

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 243/10
5112663**

BETWEEN RAYMOND KEVIN RICHARDS
 Applicant

AND THE VICE-CHANCELLOR OF THE
 UNIVERISTY OF WAIKATO
 Respondent

Member of Authority: Leon Robinson

Representatives: Joanne Watson, Counsel for Applicant
 David France and Catherine Stewart, Counsel for
 Respondent

Investigation Meeting: 17 December 2008

Further Information: 5 February 2009
 26 May 2009

Submissions Received: 11 May 2010

Determination: 24 May 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Dr Raymond Richards (“Dr Richards”) claims the respondent University’s (“the University”) decision to decline his study leave report constitutes an unjustifiable disadvantage. He also claims breaches of his employment agreement and good faith. He also says the decision was retaliatory because he made a formal protected disclosure and also, that he has been victimised under the Human Rights Act 1993.

[2] The parties were unable to resolve the differences between them by mediation.

The facts

[3] Dr Richards is employed by the University as a Senior Lecturer in the Faculty of Arts and Social Sciences. He has been a senior lecturer since 2000. Before then he had ten years experience as a lecturer.

[4] Dr Richards was employed under the terms of a prevailing collective employment agreement “The University of Waikato Academic Staff Collective Employment Agreement 1 June 2007 to 30 June 2008” (“the Collective”).

[5] On 12 October 2004 Dr Richards applied for study leave by completing a Study Leave Application for the period 11 July 2005 to 2 June 2006. In respect of his previous period of study leave Dr Richards wrote:-

My last period of leave was 5 March – 8 June 2003. The specific outcomes listed for that period of leave were:

Writing 20,000 words of my biography of Sir Geoffrey Palmer and organizing the rest of my research to facilitate more writing.

- *Presenting a paper at an International American Studies Association conference in the Netherlands.*
- *Both of these outcomes were achieved, and my study leave report was accepted.*

[6] Dr Richards completed the details for his proposed study leave programme as follows:-

- a) *the overall academic purposes of the leave*
- b) *expected outcomes*
- c) *activities which will lead to the accomplishment of your objectives for the leave*
- d) *an outline of your proposed study leave itinerary and contact addresses*

- a) *to finish the manuscript of my biography of Sir Geoffrey Palmer*
- b) *a finished, book manuscript*
- c) *writing*
- d) *I will be writing in my campus office and at home: XX Cambridge. Telephone XXX.*

[7] The University implemented a *Study Leave Policy* approved on 12 April 2007 (“the study leave policy”). The study leave policy has this clause:-

Accountability for leave

28. *Academic staff are accountable to the University for the fulfilment of approved study leave objectives.*

29. *Within two months of return to regular duties, the staff member must provide a written study leave report to the relevant chairperson of department (or equivalent), showing how the purposes for which the leave was granted have been pursued conscientiously, effectively and in good faith.*

30. *Where the chairperson of department (or equivalent) considers the study leave report satisfactory, he or she will recommend it to the Dean (or equivalent).*

31. *Where the chairperson of department (or equivalent) has concerns about the study leave report, he or she may discuss the report with the Dean (or equivalent) and/or the staff member.*

32. *Where the Dean (or equivalent) concludes that the study leave report is unsatisfactory, he or she has the authority to*

- *decline approval of any future study leave applications by the staff member concerned*
- *take any other action he or she considers appropriate to address the matter.*

33. *The Dean (or equivalent) sends study leave reports which he or she considers satisfactory to the Deputy Vice-Chancellor for final approval. The Deputy Vice-Chancellor makes regular reports to the Academic Board regarding study leave activities and outcomes in terms of their contribution to the University's academic strategic goals.*

34. *Where no satisfactory report of a study leave has been received within four months of the end of that study leave period, qualifying service will be deemed not to recommence until the date of receipt of a satisfactory report.*

35. *Study leave outcomes are taken into account by the chairperson of department (or equivalent) and Dean (or equivalent) when considering future study leave applications from the same staff member.*

[8] On 2 November 2004 Professor Zirker the Dean of the History Department (“Professor Zirker”), wrote to Dr Richards regarding his application for study leave request from July 2005 to June 2006 and advised that he would need to see “more specific commitment to measurable (published) research before he signed the application”

[9] By memo dated 11 November 2004 Dr Richards responded to Professor Zirker giving his assurance that the purpose of the leave was “to finish the manuscript of my biography of Sir Geoffrey Palmer and that the expected outcome of the Study leave would be ‘a finished, book manuscript’.”

[10] On 16 November 2004 Professor Zirker approved Dr Richards’ study leave request “rather reluctantly”.

[11] Dr Richards was asked to teach and consequently his study leave proceeded in two phases firstly from 18 July 2005 to 13 February 2006 and secondly from 5 March 2007 to 31 May 2007. That second phases was reduced by five weeks because Dr Richards was involved in an exchange with Aristotle University.

[12] On 29 June 2007 Dr Richards submitted his study leave report. He wrote:-

The Study Leave was granted so that I could work on my biography of Sir Geoffrey Palmer. I have now written 15 chapters or 120,000 words.

I have written most of the Palmer manuscript.

[13] On 20 July 2007 Professor Giselle Byrnes Chairperson of the Department of History (“Professor Byrnes”) asked to see Dr Richards’ manuscript so she could write her report about his study leave.

[14] On 29 July 2007 Professor Byrnes wrote a draft report on Dr Richards’ manuscript to Dr Richards, listing numerous areas where it needed attention. In her email to him she wrote:-

I’ve read your ms on Palmer over the weekend (which I enjoyed) and have made some notes on it (general comments) which I’d like to give to you and also return the ms to you. This has helped me enormously, thank you.

[15] Dr Richards and Professor Byrnes met to discuss the Palmer manuscript. They disagree strongly about the content of the discussion they had. Dr Richards says that at no stage did Professor Byrnes say she would submit a different report, or a negative report, or that she would not be supporting his study leave report. He says she did not indicate any problem whatsoever. Professor Byrnes says she did discuss her concerns with Dr Richards and says her note to Dr Richards corroborates confirmation of issues raised with him.

[16] On 31 July 2007 Professor Byrnes wrote a report on Dr Richards’ study leave report to Professor Zirker. The report was different to the report she had provided to Dr Richards and contained this additional final summary:-

I now have a much better sense of the current status of Dr Richards' research. However, I find his study leave report to be very thin and I still cannot tell exactly what progress has been made on the draft over Dr Richards' most recent period of research and study leave. In sum, I would conclude that while the Palmer manuscript exists as a complete draft, and while it is of potential publishable quality (with some significant reworking), this one manuscript (which has not to my knowledge been through any sort of peer review process), is a very modest output for some ten years' research efforts.

I would add the Dr Richards is a very highly regarded teacher in the History Department and receives excellent teaching evaluations from students. Nevertheless, teaching is only part of what we, as academics, are expected to do. I am forwarding Dr Richards' report to the Dean for his consideration.

[17] On 10 August 2007 Dr Richards wrote to the Chancellor describing a "Protected Disclosures" complaint regarding University of Waikato's financial assistance for accommodation and living expenses for an academic staff exchange agreement with Aristotle University.

[18] On 28 August 2007 the Chancellor responded to Dr Richards' letter declining to proceed further with the investigation regarding academic staff exchange with Aristotle University.

[19] On 4 September 2007 Professor Zirker wrote to Carole Gunn, Human Resources Director ("Ms Gunn"), stating that he was "frankly very dissatisfied" with Dr Richards' study report. This advice was very critical of Dr Richards.

[20] On 19 October 2007 Professor Sutton, Deputy Vice Chancellor ("Professor Sutton"), declined Dr Richards' study leave report.

[21] On 24 October 2007 Carole Gunn advised Dr Richards that as his study leave report was not satisfactory and that his study leave was deemed to cease accruing as from 19 October 2007. Ms Gunn requested Dr Richards to discuss with his chairperson what steps he might be able to make in order to submit a satisfactory report. She wrote:-

As a result and in accordance with University policy on study leave (former policy clause 24, current policy clause 34) your qualifying service for study leave credit will be deemed to cease with effect from 19 October 2007 until such time as a satisfactory report is received.

[22] On 8 November 2007 Dr Richards wrote to Professor Sutton disputing the decision to decline his study leave report and setting out his reasons. He stated that he did not finish the manuscript firstly, because his leave was split and secondly, because his leave was shortened by five weeks due to an exchange to Aristotle University.

[23] On 30 November 2007 Dr Richards' representatives notified a personal grievance on his behalf

[24] On 7 December 2007 Alan Frauenstien, Human Resources Adviser, and Professor Byrnes met with Dr Richards and endeavoured to persuade him to take another 5 weeks study leave to finish his manuscript, however Dr Richards declined to do so.

[25] On 11 December 2007 Professor Sutton responded to Dr Richards' letter disputing the decision to decline the study leave report and outlined in detail his reasons as to why his decision remains unchanged.

The merits

[26] Dr Richards tells the Authority he did not finish the Palmer manuscript because firstly the goal he had set in 2004 proved to be too ambitious. Secondly, he said his time at Aristotle University had shortened his study leave. Thirdly, the breakdown of his family relationship involving his two children made it hard for him to work. He tells the Authority he pursued the goal in good faith and he had written 60,000 words during the study leave period.

[27] Dr Richards says that he did not know of Professor Byrnes changed assessment or that it was viewed as a basis to decline his study leave report until he was notified in the letter to him dated 24 October 2007 that his "study leave report has been declined by the Deputy Vice Chancellor for reasons set out reports received from [his] chairperson and Dean".

[28] Dr Richards is aggrieved because he said that until he received that advice, he had no idea that there was an issue at all with his study leave report. He says he

believes the assessment Professor Byrnes provided to him was more of assistance in getting the manuscript published. He says there was no indication that she did not think the manuscript met the standards in terms of approved study leave. He says he had undertaken to have the manuscript finished, not published. He says he had been unable to do so because of a number of reasons including that his leave was reduced. He says there was nothing said to him by Professor Byrnes that alerted him to any problem at all with having his study leave report approved. He says he feels he has been misled and possibly deceived. He says Professor Byrnes told him she had not intended her assessment to be viewed as grounds for declining his study leave report. He says she told him she was shocked when the Dean told her he would be recommending Professor Sutton decline his report.

[29] Professor Byrnes tells the Authority she had told Dr Richards that she was not supporting his study leave report for approval. She said she had done so when she saw him in a photocopy room one weekend. She later said she found Dr Richards intimidating and preferred not to be alone with him.

[30] Dr Richards complains that it was unfair that he did not see the reports from his chairperson Professor Byrnes and Dean Zirker before they were sent to Professor Sutton. He also says that the relevant period should be the seven weeks between 5 March 2007 and 24 April 2007 because he says the first phase of his study leave is not in issue following the acceptance of his interim report of 30 April 2006, on 22 May 2006.

[31] He says that during those seven weeks he revised much of the draft he had written and he wrote a further 70,000 new words. He says Professor Byrnes read his work a total of 120,000 words and wrote that it was of potentially publishable quality. Because of this, Dr Richards says he pursued the purpose for which his study leave was granted “conscientiously, effectively and in good faith”. In essence, Dr Richards maintains he has met clause 29 of the study leave policy and his study leave report should be accepted. He attempted to persuade Professor Sutton of this position.

[32] Professor Sutton wrote on 11 December 2007 that the expected outcomes of the study leave were not achieved and further:-

The fact that your study leave report has been declined should not be taken to imply doubts as to whether you pursued the purposes of the leave conscientiously or in good faith. The decision relates rather to the comparison between the proposed outcomes of the leave as stated in your study leave application and the actual outcomes.

[33] Dr Richards argues his study leave was not granted on the basis of a publication.

[34] He strongly believes that the circumstances show his study leave was declined unlawfully and further, that it was declined in retaliation for his complaints including his protected disclosure about the way the University was not meeting its obligations to the University of Aristotle, as he saw them.

[35] I consider that if Professor Byrnes had communicated any concerns to Dr Richards' about his study leave report or indicated to him she would not support his application, that Dr Richards would have pursued the matter vigorously immediately. I incline to the view that he was not aware of the views that Professor Byrnes subsequently formed and that Dean Zirker communicated to Professor Sutton before Ms Gunn's letter to him (Dr Richards) disclosing the same. I find that Dr Richards' was not given an opportunity to comment or defend himself before very negative comments and views were expressed about him were conveyed to Professor Sutton.

[36] I note that the study leave policy at clause 31 does not oblige the chairperson of department to discuss matters with the staff member. It says that the chairperson "may" discuss the report with the Dean and/or the staff member. I find that contractually, the chairperson, or Professor Byrnes is not obliged to do so.

[37] Dr Richards' counsel argues that the study leave policy does not require the purpose of the leave to be achieved, just "pursued conscientiously, effectively and in good faith". It is submitted that nowhere is there a requirement to actually achieve, and nowhere is it stated that "effectively" means achieving. Counsel submits that the basis on which the study leave report was declined was not in accordance with the policy and was biased and based on irrelevant and incorrect information.

[38] Dr Richards says he is disadvantaged because of the University's refusal to accept his study leave report. The disadvantage is that he no longer accrues study leave credits and is likely not able to successfully seek study leave again. He says this is a disadvantage in his employment but also his career and his academic reputation.

[39] I accept that according to the policy, study leave is neither a right nor an entitlement and that eligibility and approval is at the discretion of the University. But Dr Richards' leave was always approved. Having approved that leave, I consider the parties were both bound by the mutual obligations of good faith, to observe the provisions of the study leave policy.

[40] I regard clause 29 of the study leave policy as critical in the resolution of this employment relations problem. That clause provides:-

29. Within two months of return to regular duties, the staff member must provide a written study leave report to the relevant chairperson of department (or equivalent), showing how the purposes for which the leave was granted have been pursued conscientiously, effectively and in good faith.

[41] Critical is the purpose of the study leave. Dr Richards specified the overall academic purposes of the leave "to finish the manuscript of my biography of Sir Geoffrey Palmer and further, the expected outcomes as "a finished, book manuscript". I am surprised by the lack of detail but that is irrelevant because the University through the Dean accepted the same and approved the leave notwithstanding.

[42] I incline to accept Dr Richards' interpretation of clause 29. It is not absolute achievement that is required. Rather it is only "pursuit". I find that Dr Richards was not required to demonstrate absolute achievement in terms of a "finished, book manuscript" but rather the pursuit of the same conscientiously, effectively and in good faith.

[43] I find that Professor Byrnes and Dean Zirker did not direct themselves to the critical issue, ie the pursuit by Dr Richards of a "finished, book manuscript" conscientiously, effectively and in good faith.

[44] Having said that, I also consider Dr Richards' own study leave report did not deal with the issue helpfully or substantially either. If he had used a University template that might be understandable but nonetheless his own efforts did not advance the critical exercise.

[45] Professor Byrnes wrote that she could not tell exactly what progress had been made on the draft over Dr Richards's most recent period of research and study leave. That was the salient issue. It needed to be conclusively determined. Dr Richards' further input was required and I tend to the view he ought to have been further consulted so that the matter could be concluded. I find that he was not. I find that the failure to involve him in that regard was unfair to him and in the end quite unwise.

[46] I have the same view in respect of the issue as to "effective" pursuit being tantamount to a completed manuscript. Principally, I do not agree that "effective" pursuit is so absolute as to amount to a completed manuscript. In any event, if that was the University's actual expectation, the matter should have been explicitly identified to Dr Richards and put directly to him to deal with before adverse findings were made.

[47] As well, Professor Byrnes was right to distinguish the recent period of research and study leave. I find that Dr Richards' was assessed in terms of historical leave periods and that was wrong and unfair to him because the previous periods of study leave were no longer in issue. No issue had been taken in respect of them. They had been both approved and accounted for.

[48] I ask now whether Professor Byrnes as chairperson actually made a recommendation to the Dean. I consider that the study leave policy by reading clauses 30 and 31 together actually contemplates a recommendation either way. But I am unable to discern from what she wrote to the Dean that there was actually a recommendation from her. It concludes only that she is forwarding the leave report to the Dean for his consideration.

[49] As I understand clause 31, if she had concerns, Professor Byrnes had a discretion to discuss the report with either the Dean or the Dr Richards. I find that

Professor Byrnes did not discuss any “concerns” she may have had with Dr Richards’. Concerns in the context of the clause relates to the leave report itself and not the manuscript. I find that Professor Byrnes did not discuss concerns with the leave report itself with Dr Richards. I make no finding whether any concerns she had with the leave report were discussed with the Dean but it is undisputed that she wrote about some concerns to him. Because of that fact, I find that Professor Byrnes did not recommend Dr Richard’s study leave report.

[50] I find that the Deputy Vice-Chancellor is involved only where the Dean is satisfied with a study leave report according to clause 33. The Vice-Chancellor is involved only to finally approve satisfactory study leave reports. Where the Dean is dissatisfied, the Deputy Vice-Chancellor has no contemplated involvement. This is the plain, natural interpretation of clause 33.

[51] If I am right in that conclusion, the University was wrong to write to Dr Richards by Ms Gunn’s letter of 24 October 2007 to advise that his study leave report “has been **declined by the Deputy Vice-Chancellor** for the reasons received from your Chairperson and Dean”.

[52] The decision taken under clause 34 to suspend qualifying service for study leave was consequently also wrong because it was founded on an incorrect basis.

[53] My interpretation above continues so that I find that only the Dean is empowered and authorised to act in situations where there is an unsatisfactory study leave report and that interpretation flows directly from the plain words of clause 32.

[54] In terms of a request for a further report from Dr Richards, that ought to have explicitly requested of him a report as to the pursuit by him of a “finished, book manuscript” conscientiously, effectively and in good faith.

[55] It is true that clause 28 requires the staff member to be accountable to the University for the fulfilment of approved study leave objectives. But that does not mean absolute fulfilment is required.

[56] The University argues that the study leave policy does not provide any specific criteria by which the Dean makes his decision to approve or decline study leave reports. But it is clear that the decision is made on the basis of the study leave report. The requirements for that study leave report are expressly stated at clause 29. That means the decision made by the Dean must logically be founded on clause 29.

[57] I consider the essence of the University's position is specified in Professor Sutton's advice of 11 December 2007. There he wrote:-

The fact that your study leave report has been declined should not be taken to imply doubts as to whether you pursued the purposes of the leave conscientiously or in good faith. The decision relates to the comparison between the proposed outcomes of the leave as stated in your study leave application and the actual outcomes.

[58] I do not agree that the University was entitled to require a finished book manuscript. That was only ever an expected outcome. I consider the University was required to assess the extent to which Dr Richards pursued that expected outcome conscientiously and in good faith. It did not do so, it did not involve him in any exercise directed at doing so and so it cannot fairly have arrived at its decision to decline the study leave report.

[59] For the reasons outlined above, I conclude that the University's decision to decline Dr Richards' study leave and that his qualifying service for study leave credit deemed ceased from 19 October 2007 was wrong and unfair to Dr Richards. I conclude that the University did not act to satisfy itself of the proper considerations. The decision to decline Dr Richard's study leave report was an unjustifiable action which I accept caused disadvantage to Dr Richards. I therefore conclude Dr Richards has a personal grievance for unjustifiable disadvantage.

[60] Having reached that view it is unnecessary for me to make findings as concerns protected disclosures. I do find however that there was no serious wrongdoing in these particular circumstances. But most pertinent, I am not persuaded that there is sustainable evidence that Dr Richards' study leave report was declined out of retaliation for his alleged protected disclosure.

[61] Consequently, I make no findings in respect of the Human Rights Act 1993.

The determination

[62] I find that the University breached the study leave policy in relation to Dr Richards by failing to assess his study leave report in accordance with the clause 29 of the study leave policy.

[63] I decline to make findings that the University breached its obligations to act in good faith through the chairperson's conduct. I decline to make any order in this respect.

[64] **I find that Dr Richards has a personal grievance for unjustifiable disadvantage.**

[65] **I am not prepared to make an order that the University reinstate Dr Richards' ability to accrue study leave from the date it determined he was unable to accrue study leave. I consider the appropriate course of action is for the University to revisit the matter and apply the study leave policy according to the interpretation I have expressed. As Dr Richards says in his evidence, the study leave report is to be assessed in terms of the actual requirements.**

[66] Having made the above findings I am required to assess contribution by Dr Richards. I find no blameworthy conduct on his part which ought properly to require a reduction in the nature or extent of remedies to be provided to him.

[67] Dr Richards claims compensation. He says in his evidence that the issue has caused him great stress and anxiety. He offers no further detailed evidence. I accept however that he has inevitably suffered injury to his feelings, anxiety and hurt and humiliation. I award him modest compensation to both mark the wrong that has been done to him and compensate him for the effects of the unjustifiable action. I award him \$2,000.00 compensation. **I order the Vice-Chancellor of the University of Waikato to pay to Dr Raymond Richards the sum of \$2,000.00 as compensation.**

The costs

[68] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Watson is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr France is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority