

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Margaret Holding (Applicant)

AND Design and Arts College of New Zealand Limited (Respondent)

REPRESENTATIVES Paul Brown, Advocate for Applicant
Linda Penno, Advocate for Respondent

MEMBER OF AUTHORITY James Crichton

INVESTIGATION MEETING Christchurch, 25 October 2006

DATE OF DETERMINATION 20 December 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Holding) alleges that she has been constructively dismissed and that one or more of the conditions of her employment was effected to her disadvantage by unjustifiable acts of her employer, the Design and Arts College of New Zealand Limited (the College).

[2] The College resists those claims, first on the basis that many of them are out of time and therefore not capable of forming part of an allegation of personal grievance anyway, but then on the basis that they do not disclose actionable wrongs.

[3] Ms Holding worked as a faculty director at the College for 7½ years from 1998 until her alleged forced resignation on 23 June 2005.

[4] Ms Holding says that she was offered the position while still in the United Kingdom but that by the time she arrived in New Zealand, the managing director of the College (Ms Susan McAllister) endeavoured to alter the terms of the employment that had previously been offered.

[5] Ms McAllister's evidence is that when Ms Holding presented herself in New Zealand she and Ms Holding had a discussion about the terms and conditions of her employment and Ms Holding agreed to vary the terms and conditions of employment so as to reduce her salary but also to reduce her hours and to give her certain other benefits which she did not previously have in the package originally offered, including the ability to work at home. The documentary evidence tends to support Ms McAllister's recollection of these events but given the passage of time, nothing turns on the accuracy or otherwise of either party's recollection.

[6] Ms Holding says that she subsequently discovered that she was being paid significantly less as a faculty director than the other faculty directors. The College's evidence was that her remuneration reflected the unique nature of her terms and conditions and that the other faculty directors did not have comparable situations. The College also claimed (this was not challenged by Ms Holding) that Ms Holding resigned on two occasions during her employment when she was dissatisfied with the terms and conditions of her employment, particularly

around wage and salary negotiations. Ms McAllister said in her evidence that Ms Holding *knew how to negotiate from a position of strength as on both of the earlier occasions she resigned at times when we would not have been able to replace her, in time for the next imminent student intake.*

[7] Ms Holding complains about successive changes in principals and deteriorating relationships that she had with those officials of the College with the exception of the most long standing of those principals who was Pieter Kachelhoffer. Ms Holding clearly had a good relationship with Mr Kachelhoffer who she described as *a remarkable principal*. She said *the College was at its most functional during his time and that he was there the longest*. However, her relationship with other principals was, it seems, poor.

[8] Ms Holding raised her concerns in her various quarterly and annual reports and she says that the College *never addressed these issues*.

[9] Ms Holding attributes a decision she made to support a colleague taking a personal grievance against the College as a further reason for a deterioration in her relationship with the College.

[10] In the middle of the winter of 2004, Ms Holding was told that the College was for sale and that Ms McAllister was a potential purchaser. Ms Holding asked Ms McAllister at a general staff meeting if that was true and Ms McAllister denied that it was true. Subsequently in February of 2005, Ms McAllister did in fact purchase the College.

[11] Ms Holding accuses Ms McAllister of lying when she told the staff meeting on 11 August 2004 that she was not purchasing the College.

[12] I do not accept that pejorative description at all. Ms McAllister's evidence, which I accept, was that at the time she answered the question at the staff meeting, what she said was absolutely accurate. She did subsequently purchase the College but the situation by then had changed significantly.

[13] As part of the outcome from the personal grievance which Ms Holding was involved in as a support person, the College agreed to involve a facilitator called Gay Pavelka who produced a report which Ms Holding said contained sensible recommendations which the College never acted upon. For its part, the College denies that the recommendations were never acted upon and indeed gave evidence that a working party was involved in implementing the recommendations.

[14] In December 2004, there had been a meeting to which Ms Holding was summoned wherein Ms McAllister challenged Ms Holding about Ms Holding's decision not to enrol a particular student who Ms McAllister happened to know. According to Ms Holding, the meeting deteriorated into a personal attack on her by Ms McAllister with Ms McAllister allegedly encouraging Ms Holding to contemplate resigning. Ms McAllister does not deny the suggestion that she talked about the possibility of Ms Holding resigning, but she explained it in the context that Ms Holding had tendered her resignation twice before. She said *history told me when she [Ms Holding] was clearly unhappy, her response in the past had been to resign. My question was not out of making her resign but so that I would know whether I would need to try and negotiate something around her unhappiness*.

[15] Michael Hadley became principal in 2005 and clearly Ms Holding's relationship with Mr Hadley was not as good as she would have liked. Mr Hadley gave evidence at the investigation meeting and he presented as a straightforward, no-nonsense person who wanted to get things done.

[16] Ms Holding accuses Mr Hadley of cancelling senior staff meetings; Mr Hadley agrees that he did that and he says that he did it because he was tired of Ms Holding's confrontational and aggressive behaviour at those meetings.

[17] When Mr Hadley commenced employment with the College as principal, it seems that there were a number of early meetings between Mr Hadley and Ms Holding which were unsatisfactory. In effect, each accuses the other of *a confrontational approach*. Ms Holding uses just that expression in her brief of evidence to describe the approach of the employer, and particularly Mr Hadley, and Mr Hadley uses the same phrase to explain why he decided to end faculty meetings with Ms Holding because of her alleged *confrontational behaviour*.

[18] There was further controversy between Mr Hadley and Ms Holding over Mr Hadley's decision to change the payroll system and in particular to make a change from the conventional hard copy pay slips which had previously been supplied to employees and a new electronic pay slip. Ms Holding objected to her pay slip being furnished electronically on what she described as *privacy concerns*. She says she was *ignored*.

[19] For his part, Mr Hadley indicated that he had in fact taken cognisance of Ms Holding's concerns but that it took a significant period of time to resolve an alternative way of providing pay slips. In effect, Mr Hadley said that Ms Holding's concerns resulted in a change being necessary to the computer programme which directed the new payroll system. That was both time-consuming and difficult, but it was eventually achieved.

[20] Mr Hadley said that he was *frustrated* by Ms Holding's objection to the electronic pay slip arrangement and particularly by Ms Holding's *constant going on* about the electronic pay system. He described that whole debate as *incredibly inefficient* for him personally.

[21] Another issue on which there seemed to be division was the suggestion that the College was effectively *anti-union*. This general allegation was levelled particularly at Ms McAllister and Mr Hadley.

[22] Mike Dawson, the National Legal Officer of the Association of Staff in Tertiary Education (ASTE), gave evidence about the alleged anti-union bias of the College. He said, amongst other things: *The nub of the problem for me was the attitude of Susan (Ms McAllister) to union members.*

[23] Mr Dawson said that he believed the employer had decided that the influence of the union had got too great and it *needed to be dealt with*.

[24] Mr Dawson noted that there had been a strike during collective bargaining negotiations and that he felt that the employer's attitude after the strike was that it was *payback time*.

[25] Mr Dawson referred to his experience in the tertiary education sector, which is extensive, and said it was *not the norm for there to be grievance after grievance after grievance* and that it was *quite unusual* for there to be *this number of grievances* in one workplace.

[26] Mr Hadley clearly saw these views as evidence of conspiracy thinking and described his role as being that of *a change agent*. He said that people did not like change, and his efforts to try to redirect the College into a more profitable mode was not necessarily welcomed by all of the faculty directors.

[27] Mr Hadley freely acknowledged in his evidence that his relationship with Ms Holding was particularly poor. He described her as *defensive, sensitive, and difficult to have meetings with*.

[28] Mr Hadley absolutely denied the contention that either he or Ms McAllister were *anti union*. He acknowledged, however, that *some things weren't handled well* and he referred to his own progress in the job as providing him with *a washing machine of emotions*.

[29] When Ms Holding resigned for the third time on 23 June 2005, Ms McAllister's evidence is that she felt she *had to accept the third resignation although it was in the middle of a semester because she fundamentally said she had no commitment to the new vision of the business*. That new vision that Ms McAllister talks about is of course Ms McAllister's own vision, she having recently completed the purchase of the College on her own account. Certainly the letter of resignation dated 23 June 2005 refers to Ms Holding not supporting the new vision for

the College. I do not accept Ms Holding's claim that that lack of support for the new vision is not central to her letter of resignation. I prefer the view advanced by the College's witnesses to the effect that Ms Holding's lack of support for the new College vision is in fact central to the letter of resignation.

[30] The letter of resignation also makes quite pointed criticisms of both Ms McAllister and Mr Hadley and in those circumstances, Mr Hadley's email in response to the letter of resignation, which is also dated 23 June 2005, not unnaturally refers to Ms Holding having lost trust and confidence in the employer as evidenced by the criticism in her letter of resignation.

[31] Mr Hadley also observes in his email response to the letter of resignation that if, as Ms Holding alleges, her resignation is in part a function of her being unwell and having elevated stress levels, then the College ought to have been notified that that was in fact the position and it was not.

Issues

[32] The applicant, Ms Holding, alleges that she has been the subject of unjustifiable acts to her disadvantage and contends that the same factual matrix also supports her contention that she was constructively dismissed.

[33] It follows that it will be helpful to consider first the issue of whether the factual allegations ground a claim for a personal grievance based on an unjustified action or series of actions by the College, and then to consider whether the same facts allow of a constructive dismissal interpretation.

The disadvantage claim

[34] The disadvantage claim is based on a number of different issues stretching back into time and certainly considerably pre-dating the 90 days prior to the personal grievance claim being raised with the College. In their closing submissions, the College encourage me to strike out many of the alleged breaches Ms Holding relies on, on the basis they happened well outside 90 days before the grievance was raised. I prefer to look at the merits of the alleged breaches in isolation and then return to the *90 day issue* in conclusion.

[35] Ms Holding's representative lists eight alleged breaches by the College and it is helpful to consider each of these in turn. Four of those alleged breaches relate more properly to the constructive dismissal head and I consider them there. The first alleged breach relating to the disadvantage claim is the alleged failure of the College to provide a safe workplace. In my opinion, the evidence suggests that the workplace was going through a period of change. Particularly after the purchase of the College by Ms McAllister, there was certainly a fundamental change of direction which posed some strain on the individual employees, or some of them. However, I do not think that the evidence that I heard supports the contention that Ms Holding was *unsafe* in her workplace.

[36] It is certainly true, as I indicated above, that in the latter part of her time at the College, the workplace was undergoing reasonably significant change. But change of itself is not enough to create an unsafe work environment. Nor for that matter is occasional bouts of unpleasantness between management and an employee, even a senior employee. This is so particularly where, on the evidence I have heard, some of that unpleasantness is a function of Ms Holding's own penchant for being direct in her own communications; her own evidence supports this contention.

[37] The second alleged breach identified by Ms Holding's representative is the failure of the College to take positive action to *preserve the employment relationship*. This allegation seems to me to be completely without merit. Ms Holding resigned on three occasions during her career at the College and on the first two occasions that she did that, the College negotiated

with her and did everything in its power to try to hang on to her. The College's evidence which, on this point, I accept was that Ms Holding was *difficult* but good at her job and so the College took all reasonable steps to retain her services. These *reasonable steps* included a \$10,000 salary increase on one of the occasions when Ms Holding threatened to resign. It was only when Ms Holding's third resignation evidenced her lack of support for the College's new vision and her lack of trust and confidence in the College's management that the employer felt impelled to accept the resignation.

[38] The third allegation is that there was a direct discrimination against union members by the College. The evidence that came before the Authority does not support that contention. I accept counsel for the College's contention that much of the evidence tendered in this particular respect is hearsay. The repeating of propositions which are simply not supported by the available evidence, as happened in this case, does not make those propositions any more believable. In my opinion, the evidence suggests that the reason that Ms Holding had difficult relationships with the employer was not a function of her membership of the union at all but a function of the interpersonal difficulties between Ms Holding and the employer party for which she must take some of the responsibility.

[39] I accept the evidence of Mr Dawson, the union official from ASTE, as accurate and credible when he told the investigation meeting of the large number of personal grievances that this particular employer had had. I accept that there were difficulties around the negotiation of a new employment agreement but none of that, in my opinion, supports Ms Holding's contention that she, as a union member, was the subject of discrimination because of her union membership. That there were difficulties between the union and the employer is undoubted; however the only issue I can determine in this case is whether those difficulties impacted on Ms Holding's employment relationship problem, and there is no evidence, in my view, that they did.

[40] The next alleged breach is based on the contention that Ms McAllister ought to have consulted with senior staff before she entered into the purchase of the College. There is, as Mr Dawson pointed out to Ms McAllister, a statutory obligation and, it seems, an obligation from the collective employment agreement although that document was not put into evidence. Ms McAllister admitted she had not fulfilled these obligations. Her explanation for this failure was simply the pressure of time at the point at which the purchase was attended to.

[41] I return now to the 90 day issue. The College, in their statement in reply, complain that Ms Holding's allegations *are not thematic in a way in which pre 90 day allegations are properly considered "live" at law*. I do not accept that submission. It cannot be good law that each and every breach which might ground a constructive dismissal allegation must be the subject of a separately raised personal grievance. The only way that a grievant alleging constructive dismissal on the basis of a course of conduct or a series of breaches of duty can mount her claim is on the footing that individual examples of the conduct are referred to. It is a matter of evidence as to whether those individual examples amount to a course of conduct or a series of breaches of duty sufficient to ground a claim.

[42] My assessment of the evidence before me is that Ms Holding has only demonstrated one example of a breach or unjustified action by the College and that is in relation to their failure to consult when the business was sold. On the other alleged breaches she refers to, I am simply not persuaded the evidence supports her contention that they amount to unjustified actions by the College.

[43] Even in relation to the single example of an unjustified action by the College there is no evidence before me that Ms Holding suffered any disadvantage as a consequence of that breach and accordingly it cannot ground her claim for personal grievance under this head. Her claim for a disadvantage grievance must, of necessity, fail.

The constructive dismissal allegation

[44] Ms Holding contends that she was constructively dismissed by reason of the College having *“the deliberate and dominant purpose”* of forcing her resignation by *“a mixture of both the course of conduct and the breaches of duty”*.

[45] Ms Holding refers to the allegation that there were *direct attempts* by the College to coerce her resignation. In this regard, Ms Holding presumably refers to a meeting which I have described earlier in this determination which took place in December 2004. At that meeting, Ms McAllister asked Ms Holding if she intended to resign. I accept that those words, which Ms McAllister freely admits she used, are ill-judged, but I do not accept that, of themselves, they evidence an attempt by the employer to obtain Ms Holding’s resignation. Ms McAllister, in her evidence, explained that she was simply trying to establish whether Ms Holding was going to resign again as she had done in the past when there were difficulties. I accept that evidence as truthful and in the context in which the events happened, I do not think that Ms McAllister’s actions, and in particular her statements, can be properly construed as an attempt to coerce a resignation.

[46] Next, Ms Holding contends that the employer ought to have established whether she was in a fit mental state to issue her notice of resignation. This contention requires the Authority to consider whether the employer knew or ought to have known that Ms Holding was unwell. Ms Holding refers to her regular claims in her quarterly and annual reports that she was under pressure as evidence that she told the employer that she was suffering from stress and was therefore unwell. I do not accept that contention. All workplaces and all work of whatever sort is occasionally, or even regularly, stressful. Stress is a frequent part of the performance of much of the work many of us do as it is a frequent part of much daily living. What the law requires is for an employer to ensure that, so far as is possible, employees do not become unwell as a consequence of workplace stress or as a consequence of other factors generated by the workplace. It is not the stress that is proscribed but the illness or illnesses that are developed from the stress.

[47] In A G v Gilbert [2002] 1 ERNZ 31 the Court of Appeal had this to say: *“An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgement on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employers’ obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risk”*.

[48] In this particular case, there is no evidence at all that Ms Holding told her employer, until the point at which she resigned, that she was unwell; there was plenty of evidence that Ms Holding referred regularly in her reports to being under pressure, but that is not enough to meet the legal test. Ms Holding’s regular complaints of being under pressure do not, in my judgement, amount to *“unreasonable stress”*. The Colleges’ evidence, which I accept, was that they responded by providing extra resources. On the face of it, there seems nothing intrinsically unsafe about the nature of the duties performed by Ms Holding or the system of work and the fact that Ms Holding did not specifically alert the College to her unwellness until she resigned means that the College fulfilled its contractual obligation to take reasonable steps to avoid risk to Ms Holding based on their state of knowledge at the time.

[49] Finally, Ms Holding alleges that the employer has failed to rebut the presumption that there has been a dismissal. There is no requirement that an employer rebut the presumption of a dismissal in a constructive dismissal allegation. Indeed, quite the reverse is the position. In a constructive dismissal allegation, the onus is on the employee to rebut the presumption that the resignation is indeed evidence of a constructive dismissal and not a resignation pure and simple.

[50] The factual circumstances surrounding her resignation are beyond dispute. She wrote a letter of resignation dated 23 June 2005 in which she indicated that she did not support the

new direction of the College and had no confidence in the College's principal, Mr Hadley, or in its new owner, Ms McAllister. In those circumstances, notwithstanding that once again her resignation (as her two previous resignations were), was in the middle of the semester, the College accepted that there was no reasonable basis on which it could challenge the resignation and seek to have Ms Holding stay and accordingly her resignation was accepted.

[51] In the circumstances of the resignation as I have described it, I think the College behaved reasonably and its decision not to seek to change Ms Holding's mind was perfectly understandable in all the circumstances.

[52] In the well known passage from the English decision Woods v WM Car Services (Peterborough) Ltd [1982] 1 CR 693, the Court said:

"... There is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee... The Tribunal's function is to look at the employers' conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

[53] I have already found that the breaches of duty Ms Holding relies on do not create a personal grievance by reason of disadvantage. I have also found that the breaches which Ms Holding relies on more particularly in respect to the constructive dismissal allegation are also not made out. There is no basis then on which to ground a finding that Ms Holding was left in a position of not being able to "put up" with the Colleges' allegedly inappropriate conduct.

[54] The evidence presented of a course of conduct, as distinct from a succession of breaches of duty, simply does not meet the test of "dismissive or repudiatory conduct" on the part of the employer: Williamson J in Wellington Clerical IUW v Greenwich [1984] ACJ 347. Certainly there is evidence of some unhappiness and resentment from time to time over a relatively long employment relationship but, in my view, nothing that speaks of repudiation by the College.

Determination

[55] For the foregoing reasons, I am not persuaded that Ms Holding has made out her claim, either for a personal grievance on the grounds of an unjustified action by the College to her disadvantage, or for a constructive dismissal.

[56] It follows that Ms Holding's claim fails in its entirety.

Costs

[57] Costs are reserved.

James Crichton
Member of Employment Relations Authority