

IN THE DISPUTES TRIBUNAL

[2014] NZDT 668

BETWEEN

**AV
APPLICANT**

AND

**ZE
RESPONDENT**

Date of Order:

8 October 2014

Referee:

Referee Luke

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZE is to pay AV \$3,300.00 by Tuesday 21 October 2014.

Facts

[1] AV enrolled in an immersive 34 week Maori language course with ZE in 2013. She paid \$6,063.64 for the course. AV's daughter was hospitalized part way through the term and as a result she missed 23 consecutive days. The school terminated her study as of 14 June 2013 on the basis that she had missed 20 consecutive and the school was therefore entitled to dismiss her. AV wants the portion of her fees relating to the portion of the course she has missed refunded. She estimates those to be \$3,300. She says the school should not have terminated her and ought to have exercised a greater degree of compassion in the way it handled the situation, at least giving her the chance to see if she could sit out the remainder of the course.

[2] AA represented the school at the hearing. His position is that the school is entitled to have rules and a constitution in relation to the course it offers and that one of the rules as set out in the published Rules and Regulations Booklet is that the school is entitled to terminate a student if they miss 20 or more consecutive days of classes. AA explains that this is for the very good reason that because the course is so intense and immersive, the student who has missed so many classes will be very far behind and will place the teacher in an invidious position. AA says he personally interviews the students and emphasises to them the importance of attendance and that they should attend more than the 80% minimum requirement. AA also says he points out to students that they must comply with the rules and regulations of the school and that a copy of them is present in every lecture room.

[3] AA further points out that according to section 235 of the Education Act a student is only entitled to a refund if they terminate within the first 8 days of a course and after that the school is entitled to retain the fees. He says this is pointed out in the Rules and Regulations Booklet.

Issues

[4] Does Section 235 entitle the school to refuse a refund?

[5] Is AV bound by the 20 consecutive missed days rule?

[6] Did AV breach the contract with the school, and if so what should be the outcome?

[7] What about the “justice and merits” of the case?

Decision / Law

Does Section 235 entitle the school to refuse a refund?

[8] Section 235 does not apply to this case because I find that AV did not terminate the course. Her contract with the school was cancelled by the school. Regardless, the section has been misconstrued by the school. The section provides a protection for students that entitles them to a full refund should they change their mind within 8 days. It is not intended to be a protection for schools in cases where termination happens after the 8 days. What it says is that the trustee holding the money is to release it to the school. From that point the normal rules of contract apply and the section points out that the school is free to agree to refund the fees. The section has no application here where the school has cancelled and nor does the section in the Rules and Regulations under “*Protection of Student Fees Refunds, Trust Account.*”

Is AV bound by the 20 consecutive missed days rule?

[9] AV’s enrolment in the course is a contract between her and the school. It is governed by the ordinary rules of contract law. A contract is formed when two people have a meeting of the minds. One person makes an offer of what the contract is to be and the other accepts. It often happens that one party is not fully aware of all of the detailed terms of a contract they have accepted or signed. Ordinarily they are deemed to have accepted the terms based on having had the opportunity to know and understand those terms and having done an act (such as signing) to indicate acceptance. With more important terms, however, there is an expectation that they are not “*buried in the fine print*”. If a person would not reasonably have agreed to a term that ought reasonably to have been brought to their attention, then acceptance by conduct or signing is negated, and there is in truth no acceptance.

[10] On the enrolment form that AV signed is a statement just above her signature and the declaration that reads:

Rules – In signing this enrolment form you undertake to comply with the published rules and policies of the Organisation with regard to attendance, academic progress, standard of dress, health and safety, and behaviour.

I find that “*published rules and policies*” is a reference to the Rules and Regulations Booklet containing the rule as to 20 or more consecutive days missed.

[11] The problem for the school is that it is one thing to say “*You agree to attend and this is very important.*” And it is quite another to say “*If you don’t attend as you have agreed then we will be entitled to cancel your course and keep your fees.*” I accept the school made it clear to prospective students that attendance was important. But the information that the course would be cancelled and fees not refunded was buried in the Rules and Regulations Booklet that AV did not read and most students are not going to read. Cancellation and forfeit of fees is too important a part of the contract to be buried in this way and not brought to the forefront. I do not accept that by signing the enrolment form Ms AV agreed the course could be cancelled and her fees forfeit. The school cannot enforce this term, because in short it would be unfair to do so.

Did AV breach the contract with the school, and if so what should be the outcome?

[12] I do accept the school made attendance a term of the contract through the language on the enrolment form (I am not repeating those clauses here). I note that AV had not breached the requirement to attend “*no less than 80% [of the course] under any circumstances*”. I also note that there is no statement on that form as to the consequence should classes be missed.

[13] The usual expectation with courses is that if classes are missed then the student must accept that they may not be able to make up those classes and may not qualify for the diploma or certificate which attaches to satisfactorily completing the course. That is reasonable and expected. It is not expected or reasonable that the consequence is that the student is precluded from the course and forfeits the course fees. The reasonable consequence therefore of AV’s breach in failing to attend all her classes is that she not graduate.

[14] I find that AV was entitled to sit the remainder of her classes and the school wrongfully cancelled its contract with her. I find that in truth the benefit she has received in having attended almost half the classes is only a small portion of what she would have gained had she been allowed to see out the remainder of the course. This is because she must now enrol in another complete course and pay an entire fee to get herself in a similar position she would otherwise have been. I would have been inclined to grant her close to, if not, the entirety of her fees. However, she has asked for only \$3,300, which I find to be

eminently reasonable as it relates closely to a pro-rata apportionment of the period of the course she missed as a result of the wrongful cancellation.

What about the “justice and merits” of the case?

[15] The Tribunal is required to have regard to the larger justice and merits of any claim. Part of the picture here is that AV missed 23 classes through no fault of the school. I accept this placed the school in a difficult position where it did not want to disadvantage other students in the class or place an unfair burden on the teacher, who would have to deal with a student who was behind the other students. AV wanted to be treated with compassion. AA went to some length to explain to me the importance of compassion and other values within the school and the occasions on which that has been extended in order to allow students to continue.

[16] I find that the law in this case is in alignment with the justice and merits. I struggle to see compassion having been exercised by the school toward AV. I might have been more convinced of the invidious position of the school had AA explored the possibility of AV continuing the course or at least have asked the teacher how that might have been accommodated. Actions, as they often do, speak louder than words. There were actions the school might have taken and it did not. The school has mistaken its legal rights and has wrongfully denied AV participation in the remainder of the course. I find it fair that the school refund her the portion of her fees she has asked for.