

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Mahmud Ullah (Applicant)

AND Academic English and Sports College of New Zealand Limited
(Respondent)

REPRESENTATIVES Mahmud Ullah In person
No appearance for Respondent

MEMBER OF AUTHORITY Janet Scott

INVESTIGATION MEETING 30 March 2005

DATE OF DETERMINATION 31 March 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The Statement of Problem filed by the applicant clearly discloses that there are two problems relating to his employment with the respondent that he seeks to have rectified.

1. The applicant seeks an order directing the respondent to pay arrears of wages owing to him.
2. The applicant also seeks to be compensated for losses suffered by him when he was not contacted by his employer pursuant to an agreement they had that he would take leave from his employment and return to work when work was available. It is the applicant's position that the respondent breached the agreement with him and hired other workers instead of offering him the available work.

There was no appearance at the investigation meeting by or on behalf of the respondent. I am satisfied the respondent has been served with the Statement of Problem and Notice of Investigation Meeting and that the respondent is fully cognisant of the claims brought by the applicant.

Time was allowed in case the respondent had been delayed. However, as there was neither an appearance for nor contact from the respondent to explain its absence I have proceeded to hear and determine the matter in accordance with Clause 12 of the Second Schedule of the Employment Relations Act 2000.

Background

Mr Ullah is a migrant from Bangladesh. He is a permanent resident.

Mr Ullah commenced working for the respondent as a teacher of English for Speakers of Other Languages. His employment commenced on 7 October 2002 pursuant to a fixed term contract of three months. On 6 January 2004 the parties entered into a new fixed term contract again for a period of three months. The contract was not renewed in writing at its expiry on 28 March 2003. However, the employment continued on the same terms.

The contract provides that Mr Ullah would not more than 25 hours per week. His rate of pay was \$25 per hour. Mr Ullah's remuneration was calculated and paid fortnightly. A review of Mr Ullah's time sheets reveals however that the hours that were worked by Mr Ullah varied markedly from 10 hours per week to 36 hours per week.

Arrears Claim

Mr Ullah's records show that in the early part of his employment he was paid regularly. This situation changed from January 2003 when there was a downturn in the numbers of foreign students attending the school to learn English. From the pay period ended 31 January 2003 until Mr Ullah departed his employment on 27 September that year - a total of 17 fortnightly pay periods - Mr Ullah was paid in full when his wages became due on only eight occasions. On two occasions Mr Ullah received part payments on the sums due to him in the form of cash (2 x \$300). No payment was received in respect of the remaining seven pay periods.¹ Mr Ullah has calculated that at the time of his departure from the College he was owed the sum of \$5581.92 net.

The record reveals that Mr Ullah has made strenuous efforts to recover the wages owed to him. The Authority's record shows that the respondent does not dispute it owes wages to Mr Ullah. Both parties have advised that an agreement was reached to pay the sum owing (\$5,581.92) in monthly instalments commencing in July 2004. The applicant advises that the first payment of \$590 was paid in August 2004. Other payments (5 payments of \$1000 per month) have not been paid.

Mr Ullah presented as a very credible witness and his evidence was supported with an almost full record of hours worked and monies paid to him.

Determination: I direct the respondent to pay to Mr Ullah all outstanding wages owed to him. Allowing for all sums already paid to him the sum now payable to Mr Ullah is \$5000 net. The respondent is to pay that sum to the applicant immediately.

Loss of Job

In September 2003 the College was facing a difficult financial situation because of reduced student enrolments. Mr Ullah gave evidence that he volunteered to take leave from his position on the understanding he would be recalled to work when work was available. The respondent agreed to this position.

¹ On two occasions cheques were received by Mr Ullah for the full amount but the cheques bounced.

Approximately two weeks later Mr Ullah went to the College to pursue his arrears of wages. He found that two other English language teachers had left their employment and that the College had hired two new teachers. Mr Ullah wants to be compensated for the breach of the understanding he had with the respondent's Dean that he would be called back to work when work was available.

As noted, I found Mr Ullah to be a most credible witness. I find that in order to assist the employer who was in difficult financial circumstances, Mr Ullah proposed to take unpaid leave on the understanding he could return to work when work was available. The employer agreed to this.

However, when work became available the respondent hired two new employees instead of honouring the agreement reached with Mr Ullah. This came to Mr Ullah's attention approximately two weeks after he had left his employment on voluntary unpaid leave.

This was a repudiation of the agreement the respondent had with Mr Ullah. In effect he was dismissed from his employment (on or about 10 November 2003) and he is entitled to remedies for unjustified dismissal.

Determination: Mr Ullah was unjustifiably dismissed from his employment. He is entitled to lost remuneration and compensation under s.123 (c)(i) of the Act.

Remedies

Lost Remuneration

The respondent is directed to pay to Mr Ullah the sum of \$4,077 gross as compensation for lost earnings as a result of his dismissal by the respondent (Three months lost remuneration being \$8,125 less earnings received by Mr Ullah during that time \$4,048 = \$4,077 gross).

Compensation

The events associated with his departure from the College have led Mr Ullah to suffer a major set back in the process of settling into this country. His evidence was compelling on the subject of the difficulties he has faced. I recognise that subsequent events have contributed to the overall difficulties experienced by Mr Ullah and that the employer cannot be held responsible for these events. Nevertheless Mr Ullah must be compensated for the injury caused to him by the respondent.

I direct the respondent to pay to the applicant the sum of \$2,500 net under this head

Summary of Awards

I am directing the respondent to pay to the applicant the following sums:

- \$5,000 net as arrears of wages owing
- \$4,077 gross as compensation for lost remuneration.
- \$2,500 net as compensation under s.123 (c)(i) for humiliation, loss of dignity and injury to feelings.

Costs

The applicant appeared in person. Costs are not an issue in this matter

Janet Scott
Member of Employment Relations Authority