

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Raewyn Valda Joy Kerekes (Applicant)
AND Rodney Taxation Service Ltd (Respondent)
REPRESENTATIVES Raewyn Valda Joy Kerekes In person
James Hogg, Advocate for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 4 March 2005
DATE OF DETERMINATION 18 April 2005

The applicant, Ms Raewyn Kerekes, says that she was unjustifiably constructively dismissed by the respondent, Rodney Taxation Service Ltd. Mr Jim Hogg, the Managing Director, denies the allegation and says that Ms Kerekes resigned voluntarily.

Ms Kerekes started working for Rodney Taxation in April 1997 when Mr Hogg bought the company from its previous owner, for whom Ms Kerekes had also worked.

Mr Hogg ran another tax practice office from his home in Torbay while Ms Kerekes had sole charge of the office in Warkworth. Mr Hogg would call into the Warkworth office at least twice a week and ask staff if there were any issues to discuss. Ms Kerekes said that his visits became increasingly fewer. Mr Hogg said the work done by the Warkworth office was general bookkeeping and routine tax compliance work and it serviced the budget end of the small business market. He handled anything more comprehensive and said he had taken responsibility for all workloads and deadlines and had never passed those on to other staff. However, Ms Kerekes said her workload gradually became excessive and that despite complaining to her employer nothing was done about what she saw as her excessive workload. This prompted her resignation.

Ms Kerekes' concerns

In April 2002 she put her concerns in writing. Her letter of 3 April 2002 refers to her dissatisfaction with working conditions "and in particular the impossibly high expectations of what I can handle that are behind my thoughts of working elsewhere." She also said:

I love the work and the clients, but under the pressure of the volume of work that I am expected to handle I am making mistakes that ought not to be made; and the level of stress is such that many times in the last few months I have just felt like walking out of the place.

Mr Hogg did not reply to the letter. He was in hospital having broken his wrist. He left a message on her answer phone saying he was concerned by her letter and hoped that she could hold things together.

On 16 October 2002 she wrote another letter in which she said:

It was never discussed at any stage that I would take over responsibility for the business. But this evolved – to the point that there is considerable reversal of roles. Whilst I carry a lot of responsibility I do not have the authority to make good decisions for the business.

She also complained about staffing at the office. Mr Hogg did not reply to this letter. He had, however, made arrangements for part time assistance.

Ms Kerekes said that she became concerned about her health and started taking breaks at morning and afternoon tea and half an hour for lunch and going home on time. As a result, she felt much better.

Unfortunately, Ms Kerekes reverted to her previous work patterns. Although she accepted that Mr Hogg had not asked or instructed her to do some of the things she was doing she said she could not cease doing them as the job was her livelihood. She was concerned that if she stopped responding to clients' concerns they would leave the business and seek accountancy advice elsewhere, and she would lose her job.

She complained, for example, about people phoning the office with issues relating to other business interests of Mr Hogg; and that when the office premises were moved she could not take a lunch break because often she was the only person there and that clients would corner her in the street. I asked why she had not put a message on the phone to say the office was closed for half an hour and that any queries unrelated to RTS should be made to Mr Hogg directly. She felt that people would stop using the services of RTS and that people disliked answering machines. There were simple ways of dealing with such matters, for example, a sign on the door saying the office was closed for half an hour and a polite but firm statement to a client who intercepted her in the street that she was on her lunch break. These were things that were within her control.

Ms Kerekes says her employer should have sat down with her and gone through her time sheet and told her if he thought she was spending excessive time on certain duties and identified matters he did not wish her to attend to.

Ms Kerekes complained that when her father in the States was ill and she had told Mr Hogg that she might have to resign at short notice to go to the States, Mr Hogg told her she was to take as much time as she needed. She found this response frustrating as there was a backlog of work and she was concerned about what would happen if she had to leave suddenly. It was clearly going to be Mr Hogg's responsibility to sort out any problems that arose were Ms Kerekes either to resign at short notice or to take up the extended leave offer made to her by Mr Hogg.

On 29 March 2003 she wrote saying that she had no job description and the tasks required of her seemed to be expanding. Ms Kerekes complained about the lack of a job description and Mr Hogg said he had told her to prepare one for discussion but she did not. He said he did not ask her to undertake any work outside her normal range and that he agreed to pay whatever hours were necessary for her to complete the work. His approach was very laissez-faire.

On 4 April she faxed him asking him to fill her in on what was happening and what he was expecting from her. She reiterated that the work demands on her were excessive, that she was over stretched and did not appreciate the lack of support and communication.

The resignation

On 1 May 2003 Ms Kerekes resigned. She wrote:

The conditions of work, which for some time have left a lot to be desired, over the past year have deteriorated badly to the point where it is impossible for me to continue.

She said her decision to leave was prompted by three things:

1. She discovered that it was unlikely she would get a pay increase;
2. Work for the 2002 year had still to be filed and the firm was being threatened with loss of extension of time which meant that it could go out of business and she did not know how this was to be addressed. She did not discuss this with Mr Hogg;
3. In order to meet a deadline she filed a GST return that she knew to be incorrect.

Constructive Dismissal

It is readily apparent that Ms Kerekes took on work and responsibility that she not required to. On the other hand, Mr Hogg should have responded to her complaints and discussed matters with her. He said he expected a person in a sole charge office to set her own workload and hours and to organise her work accordingly. While to a certain extent, that is fair comment, to fail to respond to an employee's concerns can constitute a breach of the relationship of trust and confidence.

In Wellington etc Clerical etc IUOW v Greenwich (1983) ERNZ Sel Cas 95 the Arbitration Court defined dismissal as the termination of the employment relationship at the employer's initiative. In cases of constructive dismissal the essential questions to be addressed were:

- (a) What were the terms of the contract?
- (b) Was there a breach of those terms by the employer of a sufficient seriousness to warrant the termination action actually taken by the employee?

The Court said at p 104:

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

Was the resignation caused by a breach of duty on the part of the employer?

Conduct falling short of a breach of a contractual term, including any duty implied by law, cannot entitle the employee to cancel the contract by resigning. The conduct must be such that it is likely to seriously damage the trust and confidence of the employee in her employer.

The breach of contract by Mr Hogg was his repeated failure to address concerns of work overload when they were raised by Ms Kerekes.

Was the breach of duty by the employer of sufficient seriousness to make it reasonably foreseeable that the employee would resign?

While I do not accept Ms Kerekes' contention that there was an excessive workload (much of what

she complained about was the result of her failure to set limits) Mr Hogg should nonetheless have addressed her concerns in a timely manner. He should have ensured that she had a job description and it is no answer to say that she should have written it as she claimed some expertise in that area. Mr Hogg was the employer. The employer has a duty to communicate with the employee and to discuss and attempt to resolve issues of concern.

The breach of duty was sufficiently serious to entitle Ms Kerekes to resign. She had clearly indicated to Mr Hogg that this could be the result if her concerns were not addressed. That does not mean that Mr Hogg had to agree with her assertions; what he needed to do was to discuss them with her.

Ms Kerekes was constructively dismissed and the dismissal was unjustifiable.

Remedies

Ms Kerekes did not attempt to find alternative employment and therefore is not entitled to reimbursement of lost wages.

She is, however, entitled to an award for humiliation and distress. I set that at \$2,000.00.

Costs

The parties should attempt to resolve this issue. Should they be unable to do so the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of Employment Relations Authority