

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 167  
5361263

BETWEEN

MORDECHAI KATASH  
Applicant

A N D

RAFFLES COLLEGE OF  
DESIGN AND COMMERCE  
(NEW ZEALAND) LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person  
Gretchen Stone, Counsel for Respondent

Investigation meeting: 15 March 2012 at Auckland

Date of Determination: 16 May 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Katash) alleges that he was unjustifiably dismissed from his employment by the respondent (Raffles) on 12 October 2011. Raffles resists that claim and contends that Mr Katash abandoned his employment. Subsequently, Raffles filed an amended statement in reply (substantially in the same terms) but included this time a counterclaim alleging various forms of incompetence by Mr Katash that led to a claim for damages of more than \$300,000.

[2] Mr Katash's employment came to an end as the result of an altercation at the workplace on 12 October 2011 where Mr Katash was the Sales and Marketing Manager reporting to the College Director. There is dispute between the parties about exactly what happened, but it is common ground that Mr Katash was summoned to the office of the Acting College Director, Louis Ng, and asked to update the electronic version of an application form for College students. Mr Katash says that he

immediately commenced work on this task, but sought to take a break at 2pm when he had a scheduled interview with an enrolling student. Mr Katash suggested that another staff member could continue updating the application form.

[3] An argument ensued between Mr Katash and Mr Ng. Mr Katash left the application form document in Mr Ng's office and said he wanted to talk to the Chief Executive Officer of Raffles. According to Mr Katash, Mr Ng responded by saying that if Mr Katash involved the chief executive officer, he would "*be in big trouble*" because the chief executive officer wanted to fire him and that Mr Katash was "*close to being fired*".

[4] Mr Ng's evidence is somewhat different but he confirms that he told Mr Katash that he regarded Mr Katash's failure to follow a lawful instruction as "*extremely serious*" and he says he "*made it clear if he would not comply with my instructions then he had a real risk of having his employment terminated*". Then, in a subsequent meeting shortly thereafter, to which there was a witness, Mr Ng told Mr Katash that Mr Katash should "*consider whether he was actually prepared to do his job or whether he was resigning*". Later still in the same meeting, Mr Ng told the Authority that he told Mr Katash that "*I considered his employment to have been terminated and asked him to leave the premises immediately and to leave all of his work items behind*".

[5] Mr Katash then left the workplace and promptly raised a personal grievance with Raffles. Raffles' case is based on its contention that, despite the evident "sending away" of Mr Katash by Mr Ng, it expected Mr Katash to return to discuss matters and Mr Ng's evidence is that he tried to facilitate that after the events of 12 October by asking a colleague to engage with Mr Katash, and by telephoning and writing to Mr Katash. The colleague, Mohammed Fahim Hussain, was the Finance Manager at Raffles and by all accounts he enjoyed a good working relationship with Mr Katash and in fact had been Mr Katash's support person during the second meeting between the principal protagonists. Mr Hussain's evidence to the Authority was that after the events just recited, he had attempted to speak with Mr Katash through the latter's wife, but that she had discouraged contact at that point because Mr Katash was still distressed about the position.

**Issues**

[6] The first issue for the Authority to determine is whether Mr Katash was unjustifiably dismissed from his employment and the second is whether the counterclaim, or any of it, is made out.

**Was Mr Katash unjustifiably dismissed?**

[7] The Authority has no hesitation in deciding that Mr Katash was unjustifiably dismissed and accordingly is entitled to the consideration of remedies for that unjustified dismissal.

[8] It is difficult to see how any other conclusion could be reached. Even on Raffles' evidence, it is plain that Mr Katash was told more than once by Mr Ng that his employment was in jeopardy and that he should consider resignation and, as if that was not enough, Mr Ng concluded the exchanges between the parties by telling Mr Katash that his employment had been terminated and further telling him to leave the workplace immediately. In the Authority's opinion, there could not be a more graphic example of a summary dismissal than this. Arguably the earlier exchanges between Mr Ng and Mr Katash could be characterised as grounding a constructive dismissal claim, but the final observation by Mr Ng is a sending away in the traditional sense of that term of art. Looked at together, the course of the conversation between the two principal protagonists constitutes, in the Authority's considered view, an unjustified dismissal of Mr Katash by Mr Ng.

[9] Raffles' argument that Mr Katash abandoned his employment is difficult to sustain in the face of the clear words uttered by Mr Ng and confirmed by Mr Ng in his own evidence to the Authority. What is more, those words uttered by Mr Ng are confirmed first by a witness for Raffles, Ms Merlyn Yin, and by Mr Hussain (as to part of the conversation anyway), and of course by Mr Katash himself whose evidence on the matter is clear and fundamentally supportive of Mr Ng's recollection of the events.

[10] Given that Mr Katash was sent from the site by the employer, in the context of being told that his employment had been terminated or, to use Ms Yin's form of words, that Mr Katash could "*no longer represent Raffles College*", it is difficult to see what was left for Mr Katash to come back and talk about, even assuming that he was properly contacted and asked to do so.

[11] The evidence about contact relies partly on attempts by the College to contact Mr Katash by telephone and letter and also by the attempts that Mr Hussain made to contact Mr Katash on a personal basis. The Authority is satisfied that, notwithstanding those efforts by Raffles to engage with Mr Katash, he was entitled to treat his employment agreement as having been brought to an end by the statements made to him by Mr Ng.

**Is the counterclaim made out?**

[12] Raffles seeks damages and penalties in relation to an alleged counterclaim. It says broadly that Mr Katash was incompetent and that he breached his implied obligation of fidelity during the employment. In relation to the alleged incompetence, Mr Katash is accused of failing to meet specific recruitment targets for new students, using Google Adwords as the main form of advertising for students but so structuring the links as to make them unuseable, publishing incorrect links to Raffles' prospectus, misrepresenting one year courses as three year courses and falsely claiming to be Acting College Director.

[13] The financial compensation sought by Raffles is significant. The claim for damages for the loss of prospective students is \$250,000, the damages sought for "*wasted expenditure*" on Google Adwords is \$56,813.49, and penalties are sought for the alleged breach of the employment agreement to be paid to Raffles in terms of s.136(2) of the Employment Relations Act 2000 (the Act).

[14] It is appropriate to deal with each of Raffles' allegations in turn. The first broadly could be characterised as an alleged failure to meet recruitment targets. In this regard, Mr Katash's evidence is that there were four student enrolment intakes in February, April, July and October. He described the April and October intakes as "*sub-intakes*" in his evidence to the Authority because they yielded far fewer enrolments.

[15] Despite the less impressive enrolments achieved with the sub-intakes, Raffles persevered with those intakes on the basis, apparently, that it aligned with intakes across the Raffles group internationally.

[16] Each of these intakes had a target but, critically, Mr Katash's unchallenged evidence is that those targets were never agreed to by him or indeed even discussed with him. Furthermore, there is no evidence before the Authority to suggest that

achievement of these targets was a term of the employment against which Mr Katash's performance would be measured or indeed that failure to achieve targets would or could result in this sort of claim.

[17] The Authority heard evidence that the two main intakes in February and July generated most of the enrolments and 80% of the domestic student enrolment came at these times. The April and October sub-intakes were maintained exclusively for the benefit of overseas students and Mr Katash told the Authority that frequently there were no enrolments at all at these times.

[18] The second allegation against Mr Katash is broadly that he placed links to the Google Adwords which, put loosely, did not work. Further, because Google was the only medium by which marketing was done, a failure to have the links work meant that, in effect, the whole marketing plan of Raffles was undermined.

[19] Mr Katash responded to this claim by drawing the Authority's attention first to the fact that budgets, expenditure and strategic planning were all centralised for the Raffles Group and not run out of New Zealand. Further, he said in the early part of his employment at Raffles, he was able to use a variety of marketing methods, including cinema advertising, newspaper advertising, radio advertising and advertising on billboards and in magazines. But, Mr Katash thought that around 2009, the directors made a decision to "*substantially cut up to half of the planned marketing budget so that the marketing department was left only with Google Adwords as a marketing tool*".

[20] Raffles maintained that it was Mr Katash's decision to base the marketing budget expenditure exclusively on Google Adwords, but the Authority does not accept that view. Mr Katash's evidence, as has been noted above, was that the decision on what to spend the marketing budget on was not made by him but was made offshore somewhere, and he gave further evidence to the Authority that he "*would have loved*" to have other marketing tools but that his other suggestions were rejected. The Authority's preference for Mr Katash's view of matters over the view of Raffles' witnesses is supported by evidence from Mr Hussain who indicated that the College's budget was developed to meet international requirements and that, in particular, the student enrolment targets were built into the budget to show a profit for the offshore owners, that the numbers were based on capacity, and were not realistic and were never met. On that basis, it seems inherently unlikely that Mr Katash would

have been given the authority to determine his own marketing spend and much more likely that the marketing budget was indeed set offshore as Mr Katash maintained.

[21] There are other curiosities in relation to this aspect. Mr Katash's evidence is that the Google advertising was very successful and that this generated 80% of the New Zealand revenue for Raffles. Mr Hussain, in his evidence, effectively confirmed the utility of the Google advertising by indicating that occasionally Raffles did not advertise on Google in some months "*because it was costly*" and when that happened the number of enrolments dropped by 60-70%.

[22] But the evidence for Raffles is that, while the Google Adwords marketing may have delivered results in previous years, in the 2011 year, it is claimed that by Mr Katash's negligence, the links from the Google Adwords to the College's various electronic web pages did not work and this explained why there were no new student enrolments in 2011. Mr Katash's explanation for that phenomenon is that the market turned down in 2011 and that, as a consequence of the reduction in the marketing spend (a decision made offshore), it was inevitable that there would be a reduction in new student numbers.

[23] Mr Katash also makes the point that the links to the Google Adwords programme worked perfectly well in previous years and so he is at a loss to explain why it is contended that they did not work in 2011.

[24] Finally and perhaps most fundamentally, Mr Katash maintains the position that he was a marketing person and not an IT person and he told the Authority that the links and web pages were all built by the appropriate experts and not by him.

[25] The final allegations relate to claims that Mr Katash placed incorrect links in the College's prospectus and incorrectly represented the length of particular courses. Again, Mr Katash denies these allegations and says that in relation to the latter matter, he at all times complied with the requirements of the academic members of the staff in terms of the length of particular courses. He says, in essence, that he was told to advertise courses at particular lengths (one year or three years in particular), and that he did as he was asked. On the wider issue of incorrect links to the College prospectus, Mr Katash again refers to the involvement of expert IT people in the technical aspects and says that, in any event, all published material of that sort went through a sign-off process which included the respective Head of Department and the

College Director. He told the Authority that *“no information is published without this approval. No errors were brought to my attention by any party during the sign-off process and therefore I am not aware of any errors and links in prospectuses or incorrect representation about the period of courses”*. This latter evidence is contradicted by the evidence of Mr Ng who says that these errors were brought to his attention.

[26] The final allegation is that Mr Katash represented that he had been the Acting College Director and according to Raffles this is wrong and *“calls into question [his] integrity and honesty ... It also shows he has the propensity for deception to mislead others ...”*.

[27] Mr Katash’s evidence is that he was indeed the Acting College Director for a period prior to the employment relationship problem which led to the termination of Mr Katash’s employment. Mr Katash’s evidence on this point is that, in October 2007 (long before Mr Ng was the Acting College Director), Mr Katash was asked to perform the role of Acting College Director when the then Director was away from the office. He said that this arrangement continued until July 2010 when he was told that the arrangement was to cease. There is no documentary evidence for this arrangement but it seems an extraordinary claim to make if it were not true. This is particularly so as the party who Mr Katash alleges asked him to perform the role is still involved with Raffles internationally. Ee Yong Chong is apparently presently Executive Director at the Raffles Education Corporation Board of Directors.

[28] In any event, the Authority is not persuaded that much turns on this allegation one way or the other. As the Authority has just indicated, it seems an extraordinary claim to make if it is not true, given that the genesis of the proposal came from an individual who, according to Mr Katash’s own evidence, is still involved in the Raffles Group internationally at a very senior level. Presumably, if Raffles New Zealand was bent on proving the nature of this allegation, it could have provided evidence from Mr Chong to refute Mr Katash’s contention. In the absence of that evidence, the Authority declines to take that matter any further.

[29] As to the other matters in broad contention in terms of the counterclaim, the Authority is not persuaded that there is any nexus between the complaints made by Raffles and acts or omissions of Mr Katash.

[30] With the greatest respect to Raffles, its evidence for the counterclaim is sketchy at best, comprising as it does seven paragraphs in one of its witness's briefs of evidence. That evidence, such as it was, was, in the Authority's view, ably dealt with by Mr Katash himself during the investigation meeting.

[31] The alleged failure by Mr Katash to meet recruitment targets is not made out. The Authority is satisfied on the evidence it heard that the targets themselves bore no relationship to achievability, were seldom if ever met, were never communicated to marketing staff, and that achievement of those targets was neither an express nor an implied term of Mr Katash's employment agreement. Those conclusions of the Authority are derived primarily from the evidence of Mr Hussain who was asked during the investigation meeting about the targets and the achievement of them. He said, amongst other things, that he "*... wouldn't call the targets targets because they were numbers that were put in the budget to show a profit. The numbers were based on capacity, were not realistic and were never met*". Mr Hussain went on to say that the "*... targets were never communicated to marketing staff*" and that failure to achieve targets had "*no ramifications for marketing staff*". Indeed, Mr Hussain said that both of the marketing people (including Mr Katash) had received bonuses for positive achievements but there were never any sanctions for a failure to achieve.

[32] In respect of the Google Adwords claim, the Authority has already made a number of observations about the evidence in that regard. First, the Authority is satisfied on the evidence that the extensive reliance placed on Google Adwords was not a decision made by Mr Katash but was a decision made offshore. Next, the explanation for why the Google Adwords marketing apparently failed in 2011 is not sheeted home to Mr Katash. He makes a number of good points in his defence which were not refuted by Raffles. First, he says that the arrangements in 2011 for the Google Adwords campaign were exactly the same as the arrangements in previous years and yet there was no allegation of any difficulty in previous years, only in 2011. Second, he makes the point that he is not an IT specialist and that all of the IT work was done by IT experts. Next, he said in his oral evidence to the Authority that as Google Adwords was the "*... only methodology approved by the College Director for marketing purposes*" and there were 20 separate campaigns and a multitude of key words it was inconceivable that the Google system did not work but that if it did not, it was an IT problem rather than a problem with his marketing area.

[33] In respect of the final group of claims, namely the claim that Mr Katash placed incorrect links in the prospectus and presented inaccurate information about the period of particular courses, Mr Katash offers the observation that all of that material was checked by the College Director and the relevant Head of Department before it was issued and that evidence was confirmed in part by Mr Ng who agreed that the prospectus in particular was proof read by a group of senior managers before being issued. On that basis, it seems a bit rich to blame Mr Katash for any failure of the electronic system to operate properly. Apparently the College did not undertake test links of any of this material prior to relying upon it and Mr Katash made the observation during the investigation meeting that it perhaps would have been a sensible step to take if only as a preventative device. In any event, as with the other aspects of the counterclaim from Raffles, the Authority is simply not persuaded that there is any nexus between Mr Katash and the various difficulties which Raffles seeks to lay at his door.

### **Determination**

[34] Mr Katash has proved his unjustified dismissal grievance and has successfully defended the counterclaim from Raffles. Raffles says that the Authority ought to determine a high level of contribution in relation to Mr Katash's behaviour on the basis that it materially contributed to the personal grievance (if found). Certainly, the Authority must, by force of statute, consider whether Mr Katash's behaviour contributed in any way to the circumstances giving rise to the grievance.

[35] Raffles says that Mr Katash, put loosely, behaved badly in the various engagements that he had with Mr Ng before the "sending away" which led inexorably to the personal grievance for unjustified dismissal. It is true that Mr Katash sought to suggest an alternative way in which Raffles might deal with the task that he had been allocated, when he (Mr Katash) had other fixed commitments to attend to as part of his ongoing work obligations. That does not seem altogether unreasonable. But Raffles also says that Mr Katash behaved badly in effectively losing his temper in the various discussions with Mr Ng.

[36] The Authority is not persuaded by that claim. The exchange between Mr Ng and Mr Katash may have been heated; but the Authority is not persuaded that any display of poor temper from Mr Katash was so grave as to lead to Mr Ng dismissing him from the employment. Indeed, it seems to the Authority the evidence is

otherwise; it is clear from both parties' evidence that Mr Ng used a pass key to unlock the door to Mr Katash's office when the latter was trying to get some privacy so that he could talk to his wife in private. It is hardly the behaviour of a fair and reasonable employer to burst in on a senior manager when, by his behaviour, he is plainly signalling a wish to have "time out".

[37] Furthermore, Mr Ng's evidence was that Mr Katash was treading on thin ice because there were performance concerns about Mr Katash's engagement in the business going back some time, but Mr Ng confirmed to the Authority in his oral evidence that no steps whatever had been taken by Raffles to address those alleged performance deficits. It seems to the Authority much more likely that if there were contributing factors to the dismissal, the contributions came from Mr Ng rather than from Mr Katash.

[38] That being the Authority's conclusion, it determines that no contribution need be factored into the remedies that Mr Katash can expect.

[39] Mr Katash seeks a contribution to lost wages, compensation and interest. In terms of the lost wages, there are three separate heads. First, there is an amount of wages allegedly due up until the date of dismissal, another sum of annual leave also due and owing and a further 30 days' notice is claimed together with three months' loss of income.

[40] The compensation sought is at the higher end of the "normal" band at \$10,000 but Mr Katash's distress at the way he had been summarily dismissed was plain to the Authority from the appearance of Mr Katash at the investigation meeting and the evidence that he gave there about the effect on him of losing his job, being unable to cope with his day-to-day expenses and not being able to pull his weight financially in his relationship.

[41] The Authority intends, in this determination, to deal only with the immediate consequences of the unjustified dismissal and accordingly intends to award compensation, a contribution to lost wages, and reimbursement of the payment of the Authority's filing fee. Rather than apply interest to the wages claimed, the Authority will take that claim into consideration in the determining of a compensatory figure.

[42] The wages allegedly due to Mr Katash up to the date of dismissal and the annual leave that he ought to have been paid at the same time are statutory

entitlements which Mr Katash should not have to petition the Authority for. According to Mr Katash, the amounts owed in that regard are \$1,935 for unpaid wages and \$3,703.50 for unpaid holiday leave. Those amounts, if they remain unpaid, ought to be paid by Raffles forthwith. Leave is reserved for Mr Katash to come back to the Authority if there is any difficulty in this regard.

[43] Mr Katash also makes a claim for 30 days' notice at a figure of \$5,000. That, in the Authority's judgement, is effectively double-counting; Mr Katash was dismissed summarily and therefore notice does not apply. But equally, Mr Katash is entitled to a contribution to lost wages from the date of the dismissal. What he is not entitled to is a payment of notice for one month together with an overlapping payment for the period from the date of dismissal onwards.

[44] With those preliminary matters now dealt with, the Authority determines that Mr Katash is to have paid to him by Raffles to remedy his personal grievance the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Act in the sum of \$7,500;
- (b) A contribution to lost wages in the sum of \$15,000 being three months' wages at the applicable rate of pay; and
- (c) The filing fee in the Authority of \$71.56.

### **Costs**

[45] Mr Katash acted for himself in this matter and as can be seen from this determination did an extremely successful job of it. Because he incurred no legal costs in the prosecution of his grievance, he is not entitled to make a claim for a portion of those costs to be borne by Raffles. That being the position, there will be no award for costs made in this matter.

James Crichton  
Member of the Employment Relations Authority