

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Dr Mouafak Arif Zaher (Applicant)
AND The Chief Executive of Unitec Institute of Technology (Respondent)
REPRESENTATIVES Chris Patterson, Counsel for Applicant
Emma Butcher, Counsel for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 23 February 2005
DATE OF DETERMINATION 28 February 2005

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] Dr Mouafak Arif Zaher has applied to the Authority under s.127 of the Employment Relations Act 2000 for an order requiring his former employer, the Chief Executive of Unitec Institute of Technology (referred to as "Unitec"), to reinstate him pending the hearing of personal grievances he has very recently raised. These are in relation to the actions taken by Unitec in suspending him on 8 December 2004 and in dismissing him on 7 February 2005.

[2] Dr Zaher became employed by Unitec at the beginning of 1999 as a member of the senior academic staff in the Faculty of Applied Skills. He describes his position as Associate Dean Research and Head of Research. His suspension on full pay at the end of 2004 was the first step taken in an investigation Unitec carried out into allegations against him of serious misconduct. Unitec concluded that the allegations had been established and that they provided grounds for summary dismissal. The following are the reasons notified to Dr Zaher by Unitec for his dismissal;

- (a) In November 2003 you accepted assignment of patents belonging to Unitec for your own or others financial advantage and/or beneficial interest and continued to take active steps to commercialise the inventions that were the subject of the patents for your own or others financial advantage and/or beneficial interest.*
- (b) Acceptance of the assignment and actions described in (a) above were in contravention of Unitec's IP [Intellectual property] Policy and Code of Conduct.*
- (c) The assignment and actions described in (a) above gave rise to conflicts of interest and that these conflicts of interest were not properly disclosed by you to Unitec.*
- (d) These actions amount to serious misconduct in that they constitute:*

- (i) *deceitful and/or dishonest behaviour;*
- (ii) *improper conduct in your official capacity;*
- (iii) *breach of your obligations under the Unitec Code of Conduct to take care that your financial and other interests and actions do not conflict or seem to conflict with the obligations and requirements of your Unitec position and that you play no role in decision making that might be associated with issues which might give rise to a conflict of interest; and*
- (iv) *breach of your obligations as an employee under your employment contract, particularly clauses 4.1,4.2,4.3(b) and 4.5.*

(e) The serious misconduct in question has destroyed the trust and confidence essential to the relationship of employment and therefore warrants instant dismissal.

Further mediation

[3] A full investigation by the Authority of Dr Zahers grievance claims has been scheduled to begin at the end of March. Although the parties have previously attended mediation following a direction of the Authority, through their representatives Mr Patterson and Ms Butcher they have indicated their wish to try that process again before the investigation takes place. Knowledge of this determination may influence the approach to the case either or both of them now takes, and Dr Zaher has also now confirmed an offer he made earlier to give Unitec back the patents that were assigned to him in late 2003 and that he was accused of dealing with in breach of his employment agreement. Exploring that offer further in mediation may now be productive. Mr Patterson has criticised Unitec for a lack of serious commitment to mediation in the way it approached that process last week on 22 February. I am not able to make any findings in this regard but it is also a matter Unitec may feel it can address next time.

Legal principles – interim reinstatement

[4] In considering applications for interim reinstatement the Authority is required by s.127 of the Act to apply the law relating to interim injunctions and to have regard to the object of the Act. To meet the first requirement four recognised tests or questions are to be applied to the case. In relation to the object of the Act the Authority in determining this case must have regard to the expressed statutory principle that productive employment relationships are founded on good faith behaviour and also on mutual trust and confidence.

[5] A further relevant object of the Act at s.101(c) is to recognise the importance of reinstatement. Under s.125 it has been made the primary remedy.

[6] Also relevant in this case are the changes made to the Act from 1 December 2004 with regard to the legal test of justification for a dismissal or other disadvantageous action taken by an employer against an employee. Those changes and the legislative purpose of them are relevant when an assessment is made by the Authority of the relative strength of Dr Zahers grievance claims. The applicable law at the time of the alleged unjustifiable dismissal and unjustifiable action, has a bearing on that assessment.

[7] Unitec overall submits that Dr Zahers application for interim reinstatement is not sufficiently well founded in fact or in law for it to be upheld by the Authority. In dealing with this application the Authority has followed well established practice by taking evidence from the parties in affidavit

form only and by hearing argument about the relevant facts that provisionally can be established from that evidence and the law to be applied. I emphasise that because they are based on secondary evidence, such findings as I have made must necessarily be provisional only. Those findings may therefore change once the Authority has fully investigated the claims by hearing the deponents in person giving oral evidence which will be tested by the Authority and the representatives of the parties.

[8] Turning then to the tests or questions the Authority must consider in determining this application. There is no dispute that they are;

- Is there an arguable case?
- Is there an adequate alternative remedy available?
- Where does the balance of convenience lie?
- What is the overall justice of the case?

Does Dr Zaher have an arguable case?

[9] Little needs to be said about this as Unitec has readily conceded that the test is met in Dr Zahers case. That fair concession no doubt has been given in acknowledgement of the relatively low threshold applicants need to achieve, and usually do, in satisfaction of the test. The application is supported by this test.

Is there an adequate remedy available to Dr Zaher as an alternative to his interim reinstatement?

[10] The adverse consequences of dismissal now being suffered by Dr Zaher include loss of income for the last three weeks since 7 February, loss of ability to perform his career work and loss of reputation in society generally, including among friends, family, colleagues and peers. I consider that financial remedies such as reimbursement and compensation which are able to be awarded in a successful personal grievance claim will be an adequate remedy for Dr Zaher as an alternative to interim reinstatement.

[11] It is relevant that the period of lost income between dismissal and final determination of the grievances by the Authority, will be quite short at about eight or nine weeks. Dr Zaher has not gone so far as to say that over that time the loss of income will leave him unable to provide himself and his family with accommodation and other necessities of life. It would be surprising if a person who has had a 30 year professional career was left completely without means to provide the basics of life for such a short time. Remedies can also include interest on lost wages to cover any borrowing that may be required by him in the interim. Legal aid is also available if he lacks sufficient means to continue his claims in the Authority.

[12] Although the practice of his particular profession was interrupted from early December 2004 when he was suspended, I do not consider that the nature of Dr Zahers job is such that the inability to perform it for about four months cannot be adequately compensated with money. In relation to harm to his reputation it is not realistic to think that reinstatement initially on an interim basis will change the views of Dr Zaher that inevitably people have already rightly or wrongly formed about him. Indeed even permanent reinstatement may not be able to fully do that. A favourable determination and compensation commensurate to this particular harm or loss will in my view achieve as much as interim reinstatement. Any employee found by the Authority to have been dismissed for dishonesty where the employer had no reasonable grounds for believing that such grave misconduct had occurred, may expect a higher level of compensation because of the very nature of dishonesty and the general spurning by society of those who have been dishonest. In this respect Dr Zahers entitlements should be no less. I find that the application is not supported by this

test.

Does the balance of convenience lie in favour of Dr Zaher or Unitec?

[13] The very short time from now until the full investigation of the grievances and the issue of a determination, I find militates against disturbing the current situation by having Dr Zaher reinstated in the interim. Such disturbance would be compounded in the event that his dismissal was found to be justified and as a consequence he once again had to depart from his job. Given the grave nature of the misconduct found by Unitec to have been committed and given also, under the last test of overall justice, my finding that the employer has a relatively strong case that dismissal was justified, I do not think Unitec should bear the burden of reinstatement in the interim even if, depending on the final determination, only for a short period. If Unitec has got the dismissal wrong then it will expect to have to fully remedy that injustice to Dr Zaher in due course.

[14] Although Unitec has laid a complaint with the Police about Dr Zaher's conduct I am not persuaded that that fact should significantly affect the balance of convenience. It was the right of Unitec as an employer believing it had uncovered dishonesty to put the matter in the hands of the Police. Perhaps as a publicly funded body it was even the responsibility of Unitec to do so. Just how and when the Police will deal with the complaint remains to be seen. If interim reinstatement might in some way compromise the ability of the Police to make necessary enquiries, as suggested in his affidavit by Mr Richard Handley, Deputy President of Unitec, the employer could have sought confirmation of this from the Police. As Mr Patterson pointed out, computer technology allows the existing electronic trail to be preserved for examination by the Police, and plainly paper files can also be kept under security to prevent them from being tampered with. It is also open to Unitec to reach agreement with Dr Zaher that reinstatement, if ordered, will be on garden leave. In conclusion however this test does not support the application.

What is the overall justice of the case?

[15] Under this final test the Authority stands back from the detail and takes a global view of the circumstances of the particular case before it. The relative strengths and weaknesses of the case of each party becomes an important consideration in doing so. I have found, and it was conceded by Unitec, that Dr Zaher does have a case, at least to the arguable level. However, as mentioned above, I consider that case to be a weak one, for the following reasons.

[16] Prior to becoming employed by Unitec, Dr Zaher had created and developed certain designs to which he then had legal title. This intellectual property was in respect of centrifugal pumps and for convenience in this determination the reference to it as "inventions" will be continued. As part of the agreement under which Dr Zaher became employed by Unitec in about March 1998 he executed a deed of assignment from himself as assignor to both Unitec and himself jointly as assignee.

[17] In about October 2003 arrangements were made with Unitec's patent attorneys for the inventions to be assigned back to Dr Zaher alone. The evidence points to Dr Martin Hall, at that time an Executive Dean of Unitec and a direct manager of Dr Zaher, as being the initiator of these arrangements. In this regard Dr Hall sent the following email message to the patent attorneys;

.....we are wanting to assign all the patents for the pump into a limited liability company. The way we want to do it is for UNITEC to assign the patents back to Dr Zaher and then he assigns them to the following company "Applied Science Research Foundation Ltd."

.....we are going to apply the invention to a research facility in France for EDF.

[18] Applied Science Research Foundation Ltd (referred to as “ASRFL”) was a company which, according to Dr Zaher's evidence, had been formed in March 2000 by Dr Hall and himself. Dr Zaher said that later in 2000 he had been asked for and had given his approval to allow Dr Hall to transfer his 50% shareholding to another company, METDCL. Dr Hall apparently remained a co-director of ASRFL with Dr Zaher at material times. Dr Zaher said in his evidence that he did not know at that time that METDCL was owned by the El-Hakei Trust. Companies Office records apparently show that when the inventions were re-assigned to Dr Zaher and then on to ASRFL, METDCL which was a part owner of ASRFL, was itself 100% owned the El-Hakei Family Trust. The records also show that the sole director of METDCL was a Ms Sherine El-Hakei who is apparently the wife of Dr Hall.

[19] No evidence from Dr Hall has been put forward by the parties to this application. This is not surprising. Unitec investigated his role in assigning the inventions and concluded that he too was guilty of misconduct. Dr Hall resigned at about the same time, at the end of 2004, although it can be reasonably inferred from Mr Handley's evidence that Unitec would have dismissed him if he had not done so. There is some speculation by the parties that Dr Hall may be bringing a claim of constructive dismissal to challenge Unitec's actions towards him.

[20] Dr Zaher says whatever motives Dr Hall might have had for initiating the re-assignment of the inventions, he was simply following the instructions given by his superior Dr Hall. He says that his cultural and religious upbringing (Arabic-Islamic) has conditioned him to do this. He is however a mature and intelligent man of science, and it might also be expected that he has assimilated to some degree to life in New Zealand where blind or unquestioning obedience to authority figures is not the norm.

[21] In my view if Dr Zaher had known or ought to have known that Dr Hall was a party even to a potential conflict of interest in his involvement with the re-assignment of the invention, he was under a duty of good faith not to stay silent but to be responsive by alerting Unitec so that it could take the matter up with Dr Hall. Viewed on its own the evidence at this stage that Dr Hall had a personal or private interest in the assignment of the inventions back to Dr Zaher and on to ASRFL, raises suspicions but does not weaken the arguable case made out by him. The significant weakness I find in his arguable case is in respect of his knowledge as to whether or not Unitec was commercially exploiting the interest it had in the inventions or was intending to do that at the time Dr Hall had had them re-assigned. Coupled with this is a failure I find on the part of Dr Zaher to comply with Unitec's Intellectual Property Policy in the way he accepted the re-assignment of the inventions.

[22] Dr Zaher told Unitec that two of its employees, Dr Greg Pringle and Professor Jacqueline Rowarth, had advised him that Unitec had no budget to commercialise the inventions and had no continuing interest in doing so. If that advice was given, Dr Zaher would have had some justification for accepting the re-assignment of the inventions to himself. However the two employees have apparently told Unitec that neither of them at any time gave such advice and that to the contrary advice had been given at regular staff meetings which were attended by Dr Zaher, that efforts to commercialise the inventions had not been abandoned. The two employees have not provided evidence to the Authority but I accept that Unitec interviewed them as part of its investigation and that their statements about this contradicted those of Dr Zaher.

[23] Under the IP Policy Dr Zaher had been bound to give notice to Unitec if he wished to have the inventions re-assigned to him. This of course was for the protection of Unitec as a party having an interest in the inventions. Dr Zaher says that he assumed Dr Hall had taken care of the

requirements under the Policy. The basis for re-assignment under the various requirement of the Policy is an absence of steps, whether by deliberate decision or inactivity, taken by Unitec to commercially exploit the inventions. Dr Zaher has told Unitec that not only had Unitec taken no steps to exploit the inventions but that Unitec employees had told him it had decided not to do so. Those two employees have denied giving him that advice and Unitec has pointed to the minutes of meetings as showing that Dr Zaher could not have believed commercialisation had been abandoned when the inventions were re-assigned.

[24] The formal minutes of various meetings attended by Dr Zaher have been shown to the Authority. Although there are many of them mention of one only is necessary. It records the business of a meeting of the Unitec Research Committee held on 2 April 2004. Dr Pringle and Dr Zaher are both recorded as being present when the following motion was carried;

That the Research Committee seek endorsement from the Executive Committee for the continuation of the commercialisation of the wallboard and pump projects and recommend these to the Director – Research for resourcing.

[25] The minutes show that this recommendation with regard to the inventions was moved by Dr Pringle who Dr Zaher has claimed told him in 2003, before the re-assignment, that commercialisation of the inventions had been discontinued. In my view this minute (assuming it is an accurate record) was capable of strongly supporting the finding by Unitec that Dr Zaher had committed serious misconduct in relation to the re-assignment of the inventions to himself and further assignment on to his company ASRFL. The minutes support the conclusion that Dr Pringle is unlikely to have told Dr Zaher in 2003 that commercialisation had been abandoned when in April 2004 he was moving the Committee for “continuation of the commercialisation”. Further, it is a reasonable conclusion from the minutes that Dr Pringle was unaware of the reassignment that had taken place about five months earlier. Further still, Dr Zaher remained silent about that at the meeting when Dr Pringles misapprehension must have been obvious to him. To say that he thought Dr Hall had told Dr Pringle is not a satisfactory explanation and Unitec were entitled to give weight to his lack of response in considering whether there had been serious misconduct on the part of Dr Zaher.

[26] I conclude from the evidence, provisionally, that Unitec has a strong case for showing at a full investigation that it had reasonable grounds for believing that Dr Zaher had acted in such a way as to destroy the trust and confidence fundamental to the maintenance of the employment relationship. Furthermore it has a strong case for showing that Dr Zaher sought to deceive his employer when it was carrying out an investigation into his actions. This too strikes at the heart or root of the employment relationship founded on good faith and may provide grounds for dismissal. Unitec has a strong case, by comparison with that of Dr Zaher, for showing that in the circumstances it acted towards Dr Zaher in the way that a fair and reasonable employer would have.

[27] Given the allegations of misconduct and given the relatively strong case Unitec has against Dr Zaher, I find that the overall justice of this application does not lie in favour of interim reinstatement.

Determination

[28] For the above reasons no order is made under s.127 of the Employment Relations Act 2000 for the interim reinstatement of Dr Zaher.

Mediation

[29] After my discussion with Mr Patterson and Ms Butcher, I anticipate the parties will be returning to mediation before the full investigation commences at the end of March. Formal directions in this regard seem unnecessary from what has been said by the representatives, but application can be made should the need arise.

Costs

[30] Costs are reserved.

A Dumbleton
Member of Employment Relations Authority