

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 152
5643254

BETWEEN ANDREW MICHAEL COLARIK
Applicant

A N D THE VICE CHANCELLOR OF
MASSEY UNIVERSITY
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Hamish Kynaston with Ella McLean, Counsel for
Respondent

Investigation Meeting: 9 March 2017 at Auckland

Date of Determination: 24 May 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Dr Colarik) alleges that the respondent (Massey University or the University) has breached the law in three particular respects relating to his employment as an academic in that it bargained unfairly with him for a fixed term engagement being a breach of s.66 of the Employment Relations Act 2000 (the Act), engaged in adverse conduct with him for a prohibited health and safety reason thus creating a personal grievance under s.103(1)(j) of the Act and also breached s.110A(1)(b) of the Act where Massey University refused to provide Dr Colarik with the same terms and conditions of employment as applied to other academics in similar positions.

[2] Massey University denies Dr Colarik's claims and maintains they have no legal basis. Massey University says that at all times it has acted lawfully and in good faith in its dealings with Dr Colarik.

[3] Dr Colarik's first claim is that his employment agreement, which is a fixed term engagement, has been imposed upon him by Massey University for a reason that is not genuine and that this amounts to unfair bargaining.

[4] Massey University says that the fixed term engagement is for a perfectly genuine reason so there can be no proper basis for any claim of unfair bargaining. Moreover, Massey University says that the circumstances in which the negotiation of Dr Colarik's fixed term contract took place do not conform with the legal definition of unfair bargaining contained in s.68(3) of the Act.

[5] Dr Colarik's second claim is for a personal grievance under s.103(1)(j), of the Act because it is said Massey University engaged in conduct that was adverse to Dr Colarik for a prohibited health and safety reason in terms of that section.

[6] This is a discrimination claim which, put shortly, prohibits an employer from discriminating against an employee because they are exercising health and safety powers or functions in terms of the Health and Safety at Work Act 2015 (the 2015 Act).

[7] Massey University says that Dr Colarik did not exercise any health and safety powers or functions during his employment and thus the central element of the allegation is missing.

[8] The final claim made by Dr Colarik is that he has been treated differently from other like employees and that that allegation constitutes adverse conduct for prohibited health and safety reasons pursuant to s.110A(1)(b) of the Act.

[9] Massey University denies treating Dr Colarik differently from other like employees and in any event denies adverse conduct for a prohibited health and safety reason.

The issues

[10] I will need to consider each of the grounds that Dr Colarik advances. In addition, I will need to review the way in which the claims were modified during the

course of the investigation meeting partly, I accept, as a consequence of the observations that I made at its commencement.

[11] Those observations were to the effect that the claims Dr Colarik made in reliance on the prohibited health and safety grounds were, I thought, the first such claims made under what were undoubtedly new provisions.

[12] At a later point in the investigation meeting, I opined that I thought it likely the reliance on the health and safety discrimination grounds was misconceived and that the better view was that Dr Colarik's claims, if any, were more properly discrimination grievances.

[13] Massey University helpfully and entirely properly conceded that I could conclude that the personal grievance claimed was of a different type from the one pleaded and that allowed the investigation meeting to proceed in a seamless fashion without undue resort to legal technicalities.

[14] That stance by Massey University was particularly appropriate because Dr Colarik had elected to represent himself and while there might well be argument about the legal basis of his claims, there could be no doubt about his strong personal sense of grievance.

[15] It was in the spirit of trying to address his sense of having been wronged that the University addressed the changing dynamic of Dr Colarik's claims as the investigation meeting progressed.

[16] It follows from the foregoing discussion that in addition to addressing the original claims that Dr Colarik made in his statement of problem, it will also be necessary for me to review the ground to which various of the claims had moved, in order to do justice between the parties.

[17] Moreover, some of the remedies that Dr Colarik sought from the Authority were simply not within the Authority's remit and accordingly where such requests are made, I have dealt with them in the context of the particular claim they relate to.

[18] To deal with the matter in an orderly fashion, I propose to examine the matter under three broad headings with appropriate subheadings as necessary.

[19] The three broad headings that I propose to adopt in this determination are respectively:

- (a) The fixed term engagement;
- (b) The alleged discrimination for health and safety reasons;
- (c) The reframed disadvantage personal grievance.

The fixed term engagement

History

[20] It is common ground that Dr Colarik was employed by Massey University for two successive fixed term agreements. The first of those agreements was offered on 13 January 2015 and contemplated employment from 19 January 2015 to 18 December 2015.

[21] Massey University's intention was to provide cover for a new paper called Cyber Security Environment which was being offered for the first time in calendar 2015.

[22] The University's original intention was that a permanent position at either lecturer or senior lecturer level would have been recruited by 18 December 2015, at which point the necessity for the fixed term position would disappear.

[23] It is apparent on the evidence that Massey University's circumstances changed during that fixed term. In particular, the University's ability to confirm the future of the course that Dr Colarik was teaching, and therefore his position as its teacher, fell away.

[24] This was principally because the then director of the Centre for Defence and Security Studies (the Centre) had resigned suddenly and that resignation put the timetable back.

[25] It appears that as soon as the uncertainty about the future became apparent, Massey University offered Dr Colarik a further fixed term engagement on 26 June 2015 (in effect about halfway through the first fixed term engagement) and this second fixed term was expressed to be for the period from 19 December 2015 to 22 December 2017.

[26] While the reasons for the two fixed term engagements were similar, I am not satisfied they were the same. The first fixed term was offered because the paper being taught by Dr Colarik was offered for the first time in 2015. On the evidence, it was the only specialist cyber security paper Massey University offered.

[27] Massey University had to assess the viability of that paper as well as the relationship between that paper and its teaching on the one hand, and whatever other teaching or research obligations a permanent incumbent in that role might have.

[28] As I observed during the investigation meeting, the Authority is familiar with the stance taken by tertiary institutions concerning the assessment of new courses of study and there is nothing particularly unique about this fact situation that makes it stand out. Put shortly, any tertiary institution, as I remarked during the investigation meeting, would want to proceed cautiously about a brand new subject area.

[29] I am satisfied that the departure of the Centre director suddenly in the middle of 2015 was the tipping point for the University to offer Dr Colarik a further fixed term engagement to commence from the conclusion of his first fixed term contract. In effect, the departure of the Centre director put the timetable back and removed from the process the key decision-maker.

[30] In reaching that last conclusion, I rely on the evidence of Distinguished Professor Paul Spoonley whose evidence was quite explicit that there was a difference in kind (rather than a difference in degree) between a permanent appointee to the role of director of the Centre on the one hand and an acting director role. Distinguished Professor Spoonley's evidence was to the effect that the acting director would simply maintain the status quo and would not make any fresh commitments on behalf of Massey University.

[31] The second fixed term engagement was necessary then because of the sudden departure of the Centre's director, which meant that progress towards the finalisation of decisions around courses and who taught them was brought to a sudden halt.

[32] To give the University the time it needed to complete the exercise that was left unfinished by the departure of the former director of the Centre, a second fixed term engagement was proposed to Dr Colarik with a view to giving the University sufficient time to complete the work it had postulated would be completed during the first term of engagement.

[33] In addition, in the second fixed term engagement, as well as assessing the utility of the course that Dr Colarik was hired to teach, the University was also seeking to develop the relationship between the possible continuation of the course that Dr Colarik was teaching and a Masterate programme which might include such a paper.

[34] As I write this determination, Dr Colarik and Massey University are still contracted together in the second fixed term engagement.

Was the first fixed term engagement genuine?

[35] The law on fixed term engagements is set out in s.66 of the Act and the test the Authority must apply is whether Massey University had “*genuine reasons based on reasonable grounds*” for the fixed term.

[36] As the submissions for Massey University make clear, first I must assess whether the employer has a genuine reason (a subjective test), and second I must look at whether the reasons are based on reasonable grounds or not and that of course is an objective test.

[37] It seems to me very clear that Massey University had a genuine reason for the first fixed term engagement. That reason was essentially that it had yet to determine its ongoing needs for the position and with the future of the paper to be taught as yet uncertain, it seems to me self-evident that there were genuine reasons for the fixed term engagement (the University’s position on the matter was sincere) and that those reasons for the fixed term engagement were themselves objectively reasonable for reasons I have already made clear.

[38] I think it is also fair to observe that Dr Colarik himself, in his evidence to the Authority, seems to have no objection to the first fixed term engagement; it was the fact that that first fixed term was barely halfway through when the University offered an unexpected continuation of a further fixed term, that created anxiety for him.

Was the second fixed term engagement genuine?

[39] I am also satisfied that the second fixed term engagement was genuine. As I have already indicated, the circumstances had now changed. The Centre director had left. There was an acting director in place. The requirements of the acting director

were different from the requirements of a permanent director. The acting director could not make binding commitments. The acting director simply maintained the status quo.

[40] The reasons for the second fixed term engagement were similar to the reasons for the first term but, as I have already noted, not the same. There were further obligations on the parties. The relationship between the proposed new course and a possible Masters programme is an additional impost. But I am satisfied that the main reason for the second fixed term engagement was the loss of the Centre's director and therefore the loss of the leadership role that that position encompassed, which was central to the need for the second fixed term engagement.

Was the second contract offered to test suitability?

[41] I need now to deal with Dr Colarik's claim that the second fixed term was exclusively for the purposes of assessing his suitability for permanent employment. I am absolutely satisfied that the evidence supports no such conclusion. Put shortly, the University still had no continuing need for the position that Dr Colarik occupied and until it had made the necessary assessments of the need for the position (and not of Dr Colarik's suitability for the position), there could be no permanent tenure offered.

[42] Dr Colarik's position is that the explanation for the second offer of fixed term engagement was not, as the University says, for reasons similar to the first offer. Dr Colarik says that he was offered a second term to assess his suitability for permanent employment.

[43] This claim seems to be at variance to Dr Colarik's contention (which I deal with next) that he was promised permanent employment.

[44] If permanent employment were offered, then it is difficult to see why there would be any enthusiasm for assessing suitability, especially if permanent employment were offered, or postulated, before assessing suitability. On Dr Colarik's evidence, he was promised tenure in a number of discussions including before he was hired for the first fixed term engagement but the reason for the second fixed term engagement, he says, is to assess his suitability for permanent employment.

[45] Put shortly, I have not found any evidence whatever that the University offered a second contract to Dr Colarik to assess his suitability for permanent employment.

[46] Dr Colarik says that the second fixed term offer was made by Professor Fraser shortly before Professor Fraser became acting director of the Centre.

[47] While I did not hear from Professor Fraser, the evidence that is before me enables me to make an assessment that Professor Fraser thought highly of Dr Colarik and on that basis, it is difficult to understand why he would have thought it necessary to check Dr Colarik's suitability.

[48] More importantly though, if the University was using the second fixed term engagement to assess Dr Colarik's suitability, that would mean that the evidence given for the University by Ms Morgans, the senior HR adviser who formally made the two offers to Dr Colarik on behalf of the University, gave misleading evidence to me. It would also mean that Distinguished Professor Paul Spoonley's evidence was, in parts, designed to deliberately mislead me.

[49] I simply do not believe that that evidence of the University is untrustworthy.

[50] I think Dr Colarik's view of the matter is mistaken and there is no sense in which the University offered him a second term to check his suitability.

Promises of permanent employment?

[51] As I have just intimated, Dr Colarik also alleges that he was promised permanent employment on a number of occasions including at his first interview with a Dr Ball. Then he says that Professor Azizian, the new permanent director of the Centre, subsequently promised him permanent employment.

[52] Both claims are resisted by Massey University and for the avoidance of doubt, I prefer the University's evidence on this point as well.

[53] I did not hear from Dr Ball in evidence but even reviewing Dr Colarik's own evidence, where he reports what he alleges Dr Ball said, it seems to me that Dr Ball is simply describing the usual process with an academic recruitment for a new course of study.

[54] What Dr Ball is supposed to have said is that, in those circumstances, the University initially recruits on a fixed term but the academic ends up getting permanent employment. Such an observation is not a promise of permanent employment. It is an indication about what may have happened commonly in the past and indeed it may be predictive of what might happen to Dr Colarik in the future.

[55] In respect of the observations made allegedly by Professor Azizian, he gave evidence at my investigation meeting and he flatly denied making the promise Dr Colarik relied upon.

[56] What Professor Azizian freely admits to is saying words to the effect that he was endeavouring to move academic staff on fixed term engagement to permanent roles as quickly as was possible consistent with the need to demonstrate the University's requirement to have the role permanently.

Obligation to disclose fixed terms?

[57] Dr Colarik says that if he had known at first engagement the high proportion of temporary staff to permanent staff, he would never have taken the initial engagement.

[58] This is one of the claims which "*developed*" during the course of the investigation meeting.

[59] Not only does Dr Colarik claim that the percentage of temporary to permanent staff is critical and ought to be disclosed, but he also contends that by virtue of the very small number of permanent staff at the Centre, relative to temporary staff, the permanent staff effectively have unwholesome influence, or to use the phrase he used in his oral evidence, "*a power dynamic which is unhealthy*".

[60] The first question is whether there is any such obligation. For that purpose, I conclude that Dr Colarik is a person intending to work and therefore is a person to whom the statutory good faith obligation ought to apply.

[61] However, that is not an end of the matter. Would an employer imbued with the obligation of good faith have to disclose, as a matter of routine, the percentage of temporary staff to permanent staff?

[62] I conclude the answer to that question is in the negative. This is because, at least in Dr Colarik's case, he has been an academic for many years and on his own evidence has worked extensively on temporary contracts. Moreover, he has worked on temporary contracts in a variety of different institutions, so it seems to me implausible for him to be surprised about the number of temporary contracts in academic institutions.

[63] That may overcome the general point but it may not deal with Dr Colarik's point about the high proportion of temporary to permanent staff in the Centre or indeed the point he makes about the unwholesome influence of a small number of permanent staff.

[64] But it seems to me unrealistic to expect a prospective employer, in the process of recruiting an experienced professional, to be required to predict what matters to that individual.

[65] To put it another way, the good faith obligation that applies is a bilateral obligation, not a unilateral one, and if Dr Colarik has a particular interest in the proportion of temporary to permanent staff (or indeed any other aspect of the workforce), then it seems to me it is incumbent upon him to ask.

[66] I am not persuaded that a good and fair employer ought to be required to guess what aspects of the structure of the employer's workforce might be sufficiently important to a prospective employee to constitute a basis for concluding an agreement, or not.

[67] Given Dr Colarik has been employed in academic institutions on fixed term engagements since 1995 and is by my observation a bright, articulate and able individual, it seems to me the onus is on him to make inquiry of a prospective employer if there are some aspects of the structure of the workforce which are of particular interest to him.

[68] The contention that he would not have taken the role if he had known of the high proportion of staff who were on fixed term engagements seems at odds with his own career which, on his own evidence, has involved him working pretty well exclusively on fixed term engagements since 1995.

[69] Presumably, the fact that he worked more or less exclusively on fixed term agreements since 1995 would suggest that none of those fixed term agreements ever crystallised into a permanent role in the way he says that Dr Ball postulated when the latter interviewed him at the commencement of his relationship with Massey University.

[70] As much as anyone then, I would expect Dr Colarik to be very familiar with the way that fixed term engagements work and even their *raison d'être* in the academic environment. But more than that, it is difficult to see any detriment to Dr Colarik having accepted two successive fixed term engagements with Massey University. It is not as if he is not being paid or indeed is locked into an arrangement which precludes him from seeking alternative roles in other institutions. Nor is he precluded from a possible future with Massey University by way of a permanent role at the Centre.

[71] My conclusions then are that Dr Colarik and Massey University have good faith obligations to each other but that it is not part of Massey University's obligation to volunteer to Dr Colarik items of information such as the percentage of temporary staff to permanent staff, which the University thinks Dr Colarik might be interested in.

[72] To the contrary, if Dr Colarik has concerns about particular aspects of the structure of the workforce, then I am satisfied the onus is on him to ask about it.

[73] Further and finally, having accepted not one but two temporary engagements with Massey University, it is difficult to see any disadvantage being sustained by Dr Colarik; he is being paid, he can resign at any time and take an alternative role of any description elsewhere, and notwithstanding his anxiety about tenure in his current position, he still has the possibility of aspiring to a tenured position with his present employer.

Remedies for this part

[74] Because I have concluded there is nothing improper in either of the fixed term engagements between Massey University and Dr Colarik, there can be no question of any entitlement to remedies.

[75] However, for the avoidance of doubt, I should make clear that some of the remedies that Dr Colarik seeks are simply not available to the Authority as a matter of law.

[76] In particular, I do not have the ability to conduct a full investigation of the use of fixed term agreements within Massey University; my obligation is certainly to investigate but only to the extent necessary to establish the extent of an employment relationship problem. I do not have the power to conduct an investigation of the use of fixed term agreements across Massey University.

[77] Nor do I have any power to provide compensation because Dr Colarik was employed on a fixed term engagement.

[78] But the most important point to rest on here is that I have not found anything improper in Massey University's reliance on the two fixed term engagements it has entered into with Dr Colarik, and as a consequence, there can be no question of remedies of any kind pursuant to this part of Dr Colarik's claim.

Discrimination for health and safety reasons

Ground for personal grievance

[79] Dr Colarik claims that he has suffered a personal grievance by reason of a breach by the University of s.103(1)(j) of the Act.

[80] I am satisfied that this claim is misconceived as I explained at the investigation meeting.

[81] For present purposes, it is enough to say that subparagraph (j) was inserted into the section by the effect of the Employment Relations Amendment Act 2015. The subsection implements a new class of personal grievance relating to health and safety. The new health and safety personal grievance has its genesis in the 2015 Act.

[82] What subsection (j) does is create a personal grievance where the employer undertakes conduct adverse to the employee for "*a prohibited health and safety reason*", or contravenes s.92 of the 2015 Act.

[83] Those provisions in subsection (j) are disjunctive so either could ground a claim of personal grievance.

[84] As to the second of the provisions, contravention of s.92 of the 2015 Act contemplates action taken against an employee by an employer designed to coerce or induce the employee to do or not do something under the 2015 Act.

[85] There is nothing in the evidence before me in the instant matter which would lead me to conclude that Massey University has sought to influence Dr Colarik in any way, either to do or not do anything pursuant to the 2015 Act. Indeed there is no evidence at all about health and safety matters in the present case. Accordingly, I feel it is safe to conclude that Dr Colarik cannot have suffered a personal grievance by reason of the second limb of s.103(1)(j) of the Act.

[86] What of the first limb? The first limb requires conduct adverse to the employee being engaged in by the employer for a "*prohibited health and safety reason*". That phrase is defined in the 2015 Act as conduct against an employee because that employee is a health and safety representative or has taken any action or role under the 2015 Act.

[87] Again, I observe that there is no evidence at all relating to health and safety in the workplace in the present case and accordingly it is not difficult for me to conclude that Massey University did not undertake conduct adverse to Dr Colarik for a prohibited health and safety reason.

[88] In relation then to the first limb of subsection (j), I conclude that there is no evidence of personal grievance for the reasons just described and again that, as with the second limb of this subsection, Dr Colarik's claim in this regard is misconceived.

Alleged breach of s.110A of the Act

[89] This new section was, like the new personal grievance provision I have just referred to, inserted in the Act by the effect of the Employment Relations Amendment Act 2015.

[90] It is designed to circumscribe conduct by an employer against an employee that discriminates against an employee because of their role in respect of health and safety in the workplace or some like engagement relating to the 2015 Act.

[91] Dr Colarik calls this provision in aid both in regard to his complaints about the way that the employer handled his performance and development plan on the one

hand and his allegations of disparate treatment of himself in terms of salary, on the other.

[92] Neither of those complaints have anything whatever to do with the 2015 Act and I have no hesitation in concluding that Dr Colarik is in error in relying on those provisions.

[93] However, I told Dr Colarik at the investigation meeting that it seemed to me the proper basis for those two areas of complaint was a disadvantage grievance and it is on that basis that I deal with the remaining aspects of Dr Colarik's claim.

The reframed disadvantage grievance

The performance and development plan (PDP)

[94] Dr Colarik says that he was told to rewrite his PDP so as to take out material relating to his own accomplishments.

[95] There is dispute on the evidence, about whether Professor Azizian instructed Dr Colarik to remove the historical accomplishments in its entirety or simply reduce the total amount of the document that was devoted to those historical accomplishments.

[96] I do not think anything turns on that dispute. What I am clear about from the evidence for the University is that Professor Azizian sought to have what the University called a "*forward looking*" approach such that the PDPs generated by the academic staff would inform the Centre's plan for the ensuing academic year.

[97] While there is dispute about how much of Dr Colarik's historical accomplishments were to be deleted, it is, I am satisfied, evident that what the University sought was to "*get the balance right*".

[98] As a matter of fact, despite protesting Professor Azizian's request that he amend his PDP, and using this issue as one of the bases of his claim against Massey University, actually the PDP was never amended. Time conspired against Professor Azizian and in the result he simply had Dr Colarik sign the unamended original and submit it. Dr Colarik attended to that directly and the document became part of the record without amendment or alteration.

[99] If this matter were to be grounds for a personal grievance on the basis that Dr Colarik had suffered a disadvantage because of the unjustified actions of Massey University, Dr Colarik would need to identify and prove both that the University had taken action against him which was unjustified, and that he had suffered a disadvantage.

[100] Having already rejected the basis on which Dr Colarik has argued his case (see the previous section of this determination), I must now consider whether the conduct complained of amounts to a personal grievance for unjustified disadvantage. I conclude that it does not. I am not persuaded that Professor Azizian's actions in suggesting an amendment to Dr Colarik's PDP constituted an unjustifiable action; indeed I should have thought it perfectly proper for a superior to suggest to a subordinate that a document be changed to better reflect the employer's requirements. So my considered view is that there is no action by Massey University which could be construed as unjustified.

[101] But even if I am wrong about that, it is also apparent that there was no disadvantage to Dr Colarik because in the end, while he maintains that he was required to make amendments which he thought inappropriate, as a matter of fact no such amendments were ever made and the document was signed and submitted in its original form. So it follows that there was no disadvantage either.

[102] If this particular aspect of Dr Colarik's claim is analysed as a possible personal grievance for unjustified disadvantage, I find neither the unjustifiable action nor the suffering of the disadvantage and therefore I am satisfied there is no personal grievance.

Remedies

[103] The question of remedies does not arise because I have found that there is no basis for complaint but for the avoidance of doubt, I comment on the remedies that Dr Colarik is seeking.

[104] First, Dr Colarik sought a change in Massey University's practices in relation to PDPs. I do not have the legal power to make such an order even if I were persuaded (and I am not) that Dr Colarik has suffered a personal grievance. I can make a recommendation about workplace practices but as I say, I can only do that in

circumstances where I was satisfied that those workplace practices were inappropriate and on the evidence I have heard, I have not been so persuaded.

[105] The second remedy that Dr Colarik sought had he been successful in this aspect is the requirement that he receive a letter of apology from Massey University. Again, I have no power to order that even if I were persuaded that Dr Colarik was entitled to such a letter.

[106] Finally, Dr Colarik seeks the imposition of “*sanctions*” against the University. I do have the power to impose penalties on an erring party but for reasons I have already explained, I have not been persuaded that there is any error in Massey University’s process in this matter.

The disparate treatment argument

[107] Were it not for a breach of Dr Colarik’s privacy when Professor Azizian inadvertently released a schedule of the salaries of staff at the Centre to staff, Dr Colarik might not have been aware of the different pay rates of the various staff in comparison to himself.

[108] But as a consequence of the inadvertent release of this document, Dr Colarik discovered that he was “*the lowest paid academic in the Department*” and that he was “*shamed*” by that.

[109] Moreover, the release of that document meant that Dr Colarik was effectively mentoring people who were earning more than he was and that the effect of the release was to “*shame me in front of my colleagues*”.

[110] I deal with the breach of privacy in the next section of this determination but for present purposes, I am interested in exploring whether Dr Colarik has a disparate treatment argument, that is whether he can claim that by virtue of the fact that he is paid less than other staff, he has been treated unfairly and has suffered a disadvantage personal grievance.

[111] I observe first that the determination of pay rates is a matter for the assessment of the market rates for particular roles and while it is always invidious for staff to compare their pay grade with those of colleagues who they perceive to be performing the same tasks, employer parties will often maintain that while there are similarities

between various roles, they are not in fact the same and that differences are appropriate in all the circumstances.

[112] That said, the evidence for the University in relation to Dr Colarik's role is that he was paid the market rate for his particular position but notwithstanding that, when concerns were raised about the level of his salary by Dr Colarik, the University applied an increase to that salary both on 16 January 2016 and again on 16 January 2017.

[113] A further increase beyond the second of those increases is still possible for Dr Colarik, as became evident during the course of my investigation meeting. But his entitlement to that further increase necessitated him accepting an updated individual employment agreement which he apparently refused to do.

[114] During the course of the investigation meeting when this matter became evident, I satisfied myself from the University's witnesses that it was still available to Dr Colarik to accept the new employment agreement and thus get the increase and I commended to Dr Colarik the notion that he give further earnest consideration to taking that step.

[115] On the basis of this analysis then, it does not seem to me that any of the elements of a disparate treatment argument apply. The rate for Dr Colarik's particular role was set by the application of what might loosely be referred to as market forces but once Dr Colarik found out the rates that other academics were being paid and protested, there were two discretionary reviews resulting in an increase in his salary in each case and there is the prospect of a further increase the terms of which I have just explained.

[116] On that basis then, there is no evidence of a disadvantage being suffered by Dr Colarik and it is difficult to see how Massey University's actions in relation to the salary are anything other than appropriate. Accordingly, I am not persuaded that Massey University's behaviour constituted unjustifiable action.

The privacy breach

[117] It is common ground that there was a privacy breach which impacted on Dr Colarik. On 6 July 2016, Professor Azizian emailed a report containing details of the salaries of all academic staff at the Centre to those staff. The email was a mistake

which Professor Azizian readily acknowledged, sincerely regretted and apologised for.

[118] It was not a systemic failure of university systems but simply a human error.

[119] It is clear to me from listening to Professor Azizian give his evidence to my investigation meeting that he genuinely regretted the episode and that he had done his best to limit the damage that the error might have caused.

[120] For his part, Dr Colarik complained to the Vice Chancellor within a month of the error being made and subsequently complained to the Privacy Commissioner. That Privacy Office complaint has subsequently been withdrawn by Dr Colarik. A Human Rights Act claim has been foreshadowed by Dr Colarik but certainly at the time of my investigation meeting, had not been proceeded with.

[121] I did not understand Dr Colarik to be claiming remedies for the breach of privacy in this Authority. I would observe that the Authority does not administer the Privacy Act.

[122] No doubt it could be argued that the inadvertent error in releasing the report with the salaries of academic staff at the Centre in it disadvantaged Dr Colarik and it is difficult not to conclude that the error in releasing the report was an unjustified action of the employer.

[123] That said, Massey University did everything it could to put matters right after the error was made. It immediately sought to recover the report, tried to limit its distribution and the evidence the Authority heard suggested that there was a reasonable basis for concluding that only two academic staff (one of which was Dr Colarik) saw the offending report.

[124] Professor Azizian, as I have already noted, apologised for his error and the University proposed that there be some mediation between Professor Azizian and Dr Colarik to try and mend the relationship, which proposal was not adopted by Dr Colarik.

[125] While I am not certain that Dr Colarik was seeking remedies for the privacy breach, I do think that the elements of the breach, properly construed, constitute the elements of a personal grievance for disadvantage. I have already made clear my

view that Dr Colarik suffered disadvantage and I think the University concedes that the release of the report was an error and if it is an error it is difficult not to regard it as constituting an unjustifiable action.

[126] The evidence that Dr Colarik gave me in his oral testimony was reasonably graphic about the effect that this matter had on him. He said that he was “*shamed*” by the release of the report disclosing academic salaries and he used that word on a number of occasions in talking about what had happened.

[127] I think I am entitled to conclude that there is strong evidence of non-economic loss which is compensatable under s.123(1)(c)(i) of the Employment Relations Act 2000.

[128] I conclude then that in this respect only, Dr Colarik has suffered a personal grievance and that he is entitled in principle to remedies.

[129] My next task is to consider whether, in terms of s.124 of the Act, Dr Colarik has contributed in any way to the circumstances giving rise to this personal grievance. I conclude that there is no evidence whatever that he has made any contribution to the circumstances of this personal grievance.

[130] It follows that I can proceed to consider remedies and I conclude that on the basis of the evidence before me, Dr Colarik is entitled to compensation in the sum of \$5,000.

Determination

[131] With the exception of the breach of Dr Colarik’s privacy by the inadvertent and erroneous release of a report containing all the academic salaries of the staff of the Centre, I have concluded that Dr Colarik’s various claims are not made out.

[132] However, in respect of the breach of Dr Colarik’s privacy, I am satisfied that he has suffered a personal grievance because he has suffered disadvantage by reason of the unjustified actions of Massey University and is therefore entitled to be compensated for that wrong and I direct that Massey University is to pay to Dr Colarik the sum of \$5,000 net as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[133] Costs are reserved but I observe that both parties have had a measure of success and while no doubt the University might, in the normal course, seek to have an award of costs in its favour, given this is a continuing employment relationship and there has been some goodwill shown on both sides, the parties might think it is in their respective interests to let costs lie where they fall.

[134] If that view is not supported, then Massey University can file and serve a memorandum on costs and Dr Colarik has 14 days following receipt of that memorandum to file and serve his own memorandum in response.

James Crichton
Chief of the Employment Relations Authority