

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 234/09
5136919

BETWEEN ZENA FADHEEL
 Applicant

AND WAITEMATA DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Robin Arthur

Representatives: Doug Cowan for Applicant
 Anthony Russell for Respondent

Investigation Meeting: 9 March 2009

Submissions received: 17 March 2009 from Applicant
 9 March and 24 March 2009 from Respondent

Determination: 16 July 2009

DETERMINATION OF THE AUTHORITY

[1] Zena Fadheel began working as medical laboratory technician for Waitemata District Health Board in November 2004.

[2] In September 2008 she lodged a personal grievance application in the Authority over whether Board managers had carried out a full and fair inquiry into complaints she made about non-promotion, harassment, criticism of her work and discrimination.

[3] The issues for the Authority's investigation are whether the Board acted as a fair and reasonable employer would in investigating those complaints, and, if not, whether any orders and compensation should be provided as remedies.

[4] For the investigation I considered background documents provided by the parties along with written witness statements and sworn oral evidence from Ms Fadheel, Board human resources manager Hilary Moir, Board service manager Shona Trubshaw, Board human resources advisor Mary Buckley, and Board laboratory team leader Gerry Heta.

The complaints

[5] Ms Fadheel's initial complaint (27 April 2008) was over what she called "career progression". Her complaints included allegations that:

- (i) she had not been fairly considered for positions as a team leader and as a scientist; and
- (ii) performance reviews by her manager and team leaders were unfair.

[6] She also met with a board officer who dealt with bullying and harassment issues (13 May 2008) and complained about her supervisors. Ms Fadheel said she was wrongly accused of mistakes and work duties were unfairly distributed.

[7] On 28 May 2008 Ms Moir, the Board's human resources manager for Clinical Support Services, advised Ms Fadheel that a preliminary investigation of her complaints would be conducted by Ms Trubshaw, a service manager in a different section of the service.

[8] Ms Fadheel also wrote what she called a "*formal complaint*" (19 June 2008) that included allegations of:

- (i) unfair performance reviews and "*abusive aggressive behaviour*" by her supervisors; and
- (ii) discrimination on the grounds of ethnicity and age by her team leader resulting in her not being appointed to a scientist's position; and
- (iii) being accused of mistakes she had not made and being more severely dealt with over mistakes than others; and
- (iv) being "*excluded in different situations in the lab*".

The employer's inquiry

[9] Ms Moir assigned Ms Trubshaw to conduct the preliminary investigation because Ms Moir had previously dealt with other work matters involving Ms Fadheel and thought a "*third party*" should investigate "*to ensure there was no bias*".

[10] Ms Trubshaw had, two months earlier, attended a one-day course about investigating complaints in the workplace.

[11] After reviewing the documentation setting out Ms Fadheel's complaints, including her letter of 19 June, Ms Trubshaw met Ms Fadheel on 2 July and conducted an interview that ran for about two hours. Ms Trubshaw's file note of the meeting ran over two-and-a-half typed pages. Given an opportunity to comment on this file note summarising her complaints and information supporting them, Ms Fadheel's amended version ran to four typed pages.

[12] Ms Fadheel identified eight staff members who she suggested be interviewed as they had been "*witness to the different treatment*" of her by her managers.

[13] Ms Trubshaw sought advice from an experienced external investigator about whether she should interview all eight staff. She was advised to check with Ms Fadheel what evidence each supposed witness might have that was relevant to her complaints. Relevant evidence was referred to as whether they had experienced the same behaviour, seen or heard similar behaviour to someone else, or were someone Ms Fadheel had talked to about the behaviour that was the subject of her complaints. Ms Trubshaw was advised to interview a sample of such witnesses if they were "*all going to give the same evidence*".

[14] Ms Trubshaw then asked Ms Fadheel, by email, to confirm whether each of the eight named staff "*were present and witnessed the behaviour and actions*" about which she complained.

[15] Ms Fadheel's reply identified specific incidents or discussions that could be checked with six staff members and suggested that two others could be asked about what she called the "*general unfairness situation in the lab*".

[16] Ms Trubshaw got telephone extension details for each of the named staff from the laboratory manager. The manager warned that each of them might be “*difficult to track down*” as they “*work strange shifts*”. He offered to help “*round them up*” if Ms Trubshaw had difficulties contacting them.

[17] Ms Trubshaw did have difficulties and decided to make her inquiries by an individual email to each named staff member. The email said she was investigating a complaint by Ms Fadheel about “*unfair treatment by various team leaders in the laboratory*” and Ms Fadheel had said that staff member had “*witnessed this behaviour in the workplace*”. Each was asked whether they could “*confirm if this is correct*”.

[18] Five staff members responded to that email in the next fortnight – four by email and one by telephone. Of the five none reported witnessing unfair treatment of Ms Fadheel by the team leaders but one reported seeing Ms Fadheel upset and one described a team leader as being “*rough*” on another staff member.

[19] Shortly after this email had been sent to the eight staff Ms Fadheel complained that they were not being asked about the specific incidents she had identified. Ms Trubshaw replied that her query was “*an initial contact before [Ms Moir] takes over the full investigation*”.

[20] By 1 September Ms Trubshaw completed the preliminary inquiry with a written summary and this conclusion:

Given the initial evidence provided by witnesses, five of whom could not corroborate [Ms Fadheel's] account of being treated unfairly, at this point there is no substantive or factual evidence from witnesses to say that Zena has been treated differently from other staff. It would seem unlikely that a formal investigation would reveal anything more as it will become one person's word against another's. If the Waitemata District Health Board Laboratory Manager in consultation with the HR Manager decide further action is required then that is their decision.

[21] Ms Moir then sent Ms Fadheel a copy of this investigation summary along with a letter stating the outcome of the Board's preliminary investigation as being that there was “*no substance*” to her allegations.

Determination

[22] The Board submits it acted as a fair and reasonable employer in investigating Ms Fadheel's complaint. It seeks findings that its investigation was adequate and no remedies are required. It submits Ms Fadheel was given adequate opportunity to be heard and any issue of bias or predetermination was dealt with by having an investigator from a different section assigned to conduct the preliminary investigation.

[23] I find Ms Fadheel was given a fair opportunity to make and explain her complaints. However I also find that how those complaints were subsequently investigated was inadequate. Her complaints were not dealt with in the thorough and independent way that a fair and reasonable employer, operating with the policies and resources of the Board, would have done in all the circumstances. I reach this conclusion for the following reasons.

Not an independent inquiry

[24] Ms Moir, as the responsible human resources manager, clearly understood the need for an investigation to be seen to be independent and without any predetermination that Ms Fadheel's complaints were without substance, exaggerated or advanced for ulterior motives. While the assignment of Ms Trubshaw appeared to achieve this need, what then happened did not meet that standard.

[25] Email correspondence confirms that throughout her investigation Ms Trubshaw repeatedly sought and received guidance from Ms Moir on what proved to be a more difficult task than Ms Trubshaw had expected. There was no real detachment or independence.

[26] For example, Ms Moir:

- (i) gave advice on whether the staff members Ms Fadheel wanted interviewed should be spoken to and instructed Ms Trubshaw not to conduct "formal" interviews; and
- (ii) reviewed a draft and made recommendations on the content of the investigation summary from Ms Trubshaw, which was later presented to Ms Fadheel as Ms Trubshaw's report (email 1 September).

Not a full inquiry

[27] While Ms Trubshaw followed some independent external advice on getting Ms Fadheel to be more specific about what information some identified staff members might provide, she did not then follow the reasonable next step of actually asking those staff members about those specific incidents. Her evidence was that Ms Moir directed her “*that no specifics should be put to the witnesses*”. Ms Trubshaw’s general email query about whether those staff members had seen “*unfair treatment*” and then relying on non-specific responses did not, fairly, support her finding that there was nothing to corroborate Ms Fadheel’s complaints. Some of those staff members may have seen and recalled specific incidents or conversations that formed part of Ms Fadheel’s overall contention without themselves perceiving those specific events as being ‘unfair treatment’.

[28] Ms Trubshaw made only cursory efforts to speak to those staff before sending her general inquiry by email. She did not leave telephone messages for them and did not take up their manager’s offer to help her contact them if she had any difficulty.

[29] By the end of August three of the eight staff had not replied but Ms Trubshaw may no real further effort to check why or whether they had relevant information.

[30] The email replies she did receive show in one case a real fear of retaliation for any negative comments and in another, some difficulty with clear expression in English. For an experienced investigator both responses would have signalled a need for a direct conversation to ensure the staff members understood the real nature of the inquiry and had responded fully without fear of recrimination.

[31] I accept Applicant counsel’s submission that Ms Trubshaw lacked the necessary experience to conduct the inquiry Ms Moir assigned to her. The complaints were complex and Ms Fadheel was a complicated person to deal with, as evident from her responses to questions during the Authority investigation meeting.

[32] However it was not Ms Trubshaw who was responsible for the decision to assign the inquiry to her – that rests with Ms Moir. Ms Trubshaw did her best to do what was asked of her and clearly signalled the difficulties to Ms Moir. By email of

24 July Ms Trubshaw wrote to Ms Moir: *“I fear this is becoming too much for me to manage with my current workload.”*

[33] Ms Moir – who describes herself as having *“co-ordinated”* the investigation – was content to allow the cursory approach taken to continue and then relied on it to, as she put it in her witness statement, ascertain *“that none of Ms Fadheel’s allegations were corroborated or supported”*.

[34] It was a conclusion that might well be true but could not fairly be reached, in this case, on the basis of the investigation, albeit ‘preliminary’, that was actually conducted. In the circumstances Ms Fadheel has been subject to an unjustified disadvantage because all Board employees can reasonably expect to have complaints of the kind made by Ms Fadheel fairly investigated.

Remedies

[35] For her personal grievance of unjustified disadvantage Ms Fadheel sought remedies of (a) an award of compensation for distress and (b) any appropriate recommendations on improving the Board’s investigation of complaints.

Compensation for distress and injury to feelings

[36] Ms Fadheel asserts that distress arising from her treatment by Board managers and supervisors caused her to have a bleeding nose and resulted in her being admitted to hospital with chest pains, high blood pressure and vomiting. While she has presented medical certificates confirming that she told doctors of feeling stressed at work and having been unwell, there is no independent evidence confirming the connection between her work and her illness or eliminating other potential causes.

[37] The Authority’s present inquiry has been about the adequacy of the Board’s investigation of Ms Fadheel’s complaints regarding her treatment at work. While conclusions have been reached about that, it is not within the scope of this determination to reach conclusions about whether or not Ms Fadheel was mistreated as she alleges. Consequently compensation can only address distress arising from the inadequacy of the investigation.

[38] I am satisfied, having seen and heard Ms Fadheel give evidence, that she suffered real distress and injury to feelings arising from the inadequacy of that investigation and the consequent sense of frustration. The sum of \$5000 is awarded as compensation for that distress under s 123(1)(c)(i) of the Employment Relations Act (the Act), subject to any reduction for contribution as discussed below.

Other orders or recommendations

[39] I understand from subsequent correspondence to the Authority from the parties that Ms Fadheel no longer works for the Board. In those circumstances it is not necessary to make any orders or recommendations on whether and how an investigation of her complaints could continue.

[40] Both the Board's and Ms Fadheel's closing submissions suggested specific recommendations about the conduct of future investigations might by an appropriate remedy under s123(ca) of the Act. I do not consider this necessary as the evidence suggested the Board's managers were aware of the relevant principles regarding pre-determination, had appropriate processes for conducting investigations, and were able to get appropriate advice when needed. The difficulty in the present case was the application of those principles by the responsible manager.

Contribution

[41] Section 124 of the Act requires the Authority to reduce remedies where blameworthy conduct of the employee contributed to the situation giving rise to her personal grievance. In the present case I consider a reduction of 40 per cent is required for the following three reasons:

(i) the evidence for some of Ms Fadheel's complaints was weak or exaggerated

[42] For example, Ms Fadheel complained on one hand about an earlier negative performance review causing her emotional upset and then complained when her team leader sensibly offered supportive advice about preparing for a future review in order to avoid such upset.

[43] She also alleged that managers told her to look for jobs elsewhere and exhibited a discriminatory attitude by suggesting her Iraqi qualifications and experience were not recognised. However I accept as more likely the managers' explanation that (a) comments about her Iraqi qualifications and experience were statements of fact about what is recognised by the relevant New Zealand registration body rather than a discriminatory statement and (b) they pointed out jobs with other employers only because of Ms Fadheel's frequently expressed concern about advancing her career in New Zealand.

[44] Her impression that she, more than others, was queried about mistakes wrongly assumes that such issues were not also addressed with other laboratory staff in performance reviews or in individual conversations to which she was not party. What is apparent from her performance review documents, and which I accept from Ms Heta's evidence, is that Ms Fadheel was resistant to correction in her laboratory practice and this was an issue about which her managers were entitled to be concerned.

[45] Neither was her cause advanced by use of melodramatic descriptions that continued in her evidence to the Authority. She alleged she was "*treated like a slave many times*" but an example to support this extreme allegation was that a team leader had asked why she was late for work. An example given of discrimination was that a team leader had congratulated another technician on graduating from her training programme but had not congratulated Ms Fadheel when she graduated. The supervisor's explanation was simply that he knew the other technician well and no snub was intended.

(ii) her conduct raised some doubt about the overall bona fides of her complaints

[46] At each stage of her complaints the resolution Ms Fadheel sought included a full-time appointment and a position as a scientist in a particular department. The flawed inquiry conducted by the Board probably resulted, at least partly, from some understandable doubt about the real motive for her complaints – and that was a situation, objectively assessed, to which Ms Fadheel contributed.

(iii) Ms Fadheel did not make reasonable use of the Board's EAP programme

[47] Ms Fadheel was encouraged to use the Board's EAP programme, including counselling, which could have assisted with the distress she experienced during and following the Board's preliminary investigation. However she did not make use of that counselling because she decided it would not be useful in advancing her demands. By that decision she also deprived herself of its potential benefit which, in turn, was conduct contributing to the extent of distress she experienced.

Summary of determination and orders

[48] The Board's preliminary investigation of Ms Fadheel's complaints was not fairly conducted and she was consequently unjustifiably disadvantaged.

[49] As a remedy for this personal grievance, after applying a reduction of 40 per cent for her contribution to the situation, the Board is to pay Ms Fadheel the sum of \$3000 as compensation for the distress and injury to her feelings arising from its faulty investigation.

Costs

[50] The parties are encouraged to resolve any issue of costs between themselves. If they are unable to do so, Ms Fadheel may lodge an application for costs within 28 days of the date of this determination. If such an application is lodged, the Board may lodge a reply within 14 days. No application will be considered outside this timetable without prior leave.

Robin Arthur
Member of the Employment Relations Authority