

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ruapehu District Council (Applicant)
AND Ali Ibrahim (Respondent)
REPRESENTATIVES Louise Foley, Counsel for Applicant
Debra Law, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 19 November 2004
SUBMISSIONS RECEIVED 1 December 2004 from Applicant
6 December 2004 from Respondent
DATE OF DETERMINATION 10 January 2005

DETERMINATION OF THE AUTHORITY

The Ruapehu District Council claims that Mr Ali Ibrahim owes it monies pursuant to its Training Policy and pursuant to an Incentive Payment Scheme. Mr Ibrahim claims that he was constructively dismissed in that the Council destroyed the relationship of trust and confidence between the parties by unilateral action which it was not entitled to take.

Mr Ibrahim is a civil engineer, originally from Iraq. He took up employment with the Ruapehu District Council in January of 2002 and left the Council in January 2004. He said he took up the position because the Council agreed to fund his completing a Diploma in Highway Engineering. I accept that that is so.

There was much argument about the circumstances of the formation of the contract, particularly that part relating to study leave and expenses. However, it rapidly became clear that both parties agreed that the provisions of the Training Policy were applicable.

Mr Ibrahim's employment proceeded satisfactorily until he received a letter from Mr Chris Ryan, the CEO, on 18 February 2003, stating that Mr Ryan believed that the interpretation that had been given to the Training Policy re study leave was incorrect and that if Mr Ibrahim left within 12 months of completing study he would be required to pay back 52 weeks' paid annual leave. Mr Ibrahim was understandably shocked by this.

Mr Ibrahim did not believe this was correct and he formed the view that the change in Policy had been precipitated by his asking for a salary review. A meeting took place on 25 February but nothing was resolved. Mr Ibrahim wrote to Mr Ryan on 27 February but heard nothing back. On 20 June Mr Ibrahim applied for unpaid leave which was granted. On 3 June he wrote a follow up letter in which he asked for a time to discuss the matter to be set aside. He heard nothing further.

On 8 July 2003 Mr Ryan acceded to Mr Ibrahim's request that he be allowed to work in Auckland during his period of leave. In that letter he reiterated that Mr Ibrahim had an obligation to pay back expenses and the paid time off should he leave Council's employ within 12 months.

Mr Ibrahim telephoned Mr Ryan in November. Mr Ryan was unavailable and he asked the HR manager, Ms Irene Brooks, to speak to Mr Ibrahim. As a result of that conversation Mr Ryan, in a letter dated 2 December, revoked the requirement to pay back the annual leave but stated "I do not agree to extend that arrangement for any future study component you might undertake." Mr Ibrahim had not completed all the parts of the Diploma. Mr Ibrahim wrote again to Mr Ryan on 4 December, Mr Ryan replied on 8 December and Mr Ibrahim wrote again on 12 December asking that the situation be resolved permanently but received no reply. Mr Ryan said that before he was able to respond he received a notification of a personal grievance for constructive dismissal on 29 January 2004. While I appreciate that the Christmas New Year period intervened I could not elicit any adequate explanation for the delay.

Appendix B of the Employment Agreement sets out a procedure for resolving employment relationship problems and personal grievances. The Council did not follow this. Had Mr Ryan responded in a timely fashion as required by this Appendix the matter may not have come before the Authority.

The Training Policy provides that:

Council may at it's [sic] discretion, approve study leave for any permanent full time staff member, to undertake a course of study to complete qualifications, attend courses and to undertake research or project work.

The Policy provides for two kinds of leave: study leave on full pay to a maximum of four hours per week to attend lectures or study during working hours; and leave for block or vacation courses. With regard to the latter the policy states:

Where students are required to attend a course full time for a number of days or weeks, paid leave may be granted for all or part of the time at the discretion of the Manager.

The course of study undertaken by Mr Ibrahim was of the block kind. He was granted leave although Ms Brooks appears to have confused the two types of leave and told Mr Ibrahim that as the leave for the block course came to more than the four hour per week allocation he would have to take some of it as annual leave. Nothing was said about a need to pay back any of the leave taken in any circumstances until Mr Ryan's February letter.

There is no provision within the Policy to demand a refund of block course paid leave or, for that matter, of the four hour per week leave, that has been granted. Under the heading "Repayment Condition" the Policy states:

Expenses paid by Council are refundable on a pro rate basis by any staff member who resigns from Council within 12 months of completing study for which assistance was paid.

The Policy states that: "Council may pay expenses that include the following (receipts are required in all cases)". "Expenses" are defined in the Policy as constituting course and examination fees, travel costs and accommodation and meal costs. It is not possible to interpret this definition in a manner that would include payment of study leave by the Council.

The attempt by Mr Ryan to make Mr Ibrahim agree to pay back the leave he had been granted was illegal.

Constructive Dismissal

The law on constructive dismissal is straightforward. In Auckland Shop Employees IUOW v Woolworth's [1985] ACJ 963, (1985) ERNZ Sel Cas 136 (CA) it was stated that a resignation in form could amount to a constructive dismissal if:

- the employer gave the employee a choice of resigning or being dismissed;
- an employer followed a course of conduct with the intention of coercing an employee to resign;
- a breach of duty by an employer accused an employee to resign.

In Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW [1994] 1 ERNZ 168 (CA) it was held that the resignation must have been caused by a breach of duty on the part of the employer and that the breach of duty must have been of sufficient seriousness to make it reasonably foreseeable that the employee would resign. Constructive dismissal cases often involve a series of events over a period of time and no one single event may entitle the employee to treat the contract as repudiated but the cumulative effect may do so.

Mr Ibrahim undoubtedly resigned as a direct result of his perception that he had been badly treated by the Council. I do not find that there was any substance to Mr Ibrahim's feeling that Mr Ryan began treating him badly after he asked for a pay review. Mr Ryan did not wish him to resign and did not threaten his employment.

The breach that arose was the attempt to impose a repayment condition that was not in Mr Ibrahim's contract of employment. I have given consideration to the fact that Mr Ryan subsequently withdrew the attempted variation. It was not, however, withdrawn with any indication to Mr Ibrahim that there was a recognition that the attempted variation had been illegal. Mr Ibrahim had not completed his course and no undertaking had been given that any leave taken to do so would not be granted subject to a repayment requirement. There was furthermore, an expression by Mr Ryan that he was "disappointed at your ongoing upset around the issue of the repayment condition of your Council funded study assistance". There is no acknowledgement here of any error on the part of the Council; rather, there is an attempt to blame the victim for his reaction to it. When these events are taken in conjunction with Mr Ryan's tardiness (insufficiently explained to my satisfaction) in responding to Mr Ibrahim when he raised concerns, the whole series of events cannot be seen as other than breaches that were sufficiently serious to justify Mr Ibrahim treating his employment as being terminated. Mr Ibrahim was constructively dismissed and the dismissal was unjustified.

Compliance

Also at issue is whether Mr Ibrahim has to pay back any or all of the expenses paid by the Council for his unfinished course.

Given that I have found that Mr Ibrahim has been constructively dismissed, this issue has little relevance in this case. If there were any obligation to repay anything it would not be in accordance with equity and good conscience for the Council to be able to take advantage of a situation that it had itself illegally brought about. Mr Ibrahim would not have resigned had it not been for the actions of the Council; and the resignation was not in fact a resignation but a dismissal. The Council also seeks the repayment of an incentive payment. The same comments apply to this as do to the repayment of study expenses.

Remedies

Mr Ibrahim had found other employment which was at a higher rate of pay than he had been receiving at the Council. There is therefore no loss of remuneration. There is a claim for future loss. There is no guarantee that Mr Ibrahim would have successfully completed the Diploma course. I make no award in this regard.

He seeks compensation for humiliation and distress. The Council is to pay Mr Ibrahim the sum of \$4,000.00.

Costs

Should the parties not be able to resolve the issue of costs they should file memoranda in accordance with an agreed timetable. If they are unable to agree on a timetable they should come back to the Authority and I will set a timetable.

Dzintra King
Member of Employment Relations Authority