to be found to be part of the written employment agreement in spite of the provisions of clause 14.4, the list of responsibilities and duties intended by the agreement's clause 3.1(d), *"... the employee shall: ... Be responsible for discharging all responsibilities and duties set out in the Job Description forming Annex 2 of this agreement"*, may not ultimately help the defendant. What it says was the informal job description consisted of the following:

PROJECT/TASKS

- *300 teaching hours per annum – preferably in Renewable Energy Programmes but possibly required to teach in other areas.*
- *Submission of a research proposal to be agreed upon by the Institution.*
- *Research supervision of Incubator students as required by the Academic Director.*
- *Oversight of SIT's implementation of renewable energy projects.*

RESPONSIBILITIES

- *Liaison with appropriate personnel in various local government and government agencies as well as industries.*
- *Securing research funding where applicable, nationally and internationally.*
- *Undertaking in conjunction with the Academic Director a feasibility study on operating a clean energy Incubator.*

[23] Clause 14.2 of the agreement set out above required any variation of this job description to be by consent and recorded in writing. It was not open to the defendant to amend the job description unilaterally during the term of the agreement. If, as is my primary finding, there simply was no job description forming part of the employment agreement as it contemplated, it was then necessary for such to be agreed upon and recorded in writing during the currency of the agreement.

[24] On 11 September 2002, SIT's academic board approved the SIT Diploma in Renewable Energy Technologies (Electrical Engineering) for which Dr Kamel was to be responsible. Among the details of the academic programme approved was its length of two years and that it would lead to a Diploma in Renewable Energy Technologies (Electrical Engineering). It was to be conducted within the Faculty of Trades and Technology and was to commence in February of each year.

[25] When the employment agreement was entered into, SIT's intention was for Dr Kamel to be involved integrally in the preparations for the establishment of a programme in renewable energy. These were to include a determination of whether it was to be a diploma or degree or other programme. Plans had to be written and a programme approved by SIT's academic board. Curricular and other documentation had to be approved by the New Zealand Qualifications Authority (NZQA). Estimates of potential student interest had to be made. The CEO considered that it might have taken up to 18 months to begin teaching a renewable energy project. As it transpired, however, and no doubt in part because of Dr Kamel's enthusiasm and expertise, the programme began only about six months later, at the commencement of the 2003 academic year.

[26] The CEO's decision to offer a two-year term agreement (that Dr Kamel accepted) allowed for a period of programme development of up to 18 months followed by a possible period of fine-tuning after the programme's commencement. The programme would, in any event, have started at the beginning of an academic year, that is in early February. So the expiry of the two-year term would have fallen about half-way through an academic year, either the first or second year of the programme. As it transpired, the term was due to expire midway through the second year of a two-year diploma course.

[27] It is unnecessary to detail the events of the first 18 months or so of Dr Kamel's employment. That is because, although these are not irrelevant, the employer's acts and omissions said to have been a constructive dismissal occurred principally within the last six months or so of Dr Kamel's tenure at SIT. Also, the subject-matter of Dr Kamel's other complaints about his treatment by SIT during this period was acquiesced in by him and does not, in any event, amount to actionable wrongs in employment in my conclusion.

[28] The deficiencies in the employment agreement were effectively "parked" by the parties in their initial enthusiasm to establish a teaching programme to suit Dr Kamel's abilities. Although from time to time he requested SIT to address these deficiencies and other complaints that he had about the manner in which he was treated, these did not get in the way of the establishment of a teaching programme. For example, Dr Kamel clearly wished to communicate about matters affecting his employment and teaching programme with SIT's chief executive rather than with his immediate managers. Although he was correct that the CEO was his employer, equally in my view she was justified in insisting that Dr Kamel use established and delegated channels of communication about such matters that ought not to have been her concern, at least in the first instance.

[29] Dr Kamel's grievances were many and varied. A significant number of these, although genuine and keenly felt by him, cannot support a cause of action in employment law, whether his claim to unjustified constructive dismissal or, even if he did not so advance his case, a claim to unjustified disadvantage in employment. These unavailing grievances included, but not exhaustively:

- Dr Kamel's view that he ought to have been appointed as the academic director of SIT's business incubator unit under whose supervision he was at the outset but who subsequently resigned;
- that his presence on the polytechnic's staff as the holder of a doctorate in engineering should have been more prominently and frequently publicised to enhance the reputations of both parties; and

- that SIT should have named its enhanced renewable energy programme an "advanced diploma" in the same way that similar Australian programmes were styled despite New Zealand tertiary qualifications not recognising such a diploma category.

[30] There were many more dissatisfactions on Dr Kamel's part that, whether alone or in combination, do not provide him with a cause of action in employment law.

[31] Of more significance in a legal sense were what may arguably have been contractual breaches by SIT that were, nevertheless, accepted by Dr Kamel in the sense that although he disagreed with what his employer did, he nevertheless affirmed the contract by continuing to work under it as it was performed by SIT. That is significant because of the particular cause of action relied on by Dr Kamel. That was a constructive dismissal and, in particular, a breach or breaches of the employment agreement by the employer that were not accepted by the employee whose resignation or abandonment of employment as a response to those breaches was said to have been a constructive dismissal.

[32] So it is necessary for Dr Kamel, bearing as he does the onus of establishing a constructive dismissal, to prove to the Court that there was a breach or breaches of the contract of employment going sufficiently to its core, and/or illustrating an intention by the employer not to be bound by the contract, and which had not been affirmed by the employee, that caused his resignation to be a constructive dismissal.

[33] Dr Kamel resigned on 10 February 2004 by giving notice of his intention to terminate the employment relationship. It is a fact, but not a decisive consideration, that SIT gave him a brief opportunity to reconsider his resignation. It said it would not *"accept"* the resignation, at least immediately. That illustrates a commonly held misunderstanding of the act of resignation. It is not an offer that can be accepted or rejected by an employer. Rather, a resignation is notice of cessation of employment by the employee, either immediately upon giving the notice or, more usually, the giving of notice of the ending of the contract at the expiry of a required period or, if there is none, of a reasonable period.

[34] Nevertheless, Dr Kamel's solicitor confirmed his resignation and SIT quite properly advised that it considered that this was on the period of two months' notice required by the employment agreement so that his employment did not end until 9 April 2004. So Dr Kamel must show an act or acts, or omission or omissions, by the employer, sufficiently proximate to the resignation, that constituted a breach or breaches of the employment contract by SIT entitling Dr Kamel to say that his employer had repudiated it and, therefore, that he had been constructively dismissed.

[35] That is not to say that such events that occurred earlier in the performance of the contract, and may have been breaches by the employer accepted by the plaintiff, are irrelevant. Even if acts or omissions in breach were confirmed by Dr Kamel and he continued to perform the contract so that these cannot of themselves constitute or contribute to a constructive dismissal, they may nevertheless contribute to a relevant background in which other acts or omissions did so.

[36] I conclude that relevant events beginning in late 2003 help to determine whether there was a constructive dismissal. For the foregoing reasons I set out the following summary of relevant facts.

[37] These start with the parties' attempts to settle in mediation their dissatisfactions with the interpretation and operation of the fixed term employment agreement. Although what transpired between the parties and their representatives in a mediation conference conducted with the assistance of an independent mediator on 10 December 2003 were (properly) not disclosed in evidence, the issues for discussion at the mediation and its interim outcome were in evidence and are admissible when determining what was intended to occur.

[38] By October 2003 Dr Kamel had become frustrated in his unsuccessful attempts to communicate with the CEO of SIT (his employer) about his employment and his increasing dissatisfactions with what he believed should have been his role. He instructed a solicitor who wrote formally to SIT raising his grievances and proposing that these should be discussed at mediation with a view to a resolution of these complaints for the continued performance of the employment agreement. I quote from the solicitor's letter of 13 October 2003:

> 1. *The absence of any agreed job description.*
> 2. *The absence of an appropriate title for his position.*
> 3. *The failure to acknowledge that a research activity was anticipated as part of his employment.*
> 4. *The inappropriate reporting structure for the Renewable Energy Technology Course and the failure to appoint him a Project Manager.*
> 5. *The inadequacies of facilities.*

[39] There was a prompt response from SIT dated 22 October 2003 agreeing to mediation, responding to the five points, and also setting out some additional issues that it proposed be discussed at the same mediation as follows:

> 1. *Dr Kamel has a short term contract proposal which clearly states projects, tasks and responsibilities. For the tutorial work Fouad should refer to the tutorial job description given to him 11 June 2003. We acknowledge he has no further job description, but would be happy to formulate a job description which encapsulates the projects, tasks and responsibilities as stated in the contract proposal along with the tutorial tasks and responsibilities.*
>
> 2. *The title of lead tutor is entirely appropriate for the work Fouad is undertaking with the Diploma in Renewable Technology.*

3. *SIT has acknowledged the research activity anticipated both in the initial letter of proposal for a 2 year contract dated 11 June 2002 and in further clarification to Fouad on 11 June 2003. Furthermore, SIT worked with Fouad to develop a research proposal for external funding. It has become increasingly frustrating for SIT that the research proposal, beginning with the energy audits has not been undertaken by Fouad.*

4. *The Diploma in Renewable Technology is substantially based on electrical knowledge, with tutors and electrical labs used in the delivery of the Diploma. It is therefore appropriate for the programme to be in the Trades and Technology Faculty with Fouad reporting to the Head of Faculty. I am unsure where Fouad's expectation for a Project Manager came from.*

5. *I am unsure of Fouad's concerns in this area.*

[40] At the end of the first mediation conference on 10 December 2003, it was agreed that SIT would formulate a number of proposals for Dr Kamel's consideration and that the mediation would resume on a date to be agreed in March 2004 at which time these would be discussed and agreement hopefully reached to allow the parties to resolve their differences. It appears that this was intended to allow not only for a resolution of differences under the fixed term agreement that was to expire in July 2004 but also to allow the parties an ongoing employment relationship after that.

[41] Although it was known that the 2004 academic year would begin on about 9 February, that is about a month before the resumed mediation, it was not until less than a fortnight before that date that SIT put its proposals to Dr Kamel. Although it professed that it was unable to do so until then because of the Christmas break and period of leave for staff, it is difficult to accept that in the circumstances of the seriousness of the breakdown of the relationship these matters could not have been addressed and considered more promptly and, if necessary, an attempt made to bring forward the resumed mediation in the event that there was not a resolution allowing a successful restart of the programme at the beginning of the 2004 academic year as was at risk. What is clear, however, is that the mediation was adjourned to enable the parties to consider their positions that would be addressed when they resumed in March.

[42] On 28 January 2004 Mike Grumball, head of faculty (HOF) for trades and technology, handed Dr Kamel a formal letter dated 27 January 2004. Although Mr Grumball sent copies of this letter to Dr Kamel's solicitor and to the mediator, he then discussed the letter with Dr Kamel. The letter consisted of two sections. The second, with which I am less concerned, set out suggestions for the offer of a full-time tutorial position with SIT *"teaching on the Diploma in Renewable Energy."* This excluded a research component, proposed that the diploma would *"remain within the Electrotechnology Section"* and that Dr Kamel *"would be directly responsible to the Programme Manager of that section."* SIT did not propose that

the renewable energy project would then have its own programme manager because of its insufficient size to warrant this.

[43] The first part of the letter related to what it described as *"your current employment agreement"* and began:

> *This letter is to clarify your responsibilities at SIT for the remainder of your current employment agreement ... as per the recent Mediation hearing.*

[44] It concluded:

> *I trust that this letter clarifies your duties and responsibilities as seen by SIT, and that we can resolve the current situation amicably. We are happy to discuss the content of this letter at any time.*

[45] The employer's position was prescriptive. It conceded that Dr Kamel was entitled to reinstatement of the title *"Director Renewable Energy Studies and Research"* and that he was again entitled to use this on his personal business cards. But it *"required"* Dr Kamel to report directly to the HOF for trades and technology and stated that the renewable energy project would remain within the electrotechnology section *"under the management of John Knight, the Programme Manager."* It directed Dr Kamel to undertake the contracted teaching hours as directed by the HOF. The teaching responsibilities were to be *"conducted as per the current SIT Tutorial Job Description"* and any additional conditions agreed to at his first *"Performance Appraisal meeting."* All research, including then current research was to be formally submitted through the HOF to the research committee in accordance with SIT's policy, and research outputs for 2004 were to be agreed to during the first performance appraisal meeting with the HOF.

[46] Research supervision of incubator students was to be agreed with the HOF and the incubator programme manager. Dr Kamel was told that a feasibility study on operating a clean energy incubator was to be undertaken with milestones/targets agreed to with the HOF in consultation with other persons to be identified. Dr Kamel was to undertake an energy audit at a named marae and a formal plan was to be prepared outlining time frames and objectives and a report on the findings and recommendations was to be submitted to the HOF by 25 June 2004. Finally, Dr Kamel was directed to continue with his role on the Venture Southland alternative energy committee and with any further community or industry groups relevant to his field of expertise.

[47] Mr Grumball on behalf of SIT advised Dr Kamel that none of the foregoing responsibilities or tasks were considered by SIT to be outside the scope of his employment contract.

[48] Dr Kamel was subsequently asked to give an assurance that he would begin classroom teaching as scheduled on the second day of the new academic year, Tuesday 10

February. Because he disagreed with the directions and that SIT could impose them unilaterally, Dr Kamel declined initially to give that assurance if SIT insisted that the renewable energy diploma programme remained within the electrotechnology section and if he was under the management of Mr Knight as programme manager. Mr Grumball was concerned that the programme might not begin as scheduled and, on 5 February 2004, handed Dr Kamel another formal communication as follows:

> *This letter is to formally direct you to undertake the duties as outlined in my 27 January 2004 letter (Copy Attached). In particular you are directed to tutor on the Renewable Energy programme commencing 9 February 2004, and comply with the timetabled schedule as attached.*
>
> *Failure to comply with this directive will result in disciplinary action being undertaken.*
>
> *You are required to respond to this directive by 9 February or respond in writing directly to myself.*

[49] Dr Kamel, faced with this ultimatum, agreed, albeit reluctantly, that he would teach as directed and a satisfied Mr Grumball left on annual leave, to Dr Kamel's surprise at least, on the first day of the new academic year.

[50] Although the timetable given to Dr Kamel showed that his first class on the first teaching day was to be taken at a venue described as *"Rugby Park"*, the plaintiff nevertheless presented himself at a classroom on the main campus where all other classes to be taught by him were to be taken. SIT has subsequently regarded this as subversive but the students also presented themselves at the same classroom at that time and there is no explanation for their apparent mistaken beliefs about the venue. Although SIT asserted that another class had been booked to occupy that venue, none turned up. Mr Knight, however, did and redirected the class and Dr Kamel to a room at the rugby stadium about a kilometre away that was used by SIT as an overflow classroom venue.

[51] Dr Kamel, Mr Knight, and the students then walked to the stadium although when Dr Kamel arrived and saw the facility in which he was expected to teach, he walked out, returning to the main campus to present a letter of resignation that he had prepared on the previous day but withheld until then. Contact was made with Mr Knight who returned to the stadium room to deal with the dissatisfied students and Dr Kamel tendered his letter of resignation. Despite the opportunity to reconsider his position, Dr Kamel reaffirmed his resignation a matter of a couple of days later and thereafter brought his personal grievance asserting unjustified constructive dismissal.

Constructive dismissal?

[52] I have concluded that Dr Kamel was dismissed constructively by SIT. Directions it purported to give him about his role and responsibilities in 2004 were matters of contractual

negotiation and settlement and not issues about which SIT was entitled to give unilateral directions and in respect of which it was entitled to say that non-adherence by Dr Kamel would be a "disciplinary matter", that is, a breach of his employment contract.

[53] It is very unfortunate that these matters were not resolved at the outset of the fixed term contract. Although it was very anxious to engage Dr Kamel, it is difficult to understand how SIT could have left so many important issues undecided in its form of employment agreement. But having done so, it was incumbent upon the employer as the provider of the agreement and stipulator for the terms and conditions contained in it to ensure that these were negotiated, settled, and recorded. It did not do so, at least until the first mediation more than a year later.

[54] Next, although it was sensible, if belated, that the parties attempted to resolve these questions with the assistance of mediation, the timetable to the follow-up mediation simply did not allow for necessary decisions to be made and put in place before the start of the 2004 academic year.

[55] It was in all of these unfortunate circumstances that SIT managers found themselves believing that they had no alternative but to direct Dr Kamel against his will to do things its way.

[56] It is, however, neither reasonable nor lawful for an employer to direct unilaterally what should be the subject of negotiation and agreement between the parties and then to threaten disciplinary procedures that may include dismissal for disobedience of the employer's unilateral direction. Although Dr Kamel agreed with these ultimatums under protest, his unexpected direction to conduct a class at a sports stadium some distance from the main campus where it had previously been held and most expected it to take place, was the final straw for the plaintiff. His resignation in these circumstances was the plaintiff's response to the employer's repudiation of their agreement, Dr Kamel's constructive dismissal.

[57] Although I accept that SIT had not followed a course of conduct with the deliberate and dominant purpose of inducing Dr Kamel to resign, it nevertheless manifested its intention not to be bound by their contract by directing him against his will on matters that ought properly to have been the subject of negotiation and settlement as terms and conditions of that contract. That entitled Dr Kamel to say he had been dismissed constructively. His resignation in these circumstances was foreseeable by the employer.

[58] I turn next to justification for the constructive dismissal. I have already described the delays in settling important terms and conditions of employment as unfortunate. The defendant has really provided no explanation for those deficiencies in its form of contract it was anxious to have Dr Kamel agree to. It may or may not be significant that there appears

to be little, if any, expert human resources input into these later events and perhaps even into the initial formulation of the position and drafting of the contract. Despite these delays, SIT was right and justified in attempting to regularise the situation by mediated agreement. It was unfortunate too, and as I have already noted, that the second mediation could not have taken place before the start of the academic year in 2004.

[59] Nevertheless, it was not justifiable for SIT to impose terms and conditions of employment upon Dr Kamel against his will when it had accepted, correctly in my view, that these were matters of negotiation and contract to be the subject of further mediation. The ultimatums presented to Dr Kamel at the start of the 2004 academic year were heavy-handed and inappropriate. They were not justifiable as the actions of a fair and reasonable employer in all the circumstances. It follows in my conclusion that Dr Kamel's constructive dismissal was unjustified.

A lawful fixed employment term?

[60] Section 66 of the Employment Relations Act 2000 is the statutory provision governing fixed term employment agreements as Dr Kamel's purports to be. The section has been amended by Parliament recently in December 2004 but the original form of s66 as enacted in the 2000 Act applied to this case. Counsel were agreed that the only significance of whether the agreement was a for a fixed term was for remedies if there was an unjustified dismissal.

[61] Section 66 required the employer to satisfy several evidential tests before relying upon the expiry of the term of the agreement to defeat what had been concluded in litigation to be the default position of employment of indefinite duration[1].

[62] Those cumulative tests included:

- that the employer had genuine reasons based on reasonable grounds for specifying that the employment of the employee was to end at one of the following specified events:

  the close of a specified date or period or on the occurrence of a specified event or at the conclusion of a specified project;

- that the employer had advised the employee of when or how his employment would end; and
- that the employer had advised the employee of the reasons for his employment ending in that way.

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[1] *Clarke v Norske Skog Tasman* [2003] 2 ERNZ 213; *Norske Skog Tasman v Clarke* [2004] 1 ERNZ 127 (CA).

[63] As the *Clarke* case in this Court and the Court of Appeal confirmed, there was then no requirement that such advice had to be in writing or, more particularly, in the written employment agreement, although the commonsense of so including it was emphasised, if only to avoid evidential disputes such as in this case about what was said or not said a long time ago.

[64] Although the term of the agreement is clearly specified in it, the defendant accepts that the other cumulative requirements of s66 set out above are not and seeks to rely on evidence of its witnesses to say that these were imparted orally to Dr Kamel when he first met with the CEO of SIT in early June 2002 when prospective employment was discussed and an oral offer of employment made to him.

[65] I accept that SIT had genuine reasons based on reasonable grounds for specifying fixed term employment defined by date. The suggestion of a new programme in renewable energy was dependent on a number of factors including whether sufficient students would enrol to make it viable, whether external funding might be found for associated renewable energy projects and research, and whether, as in the case of any other new course, NZQA approval would be given and on what terms. If all or any of these considerations did not come to fruition, then it was foreseeable that the intended programme would have to either cease or be modified, in which case there could have been no guarantee of ongoing employment.

[66] I am satisfied, also, that the employer advised Dr Kamel, before the agreement was entered into, of the reasons for his employment ending after two years. It follows, therefore, that Dr Kamel could not have had a legitimate expectation to continued employment with SIT beyond the end of the fixed term. Although, as already noted, a proposal had been floated for another position at SIT following the expiry of the fixed term, it cannot be said with sufficient confidence that this would have matured into an employment agreement on which Dr Kamel could have relied for remedies.

Remedies

[67] Little evidence was called to support Dr Kamel's claims to remedies. Although he had not worked since his employment with SIT ceased, and appears to have returned to live in Christchurch, there was no evidence of attempts by him to obtain alternative employment, that is, to attempt to mitigate his losses as the law requires.

[68] I conclude that, SIT having complied with s66 of the Employment Relations Act 2000, Dr Kamel was engaged on a fixed term employment agreement that was to expire on 9 July 2004. There was evidence that he ceased work at SIT on 9 April 2004. I assume he was paid until then, that having been the period of two months from his resignation that I have

concluded was a constructive dismissal. In these circumstances Dr Kamel is entitled to the remuneration for the balance of the term of his employment that I am satisfied he would have concluded had he not been constructively dismissed. It appears that this was probably three calendar months if he was paid to 9 April 2004 or, if not, the equivalent remuneration from the date of last payment to 9 July 2004. Dr Kamel's annual salary having been $44,200, three months' equivalent is $14,733. Leave is reserved to apply to the Court to fix this sum if it cannot be agreed.

[69] The plaintiff has claimed compensation for non-economic loss of $25,000 under s123 of the Employment Relations Act 2000. Although Dr Kamel cannot be compensated for economic losses beyond 9 July 2004, the date of expiry of his fixed term employment agreement, that temporal restriction does not apply to compensation for non-economic loss. I accept that he has continued to suffer senses of indignity, embarrassment, and humiliation beyond that period.

[70] Dr Kamel also suffered these consequences in the period leading up to his unjustified constructive dismissal as a result of the employer's breaches of his agreement and the following constructive dismissal. Dr Kamel impresses me as a proud man who puts particular store by his academic and professional record and standing. He was humiliated by his employer's breaches of contract, if not publicly, then privately and before his family, and his sense of personal humiliation cannot be under-estimated. His relations with his immediate family that Dr Kamel values highly were affected adversely by the events leading to, and the fact of, his unjustified constructive dismissal. In addition Dr Kamel doubted his own self-worth and was unable to sleep properly for dwelling on these events. Although SIT cannot be held responsible for Dr Kamel's inability to obtain further employment, his dismissal cannot have made a difficult task any easier. In all of his particular circumstances, he was hit particularly hard by his dismissal and events leading to it.

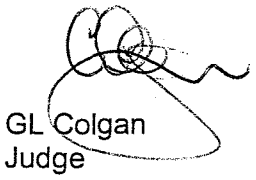
[71] Remarkably for a public body, SIT's immediate and forceful response to Dr Kamel's proposal for mediation following his unjustified constructive dismissal and intimation that he might take a personal grievance was to reject further mediation out of hand. Further, and in what I can only conclude was an attempt to dissuade him in a most direct and persuasive way from doing so, SIT told him that if he brought the challenge he did, it would strenuously seek solicitor-client costs against him. It is to Dr Kamel's credit that he resisted that blunt attempt to dissuade him and has continued to prosecute this proceeding. The employer's response to Dr Kamel's immediate attempts to address his grievance by the recommended process aggravated his distress.

[72] That is not, in the circumstances of this case, a response to a request for mediation and the intimation of a complaint about dismissal that the Court would expect to see from a public employer that is required by statute, and has committed itself by contract, to act as a good employer, more particularly after acting responsibly in inviting Dr Kamel to reconsider his decision to resign. SIT added insult to injury. If SIT is to be taken at its word, that it would have pursued Dr Kamel for solicitor-client costs in the event that he was unsuccessful, I may need to be persuaded by it that this should not now be the basis upon which costs should be awarded against the employer.

[73] Taking into account the levels of awards in other cases and to the extent that the unique facts of this can be compared to the non-economic losses suffered by other grievants, I find the plaintiff entitled to an award under s123 of $12,500.

[74] Dr Kamel is entitled to an order for costs. Although he represented himself in the Employment Relations Authority and may therefore be able to recover only disbursements in respect of that hearing at best, the plaintiff was represented professionally before this Court.

[75] If costs cannot be resolved directly between the parties, Dr Kamel may have the period of one calendar month from the date of this judgment to file and serve a memorandum in support of an award in his favour, with SIT having a further period of one month thereafter to respond by memorandum.



GL Colgan
Judge

Judgment signed at 11.45 am on Friday 5 May 2006