

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN Terence Paul Golden (Applicant)
AND Northland District Health Board (Respondent)
REPRESENTATIVES Christina Cook, Counsel for Applicant
Rodger Pool, Advocate for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 20 February 2006
DATE OF DETERMINATION 4 April 2006

DETERMINATION OF THE AUTHORITY

The problem

[1] Mr Terence Paul Golden (“Mr Golden”) claims that he was constructively dismissed from his employment as a mid-wife with the Northland District Health Board (“the Board”). He says that his employment was “*substantively changed without due process or any consultation, causing significant loss of salary, and a breakdown in the relationship of trust*”. He applies to the Authority for an investigation of this employment relationship problem and asks for orders for reimbursement, compensation and costs.

The issues

[2] 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.¹

These issues are dealt with in turn.

Did Mr Golden resign?

¹ *Auckland Electric Power Board -v- Auckland Local Authorities Offices Union* [1994] 1 ERNZ 168 (CA)

[3] Mr Golden wrote, while he was in England, to the Board's employment relations consultant Mr Shane Wealleans ("Mr Wealleans") by email dated 16 September 2005. The advice materially stated:-

Re Constructive Dismissal – effective immediately

1. *Due to the continued employment relations with Northland Health (sic) District Health Board and myself I have no option now but to put in my resignation effective immediately.*
2. *This sad state of affairs has been created wholly by NHDHB.*
- ...
12. *What I am seeking is for an offer of costs and compensation together with an apology in recognition of the inappropriate way my recruitment from the UK and employment in NZ for one job has led to a total and irrevocable breakdown in trust where the employer has been demanding I take another job which was never agreed to.*

[4] Clearly there was a resignation.

Was the resignation caused by a breach of duty?

[5] While Mr Golden was on leave in England, the Board's Maternity & SCBU Manager Mrs Lyn Wardlaw ("Ms Wardlaw") wrote by email dated 2 July 2005 to Mr Golden in the following terms:-

Hi Paul,

Hope you are enjoying your holiday. I would like to inform you of the decisions made recently at the "TeamMidwives" Planning day with our GM – Jeanette Wedding.

The Team have agreed to relieving themselves for most of their annual leave and I will relieve them after consultation with the team member that requires leave depending on the amount of leave requested. This will affect you as the reliever, but feel that the team need to be more efficient and responsible for themselves.

Sally's position has been filled, and Margaret has been made permanent. Unfortunately, since you have not completed your pharmacology or designations, this ultimately affected your opportunity to a permanent position.

I had hoped to discuss this with you prior to your holidays. But as you were off sick, then we didn't see you for your last shift which your GP had cleared you for and I attempted unsuccessfully to phone you. I felt that you needed to know the outcomes of the planning day and how this ultimately affects you. My apologies for it via email.

However, we look forward to your return and your ongoing employment with us. Although this will mainly be as a Core Midwife.

*Cheers
Lyn Wardlaw*

[6] Mr Golden says he was shocked, incredulous and concerned when he received the email. He says he was not consulted at any time about the team midwives planning day.

[7] Both parties owed a duty to each other not to do anything calculated or likely to destroy the relationship of trust between them and to deal with each other fairly and reasonably. They were also bound by the statutory duty to deal with each other in good faith.

[8] It was acknowledged that Mr Golden was affected by the decision communicated to him by Mrs Wardlaw. Accordingly, he ought to have been told about the potential for the decision and the midwives planning day at which it was resolved. It was not fair or reasonable not to have informed and consulted him in respect of both. That too is acknowledged by Mrs Wardlaw herself when she advised her intention to discuss matters with Mr Golden before his leave.

[9] The Board's actions were in breach of the statutory duty of good faith. That duty requires the parties to be active and constructive in establishing and maintaining a productive employment relationship. The parties ought to be responsive and communicative. The duty of good faith required the Board to provide to Mr Golden access to information relevant to the continuation of his employment about the decision and an opportunity to comment on the information before the decision was made. It did not do so however.

[10] Mr Golden was not treated fairly or reasonably or in accordance with the statutory duty of good faith. I find that the board breached its duties to Mr Golden.

Was a substantial risk of resignation reasonably foreseeable?

[11] Mr Golden had been offered employment initially by email dated 17 September 2004 as follows:-

Dear Paul

*I have been advised via Lyn Wardlaw, the Maternity and SCBU Manager to offer you a position as follows:
Full Time Relieving Case Loading Midwife, salary of NZ \$63,000, plus occasional Core Midwifery Duties.*

This email is sent on behalf of Lyn Wardlaw.

*Yours sincerely
Sally Cochrane
Relieving Recruitment Co-ordinator*

[12] While Mrs Wardlaw denied any knowledge of this advice and Mrs Sally Cochrane said she would not have used such wording, I have no doubt as to the veracity of the communication.

[13] By a letter dated 31 December 2004, Mrs Wardlaw provided Mr Golden, upon his request, this confirmation which she now regrets and says was ill-considered:-

This is to confirm that Paul Golden is on a salary of \$63,000.00 per annum. This commenced as from 6th December 2004.

*Yours truly
Lyn Wardlaw*

[14] It should be no surprise then that Mr Golden maintains his salary entitlement was \$63,000.00. There is some disagreement between the parties however.

[15] Mrs Wardlaw wrote to Mr Golden by letter dated 29 September 2004. She offered him employment as "full time Team Reliever and Midwife with the Maternity Unit" at Whangarei Hospital. She advised he was employed under the terms of the Northern Districts and NZNO Multi Employer Collective Agreement 2002-2005 and that his salary was as follows:-

2. Salary

Your salary will be \$42,406 per annum for a full time employee, pro rated in accordance with hours worked, which is level 8 of the Registered Nurses/Midwives Salary Scale.

You will also be required to act as a Reliever for the team midwives on an as and when required basis. The team midwives have a variation to the collective which will apply and you will be remunerated by way of a salary of \$63,000 per annum prorated in accordance with the hours worked. Please note there are no additional payments for your work as a team midwife.

[16] Mr Golden was not pleased to have ongoing employment as a core midwife only. He considered the altered position as a very different employment and that he had lost his job. He says he came to New Zealand on the basis of a salary of \$63,000.00 and that he could not manage on a salary of \$42,000.00 for the “ward job” or core midwife role Mrs Wardlaw presented to him. As at the date of Mrs Wardlaw’s advice to Mr Golden, the salary for core midwife work was \$50,000.00. The salary for relief team midwife work was \$65,520.00 pro rata.

[17] Mr Golden obtained medical advice that he was unfit for work due to work stress until 1 August 2005. That situation was not communicated by him directly to Mrs Wardlaw. He says he cancelled his return flight to New Zealand as a result of the uncertainty arising for him from Mrs Wardlaw’s advice of 2 July 2005.

[18] By letter dated 18 July 2005 Mrs Wardlaw wrote to Mr Golden asking him to phone her to discuss matters surrounding his absence and offering to meet the charges of a collect call from England.

[19] By email of 23 July 2005 Mr Golden wrote seeking to commence a formal grievance process with the Board and posing certain questions for the Board’s response.

[20] By email dated 26 July 2005 Mr Wealleans invited Mr Golden to commence discussions with the Board about Mr Golden’s “stressors” and on going employment relationship with the Board. Mr Wealleans wrote again by letter dated 8 August 2005. In essence the Board’s answer to Mr Golden was this:-

Your position within your employment agreement stipulates that you will be employed as a full time core midwife and a team midwife when required. There has been no restructuring of your job and providing that you meet your obligations and maintain your qualifications so that you are legally able to practice as a core midwife you will still have the opportunity to work as a reliever team midwife as required.

[21] The effect or impact on Mr Golden of Mrs Wardlaw’s advice of 2 July 2004 was to deny Mr Golden that part of his role where he acted as full time Reliever. When he performed those duties, he was entitled to be paid on the basis of a \$63,000.00 salary pro-rated for the hours so worked. He was employed as both “*full time Team Reliever and Midwife with the Maternity Unit*”. That was the construction used in Mrs Wardlaw’s offer of employment to Mr Golden and which he accepted. Mr Golden is entitled to consider a major component of his employment with the Board was relief work. The Board was contractually bound to provide him that work. In short, Mr Golden had a contractual entitlement to work as a team midwife.

[22] Mrs Wardlaw’s advice constituted a variation to the terms of Mr Golden’s employment. She advised him his ongoing employment with the Board would be as a core midwife. The decision taken at the team midwives’ planning day was to preclude him for the ordinary relief work. As I have said, Mr Golden was never consulted about that variation and he had no input into a decision which I am satisfied disadvantaged him. He ought to have been involved and I discern no reason

why consultation with him could not have occurred prior to the Board's unilateral action, before he went on leave.

[23] Mr Golden suggested mediation in an email of 9 August 2005. He demanded the Board meet his earlier request for further information and responses. He continued to maintain that position. I consider the Board's attempts to commence discussions were commendable. The situation was difficult however because Mr Golden remained in England. That is not a criticism of him.

[24] By 17 August 2005, the Board had still not received Mr Golden's medical certificate. The Board was desirous of some certainty about Mr Golden's return to work. Mr Golden responded that he did not have the funds to return to New Zealand and repeating his requests for information.

[25] By 25 August 2005, the Board gave notice that Mr Golden's continued absence from work was potentially a disciplinary matter. It again made request for medical information verifying his medical incapacity.

[26] The correspondence continued between the parties progressing to discussions about arrangements for mediation. Regrettably for various reasons mediation did not occur. Mr Golden submitted his written resignation by his advice of 16 September 2005. The Board wrote back to him by letter dated 26 September 2005 confirming the end of the employment relationship.

[27] I have concluded that Mrs Wardlaw's advice to Mr Golden of 2 July constituted a breach of duty. I consider that breach of duty was so serious that it was reasonably foreseeable that Mr Golden would resign.

Determination

[28] I conclude that Mr Golden was unjustifiably constructively dismissed. He is entitled to remedies in settlement of that employment relationship problem.

[29] Having made that finding 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 the actions of the employee 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.

[30] I have reached the view that Mr Golden was somewhat inflexible in terms of his stated position in the correspondence and his uncompromising demands for further information and answers to questions as a prelude to continuing discussions. I do not consider he can be criticised for remaining in England however, and the Board by Mrs Wardlaw's actions ran the risk of him remaining there because of the manner it elected to communicate with him. I do however, tend to view his position as obstructive and non-compromising and in my assessment, that behaviour constitutes blameworthy conduct. I think it appropriate the remedies to be awarded to Mr Golden be reduced by 33%.

[31] I am satisfied that Mr Golden has suffered loss in the form of lost income as a result of the Board's actions. I quantify the relevant loss in terms of the wages due to Mr Golden for the 22 weeks from 16 September 2005 until 20 February 2006. I calculate the loss in the gross sum of \$21,153.85 being 22 weeks on a core midwife salary at \$50,000.00. That sum is to be reduced by 33%. **I order Northland District Health Board to pay to Terence Paul Golden the gross sum of \$14,102.56 as reimbursement.**

[32] I am satisfied that Mr Golden has suffered humiliation, loss of dignity and injury to his feelings. He says that when he received Mrs Wardlaw's email he was sent into a quandary. He simply did not know what to do. He questioned whether he should return to New Zealand and an employment he was not employed to do. He said he was shocked and incredulous. That being the extent of Mr Golden's evidence on the matter, a modest award of compensation is called for. I consider a compensation award of \$6,000.00 is appropriate but reduced by 33%. **I order Northland District Health Board to pay to Terence Paul Golden the gross sum of \$4,000.00 as compensation.**

Costs

[33] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Cook is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Poole is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority