

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Yolande Thom (Applicant)
AND New Zealand School of Travel and Tourism Limited (Respondent)
REPRESENTATIVES Phil Butler and Sam Kirk, Advocates for Applicant
Philip James, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 14 December 2005
DATE OF DETERMINATION 9 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Thom) alleges that she has been unjustifiably constructively dismissed and has been the victim of a breach of her employment agreement, both of which allegations the respondent New Zealand School of Travel & Tourism Ltd (NZSTT) deny.

[2] Mediation was attempted but was not successful in resolving the parties' employment relationship problem.

[3] Ms Thom was employed as a Tutor by NZSTT on 16 December 2002 and about a year later, on 3 December 2003, Ms Thom was offered, and accepted, the role of Head of Department with NZSTT.

[4] Ms Thom says that there was a *verbal agreement* that she could step down within three months of taking up the Head of Department position if the role did not suit her. In that event she says, she would have reverted to her original position as Tutor. The contention that this verbal agreement existed is denied by NZSTT.

[5] There were then a series of issues arising in the workplace which Ms Thom says forced her to tender her resignation as Head of Department.

[6] Ms Thom says that she expected to revert to her original position as Tutor but no such agreement was obtained from NZSTT and in consequence Ms Thom finished her employment with NZSTT on 24 September 2004.

Issues

[7] Essentially this is an allegation of an unjustifiable constructive dismissal and it is necessary to analyse the course of conduct and the various way stations through that course of conduct, which the applicant, Ms Thom, seeks to rely upon.

[8] The following issues will be considered in turn:

- a) the employment documentation;
- b) the verbal agreement;
- c) the workload,
- d) poor communication and management style;
- e) training and support;
- f) student issues
- g) the resignation
- h) stress

Employment Documentation

[9] Ms Thom accepted her new position as Head of Department after a meeting on 3 December 2003. It is common ground that no employment agreement or job description was provided at that time.

[10] The Campus Manager of NZSTT, Ms Leonie Ashford (Ms Ashford) said in her evidence that Ms Thom was told that the job description would evolve over the initial period of her time as Head of Department and that her employment agreement was one of a number which were being rewritten and that the draft agreement would issue as part of that process.

[11] Ms Thom's evidence was that she was told that she would be provided with both a job description and an employment agreement by the time she commenced her new duties as Head of Department on 20 January 2004.

[12] Ms Thom puts into evidence a copy of an email from NZSTT dated 16 December 2003 which refers to amendments to draft contracts and advises that NZSTT plans to incorporate those amendments by 16 January 2003 (presumably the reference should be to 16 January 2004). It is however a generic email plainly directed to staff in general who were affected by the redraft of employment agreements and there is no specific reference to Ms Thom's situation.

[13] What Ms Thom did receive at the time she was offered and accepted the new position was what she described as *a thumbnail sketch* of the Head of Department position.

[14] Ms Thom had an email exchange with the Academic Manager of NZSTT, Andrew Waites (Mr Waites) on 10 December 2003 in relation to this *thumbnail sketch*. Commenting on the *thumbnail sketch* document, Ms Thom asks *are guidelines going to be more defined?*. Mr Waites responded with, amongst other things, the word *absolutely*.

[15] In the result, Ms Thom says that no documentation beyond the *thumbnail sketch* document was ever received concerning a job description for her position. NZSTT maintain that the first draft of an Employment Agreement and a job description were forwarded to Ms Thom on 1 April 2004, but if that is the case, Ms Thom says she never received the job description.

[16] During the course of the investigation meeting and, much like the production of a rabbit out of a hat, Mr James began referring to a document which he had in front of him which, on examination, appeared to be a draft of a job description for Ms Thom's position. Mr Butler, not unnaturally, objected to Mr James purporting to introduce this into evidence at the last minute.

[17] Even if the document is genuinely a version of a job description for Ms Thom's position, and critically, even assuming it dates from the period in question, none of that presupposes that Ms Thom ever actually received the job description at the time that NZSTT says she received it.

[18] I accept Ms Thom's evidence as truthful and think it is more rather than less likely that Ms Thom did not receive the job description which clearly was important to her.

[19] It is common ground that an employment agreement was eventually provided (it seems the first draft was available to Ms Thom on or about 1 April 2004) but this document was deficient in a number of respects, not the least of which was that the first version that was provided to her had the wrong job description on the title page.

[20] Ms Thom never signed the final version of the Employment Agreement principally because she says there was never a job description attached to it. The importance of the job description for Ms Thom's purposes is best conveyed in her own words:

The importance of the job description cannot be understated. It would have provided me with clear guidelines on what I was expected to do, and as importantly, what I was not expected to do.

[21] Ms Thom accepts that she eventually received an Employment Agreement which, but for the absence of a job description, may well have been satisfactory for her purposes. However, the absence of the relevant job description evidently left her feeling that her new job was somehow formless and without proper delineated boundaries.

[22] Ms Thom was, by common consent, inexperienced in the management role, although she was extensively experienced in the ordinary tutoring role, and well regarded in that earlier role, so her apparent reliance on having her job adequately scoped may well be understandable.

[23] However, I do observe that Ms Thom was unable to point to any evidence that she followed up the missing job description after about mid April 2004 although her diary entry of May 2004 suggests she was still anxious about it.

The so-called verbal agreement

[24] As part of the appointment of Ms Thom to the Head of Department position, she alleges that NZSTT told her there would be a review of her performance in the new position after three months service in the role and, critically, that she could resume her role as an ordinary Tutor in travel and tourism if, after the formal three month review, she wished it.

[25] This is another important issue from Ms Thom's perspective. Her evidence is that she thought NZSTT were making this suggestion to encourage her to take the Head of Department role and that the effect of the proposal was indeed to encourage her to take the role.

[26] NZSTT's understanding of the position was quite different. They accept and acknowledge that her Head of Department position was subject to a review process, but absolutely deny making the commitment that Ms Thom could resume her Tutor position after the review, if she chose to.

[27] NZSTT has said through their witnesses that had there been a vacancy at Tutor level, Ms Thom could have had it, but they absolutely denied making any promise that she could automatically revert to a Tutor position irrespective of the circumstances.

[28] Ms Thom says that the promise to enable her to resume her old role after the review process, was made only once, as far as she can recall, and this was at a meeting in Ms Ashford's office at which Ms Thom, Ms Ashford and Mr Waites were present. Ms Thom says that Ms Ashford made the promise that she could resume her Tutor role after the review process, if she wished, and she recalls Mr Waites nodding his head in confirmation.

[29] In oral responses to my questions, Ms Thom agreed that the *resumption* offer was only available after three months (that is, after the review of her performance as Head of Department role was complete) and she was unclear what her entitlement was outside of that three month period.

[30] Ms Thom says that there was no three month review and so it was not possible for her to exercise her option to resume her original role at the end of three months.

[31] When, some months later, she resigned as Head of Department, she says that she endeavoured to do that on the footing that she would revert to her role as a Tutor, but she claims that that opportunity was blocked by NZSTT.

[32] I need to decide whether there was in fact a review after three months and what, if anything, are the consequences of that for the subsequent behaviour of the parties.

[33] Ms Thom says there was no review, despite various promises by NZSTT management. She draws my attention to email traffic originating with NZSTT management, talking about a review at the beginning of April 2004 and referring to a meeting proposed for 2 April 2004 which both parties acknowledge, never took place.

[34] Ms Thom's evidence goes further than simply claiming that the review never happened. She claims in her evidence that NZSTT's responsible Managers, Ms Ashford and Mr Waites, ... *simply wanted to evade this responsibility because it would be easier for them that way*. Her reference to *this responsibility* is a reference to the reviewing of the trial period.

[35] In the same connection, Ms Thom says that because the review never occurred, she was denied the opportunity to step down as Head of Department and revert to her former position as a Tutor.

[36] For their part, NZSTT's Managers say that the 90 day trial period came to an end at about the time that they finally produced the completed Employment Agreement. Ms Ashford then goes on to say that *signing the contract constituted an agreement that the trial period had ended and that her role would continue*. But as Ms Ashford readily conceded at the investigation meeting, Ms Thom had never signed the contract, as she called it, and so the very point that she was trying to underline in her brief of evidence had no force or effect. And Ms Thom's evidence, which I accept, was that she had not signed the Employment Agreement because in her mind it was incomplete without a completed job description.

[37] In her oral evidence, Ms Ashford readily conceded that there should have been a review at the end of three months and there was not. She accepted Ms Thom's evidence that a promise had been

made when she was recruited to the Head of Department position that there would be a review and that that promise had been broken.

[38] However, Ms Ashford said that she was unaware that Ms Thom had any issues during the three month trial period and made the point that, although she conceded there had never been a formal review process where the pair of them had sat down and worked through any issues, she would have met with Ms Thom once or twice a week and so there was ample opportunity for Ms Thom to raise issues with her. She says that she simply was not aware from Ms Thom that it was significant that the review had not happened.

[39] Quite clearly, both parties concede that there was no review despite one having been promised. Amongst other things, this meant that Ms Thom had no opportunity, on her own evidence of matters, to relinquish her Head of Department position and resume her Tutor position, which she says is what was agreed at the time she took the Head of Department position. Ms Thom also says that the fact of there not being a review meant that she had no opportunity to present other issues to NZSTT.

[40] These two claims need to be examined carefully. First, the claim that Ms Thom could revert to the ordinary Tutor position at the end of three months was never accepted by NZSTT. They always maintained that such a step was only possible if there was an actual vacancy and they denied having made the promise in the first place. As a matter of fact, Ms Thom did not seek to resume her Tutor position after three months, saying that because there had been no review, she was unable to do that.

[41] Given that all parties accept that there had been no review, the question is whether Ms Thom can now be heard to claim that because there has been no review she has lost a right which she might otherwise have exercised and therefore, in principle, suffered a disadvantage in a legal sense.

[42] In order to assess the merits of this argument, it is necessary to look at whether Ms Thom has been prevented from raising matters with the employer because there has been no review. I do not accept that claim for a minute. The evidence is that the parties met regularly. Ms Ashford says that she met Ms Thom on average twice a week, and Ms Thom does not contradict this. Ms Thom also met with Mr Waites on a regular basis. On the face of it, the opportunity to raise matters exists in abundance.

[43] In addition, given the frequency of meetings between the parties, one would have thought Ms Thom might have taken the opportunity of urging on the employer the fact that the review was overdue and that it was important to her that that be addressed.

[44] On the evidence, I am not convinced she has done that. There is no email traffic that has been presented to me that conclusively suggested that she raised the issue, nor does her brief of evidence or her oral testimony evidence any initiative by her to make it clear to the employer that this is an issue of moment for her and one that she wants to have resolved. She, after all, seeks to rely on a promise that was made to her at the beginning of the Head of Department relationship and which by common consent, the employer failed to deliver on.

[45] Ms Thom's evidence on this point is that she had difficulties in her relationship, particularly with Ms Ashford. She said in her oral evidence in answer to a question from me, that she did not find Ms Ashford easy to deal with. She said that Ms Ashford stared at her, talked down to her and talked over her.

[46] However, Ms Thom could have spoken to somebody else, if she had such difficulty in dealing with Ms Ashford. Her relationship with Mr Waites seems to have been slightly better, although she

clearly regarded both Mr Waites and Ms Ashford as being inadequate Managers. If she felt unable to talk to Mr Waites, she could have spoken to one of the other senior Managers, including the Auckland based management team who were regularly at the Christchurch Campus, in person, or she could have dealt with them by email.

[47] I am not persuaded that Ms Thom adequately used the opportunities that plainly were available to her to raise her concerns. I do not think it fair for her to now claim that the employer ought to have worked out that she was unhappy with the absence of a review and the other matters that she says she was unable to convey because there had not been a review. In the Authority's view, Ms Thom had ample opportunity to raise those matters with somebody in the management chain.

[48] For the sake of completeness I need to deal with the submission made by Ms Thom's advocate that the effect of Ms Thom not having her Head of Department position reviewed is that her entitlement to revert to the ordinary Tutor position continues indefinitely, presumably until the review eventually takes place, if at all.

[49] Both parties accept that the review did not happen. Both parties accept that a promise was made that there would be a review. But there is no common ground about the resumption of the Tutor position with both NZSTT's principal witnesses being absolutely unshakeable that no such promise was made and that all that was ever in contemplation was that Ms Thom could revert to the Tutor position if one was available.

[50] While no doubt it can be seen as unfair on Ms Thom to deny her the opportunity to revert to the position of Tutor at the end of the three month term as Head of Department because the review due at the end of three months never happened, it seems to me equally unfair to impose a requirement on NZSTT that they must bear the consequences of their failure to complete a review more or less in perpetuity.

[51] In the Authority's view, both parties have an obligation to promote the agreed terms of the employment relationship. Employment relationships are bilateral in nature and each party has obligations to the other in exercise of the good faith principle. It is not enough for one party to require performance of an obligation by the other when there is no evidence to suggest that they themselves had equally sought to encourage that performance.

The work load

[52] Ms Thom says that the Head of Department position was *not at all what I expected it to be* and that she *was continually having new responsibilities and duties added to it without ... being consulted*. In answer to a question from me, she said that she thought the employer expected too much of her.

[53] In essence Ms Thom's evidence, and the evidence of Mr Nick McGuigan was that work was constantly being dumped on Heads of Department such that they felt *swamped* (Mr McGuigan's term).

[54] While Mr McGuigan was not well regarded by NZSTT, and their witnesses spent some time trying to discredit his evidence, on this point anyway, I had no reason to disbelieve him.

[55] Furthermore, Mr McGuigan had the sense to refuse work which he did not feel capable of performing. He referred in his evidence to work broadly within the *Student Services area* as being

an area that Heads of Department had not previously been responsible for and although Ms Thom and the other Head of Department did the work, he refused.

[56] NZSTT witnesses denied that additional work was being given to Heads of Department including Ms Thom. Ms Ashford, in particular, made the point that the span of work which Ms Thom was doing was actually less than the span of work that her successor attended to. Ms Ashford was, however, quick to accept that Ms Thom's successor was significantly more experienced in management than Ms Thom was.

[57] Ms Ashford also made the point that the organisation was a small one and some degree of flexibility was not unreasonable.

[58] NZSTT contended that one of Ms Thom's problems was that she had decided to take 18 hours of teaching load in the first semester of 2004 which, according to Mr Waites, was far too much and that he had not been responsible for asking Ms Thom to teach those classes.

[59] His evidence was that a full time teaching load was 22 hours so in effect by teaching this semester Ms Thom was, over that period anyway, doing 18/22nds of a full time teaching load as well as trying to perform her role as Head of Department.

[60] As many of the allegations in this area impact directly on Mr Waites, his evidence is important. Ms Thom says that it was Mr Waites who imposed much of this extra work on her by effectively foregoing work which he ought to have done so that it was done by default by Heads of Department or by delegating to the Heads of Department work which he had traditionally done.

[61] Mr Waites absolutely denies each and every one of those allegations.

[62] Ms Thom said that she worked 60 hours a week and there was evidence about when Ms Thom arrived and left the workplace. It seems most likely that Ms Thom started work most days before 8 o'clock and finished work most days around 4.30pm. The security system can provide evidence of individual entry before 8am which is the basis of my conclusion about Ms Thom's usual start time, and I rely on Mr Waites' evidence that Ms Thom *would leave around 4.30 on the vast majority of occasions* because I accept his evidence that Ms Thom walked past his door to exit the building. Mr Waites' conclusion is supported by ample other evidence.

[63] On that basis then, if Ms Thom were to work through each and every lunch hour, she would be performing 9 hours of work at the workplace. It is more likely that she had some lunch break so it is better to assume that she worked for 8½ hours a day which would give her 42½ hours at the employer's place of business.

[64] The security codes show that she did not enter the Campus regularly after hours, which means that the bulk of the additional work she claims to have done must have been done at home either at night or at weekends.

[65] I accept that it is possible that Ms Thom worked 60 hours a week, but such a span of hours would necessitate significant weekend hours and night time hours.

[66] NZSTT witnesses denied any knowledge of these kinds of excessive hours. Ms Ashford referred to the records available to NZSTT about Ms Thom's attendance at work (which would have suggested a normal span of hours) and in that context indicated she *never considered* Ms Thom was working *unreasonable hours*.

[67] On the face of it, the hours that Ms Thom claims to have worked and the pressure she obviously felt under while completing those hours, would seem to be unreasonable. But in the

Authority's opinion, the remedy is at least in part in her hands. She could have adopted the stance that Mr McGuigan took of simply refusing to fulfil some of the allegedly *extra* duties, or she could have taken the matter up with any number of members of the management chain at NZSTT.

[68] She did neither of those things. She compounded the problem for herself in the first semester by taking what amounted to an almost full teaching load as well, so that in effect over the first semester Ms Thom was almost trying to do two jobs instead of one. I do not think it fair that the consequences of that decision, which she either made or at least was deeply implicated in, ought to be visited on NZSTT.

[69] Nor do I think it reasonable for NZSTT to bear all of the responsibility for an overworked Head of Department when the evidence suggests the employer had no idea that Ms Thom was working the hours she claims.

Poor communication and management style

[70] Ms Thom says that there was poor communication from NZSTT Campus Managers and that in particular, Ms Ashford and Mr Waites would do a kind of double act where each would refer matters to the other, so that Heads of Department would never know who they should properly refer matters to.

[71] NZSTT denies that communications were as chaotic as Ms Thom alleges and say in effect that because she failed to do her job adequately, matters were always escalated up the management chain to Mr Waites or Ms Ashford because Ms Thom either could not or would not deal with them.

[72] As well as being highly critical of the inadequate communication of NZSTT, Ms Thom also thought the management style adopted by NZSTT was inadequate and her evidence is littered with examples of various inadequacies which she visits upon Mr Waites and Ms Ashford particularly.

[73] For their part, Ms Ashford and Mr Waites say that they did their best and that they looked to the Heads of Department (there were three of them) to assist them in the prosecution of NZSTT's business. Instead of assistance, Ms Ashford and Mr Waites say that they got an unhelpful approach, particularly it seems from Mr McGuigan and Ms Thom. Indeed, it was suggested by NZSTT that Ms Thom, anyway, was never really part of the management team in terms of her attitude and always remained essentially critical of it.

[74] Ms Thom complains that there was generally a dismissive attitude by management to matters brought to their attention by her. NZSTT, for their part, say that if Ms Thom did not get her own way or did not get an immediate response, she would claim a dismissive attitude. In essence, Ms Thom's view was that while occasionally she would be listened to, nothing ever happened as a consequence of any of the matters that she brought to the attention of Ms Ashford or Mr Waites.

[75] The responses which Ms Thom remembers from Ms Ashford and Mr Waites (and Mr McGuigan's evidence supports this view too) suggest that NZSTT representatives were also very busy and simply did not have time to deal immediately with the issues then presented to them by Ms Thom.

[76] Clearly Ms Thom had a very negative view of Ms Ashford and she referred to Ms Ashford as *intimidating* in her brief of evidence.

[77] In response, Ms Ashford expressed almost sadness that she should be thought of in those terms and simply pointed the Authority to the fact that there was no evidence that anybody else thought she was intimidating. Ms Ashford said simply that Ms Thom did not like her and that there

was little that she could do about that except try to work professionally with Ms Thom as best she could.

[78] Ms Thom complains particularly about an episode on 13 August 2004. On 3 August, Ms Thom had sent an email to Ms Ashford demanding that Ms Ashford only deal with her by email traffic in the future as Ms Thom felt intimidated by her.

[79] On 13 August Ms Ashford appeared at Ms Thom's office and in the presence of Mr McGuigan, attempted to find out why Ms Thom would not talk to her face to face. The record of the meeting which was put into evidence by Ms Thom suggests a number of long pregnant stares by Ms Ashford and an unwillingness by Ms Thom to engage with Ms Ashford. NZSTT claim the record of the meeting is inaccurate.

[80] This particular discussion and the email that preceded it were, however, approximately a month after Ms Thom had indicated her intention to resign her position as Head of Department so, whatever the significance, the dye was well and truly cast by then.

Training and support

[81] Ms Thom says that she was never given any training or support as Head of Department and it is certainly common ground that there was no induction process undertaken when Ms Thom took up her new role.

[82] However, NZSTT denied that they behaved inappropriately in relation to training and support. NZSTT witnesses say they were never made aware that Ms Thom was not coping and Ms Thom never made clear what help or training she required.

[83] Again, it seems to the Authority that both parties have an obligation to ensure that they are adequately meeting each other's expectations of the employment agreement. It is not enough for an employee party to demand training and support if it is not clear to the employer party that there is actually a deficit in that area.

[84] I have already made the observation earlier in this Determination that I do not accept that it was impossible for Ms Thom to raise issues with her employer. She clearly had formed a negative view of Ms Ashford and, to a lesser extent, of Mr Waites, but she could still have communicated her issues through other members of the management team if she had formed such a negative view of those two. She also, as a professional person, has an obligation to develop appropriate businesslike relationships with people in her work environment who she may not like, but who she is capable of developing some sort of operating relationship with.

Student issues

[85] Ms Thom complains again about a plethora of student issues.

[86] These difficulties revolved around entry level English requirements and issues around students cheating. The issues raised do not, in my view, bear directly on Ms Thom's employment relationship problem.

[87] What we are left with is Ms Thom's residual feeling that the issues that she was raising with the employer were not being addressed. The employers' response is to say that if Ms Thom did not get her own way then she became disgruntled. The employer would also contend that Ms Thom's pattern was to demand an immediate response to a concern which she advanced and in the absence of that immediate response to allege that the matter had not been addressed.

The resignation

[88] On 7 July 2004 Ms Thom initiated a meeting with Ms Ashford, Mr Waites and the other two Heads of Department. In her brief of evidence she indicates that she intended to use this meeting as one last opportunity to be heard on the issues that were of concern to her and failing that had intended to tender her resignation as Head of Department and fall back to her Tutor role.

[89] In the result, in what must have been an unpleasant and difficult meeting, Ms Thom did not get the assurances that she sought and accordingly gave verbal notice of her intention to relinquish the Head of Department position, falling back to the position of Tutor. In doing so, she also expressed some uncharitable views about the performance of Mr Waites and Ms Ashford in the presence of the other two Heads of Department.

[90] Ms Thom apparently believed at that point that she could revert to being a Tutor and she says in her evidence it was not until 19 July that she learnt that NZSTT were taking her statement of 7 July as a resignation from NZSTT service rather than a relinquishing her Head of Department position in favour of a Tutor position.

[91] There continued to be argument between the parties over this point until Ms Thom's service concluded on 24 September 2004.

Stress

[92] Ms Thom alleges that she suffered workplace stress as a consequence of the environment created by NZSTT. For their part, NZSTT points out that Ms Thom had one day's sick leave during her period of service as Head of Department, and their evidence is that she never told them the job was taking a toll on her physical and mental wellbeing.

[93] NZSTT witnesses (Ms Ashford for instance) acknowledged that Ms Thom's personality changed towards the end of her time at NZSTT (she described her at the end as *confrontational and aggressive*) but they did not attribute that to work place stress.

[94] Mr McGuigan in his evidence refers extensively to Ms Thom suffering from stress and to his noticing of her change in personality and his belief that it was caused by workplace stress.

[95] However, the real issue is whether the employer knew or ought to have known that Ms Thom was stressed and that the cause of that stress was the difficulties in the workplace. I am not persuaded that there is any evidence that Ms Thom took any proper steps to notify her employer that she was suffering from workplace stress.

[96] Indeed in answer to a question from me, Ms Thom confirmed this. She said *I didn't specifically sit them down and go through my health issues*. In the Authority's view, an applicant seeking to rely on workplace stress needs to do precisely that.

Determination

[97] Ms Thom's claim for a constructive dismissal and a breach of the Employment Agreement is based on the factual matrix I have just discussed. In that discussion, I have emphasised throughout my view that an employment agreement, by its bilateral nature, casts obligations on both parties.

[98] I do not consider it enough for an employee party to place all of the onus on the employer party when things go wrong. Both parties have an obligation to address issues in the relationship and try to make them better.

[99] I am not persuaded that Ms Thom has made out her claim for a constructive dismissal. I accept that the employment relationship has not been happy and perhaps the workplace could be better organised than it is. I accept that Ms Thom was inexperienced and hampered by having a poor relationship with her immediate manager, but I do not think that all of that constitutes the grounds for a constructive dismissal.

[100] Clearly there is no evidence that the employer gave Ms Thom the option of either resigning or being dismissed so that class of dismissal can be excluded. Further, I see no evidence, nor do I think it is contended, that the employer followed a course of conduct with the purpose of forcing a resignation.

[101] That leaves only the breach of duty cases to consider.

[102] The essence of breach of duty cases is that these cases are not restricted to fact situations where the employer connives at a resignation. These are situations where the employer may want the relationship to continue but commits one or more fundamental breaches of the employment agreement so as to effectively bring the bargain that the parties had entered into, to an end. In effect the law is that the employer's behaviour is repudiatory of the agreement and thus destructive of its very essence.

[103] It is in effect a value judgement as to whether the degree of breach by the employer is sufficient to ground a constructive dismissal, and I do not consider that the facts in evidence in this particular matter provide the degree of breach required.

[104] Certainly, there is evidence of some difficulties in the workplace and there is evidence of an unhappy employment relationship. Equally, there is ample evidence that Ms Thom did not take appropriate and practical steps to address her own problems and it seems to me unfair and unreasonable for all the burden of the unhappiness of the relationship to rest on the employer.

[105] In the end, Ms Thom chose to resign from a position that she found she could not cope with and she sought to rely upon an understanding that she had that she could resume a lower position of Tutor. But that understanding, that she could resume the Tutor position, I have found, was a flawed understanding because the employer had never committed unequivocally to Ms Thom always being able to pick up that option.

[106] It follows that Ms Thom's resignation from the position of Head of Department was just that, a resignation and I am not persuaded that the various matters that Ms Thom seeks to rely upon in advancing her constructive dismissal claim, give evidence of a sufficient degree of breach to justify a successful outcome for her.

[107] It follows that Ms Thom's claims fail for the reasons advanced.

Costs

[108] Costs are reserved.

James Crichton
Member of Employment Relations Authority