

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Peter John Dady (Applicant)
AND Cancer Society of New Zealand Inc (Respondent)
REPRESENTATIVES Sandra Moran and Peter Cranney for the Applicant
David Patten for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING 8 August 2005, Wellington
SUBMISSIONS 31 August, 15 and 16 September 2005
DATE OF DETERMINATION 17 November 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. Dr Peter Dady is employed as the Cancer Society's Medical Director. He has held the position for the past 15 years and reports to the Chief Executive, Mr Neil Chave. Part of his role is to act as the Society's spokesperson.
2. In the later part of 2004 there was a public debate in New Zealand on the proposed introduction of screening for colon/rectum cancer. This matter has been considered by the Cancer Society and it has various policies on cancer issues. The Society reconsidered its policy dated 12 June 1999 on screening for colon/rectum cancer without change.
3. In November 2004 Dr Dady was interviewed by Radio New Zealand's *Morning Report*. The interview was about screening for bowel cancer.
4. On 1 December 2004 Dr Simon Allan, the Chair of the National Health Promotion Committee (NHPC) wrote to Richard Gray, the Chairperson of the Cancer Society. The NHPC is an internal committee of the Society that has a leadership role in the Society's screening policy (ies). The committee reports to the Board. Dr Allan wrote in the following terms:

“RE: RADIO NEW ZEALAND “MORNING REPORT” – INTERVIEW RE COLO-RECTAL SCREENING, WEDNESDAY NOVEMBER 24TH

I write to express concern that our Medical Director, Dr Dady appearing in the introduction of this interview as the Medical Director of the Cancer Society, took a position as a strong advocate for colorectal screening. This is a departure from agreed/ “under review” Cancer Society policy and an embarrassment to the National Health Promotion Committee, which has been given a leadership role in the screening policy. It is my belief that the credibility of the Cancer Society, internal dynamic and policy is at stake. I would be grateful for the Board’s urgent response to this matter.

PS: I would ask that this letter be considered at the National Board meeting December 4th 2004.”

5. Mr Gray replied by email:

“Dear Simon,

It is intended that this will be addressed at the meeting.”

6. A Board meeting was scheduled for 4 December 2004. Dr Dady attended the meeting in his capacity as Medical Director and as the alternate member for the Wellington Division of the Cancer Society. Usually Dr David Lamb would attend for Wellington, but he was not available to do so.
7. At the meeting Dr Allan raised Dr Dady’s interview on *Morning Report*. Mr Gray says that he “*shut down*” the discussion as Dr Dady attempted to speak. He says he proposed a further meeting of the Board to discuss the matter later and that the Board members present agreed without dissent to this course of action, including Dr Dady.
8. On 6 December 2004 Dr Allan wrote to Mr Gray clarifying the position of his Committee. This letter read as follows:

Re: Radio New Zealand “Morning Report” Wednesday 24th November 2004

Following the Board meeting on 4 December 2004 I thought I should write to formalise my concern on behalf of the NHPC. I had previously emailed you prior to the meeting and you asked me to table the issue at the meeting, but the Board members did not have the opportunity to be pre-warned. (My Emphasis).

The radio interview certainly implied that the Cancer Society supports faecal aculte blood testing for colorectal cancer and seemed to pitch us against Dr Susan Parry, a co-interviewee, with whom the Cancer Society had worked closely to come to an existing policy decision.

A comment at the Board meeting was that this item was a “personal” issue that was being raised [ie between Dr Dady and myself] whereas I believe the key concern, and indeed my sole intent, is that there is here a manageable issue in the governance/management of Cancer Society policy.

The NHPC consists of a hard working group of volunteers and staff members who have spent considerable time and effort formulating policies which have been adopted by the Cancer Society. It is surely an expectation of these members that the Cancer Society pay credence to its policies and in particular in public forum.

We feel really encouraged by the progress made on the recommendations for screening review and guidelines but request attention to this issue of governance/management regarding promotion of policy. Otherwise we face fragmentation of relationships and credibility, both within the good offices of the Cancer Society and amongst national groups with whom we work.”

9. A further Board meeting took place by telephone conference on 4 December 2004. Dr Dady was not invited to this meeting. The Wellington Division was not represented at the meeting, although its member, Dr Lamb, was given an opportunity to attend. He objected to the meeting being held because he was concerned about the process.
10. During the telephone conference it was agreed that a subcommittee of the Board comprising Mr Gray and another Board member carry out an initial investigation into the concerns raised by Dr Allan and report back to the Board. This was endorsed without dissent.
11. Mr Gray and the other member prepared a confidential report and reported back to the Board on 21 December 2004 with recommendations that it appeared that Dr Dady, in his capacity as the Medical Director, had not accurately reflected in the Morning Report interview the Cancer Society’s policy on colorectal screening. Dr Dady says that later he saw the report left on the office photocopier that concerns him about privacy. The report recommended he be asked to explain the apparent discrepancies and that it was a serious matter. The report recommended that Dr Dady be advised of his right to obtain a legal representative. A draft letter was prepared and circulated for the Board’s agreement. It was sent to Dr Dady on 25 January 2005 requesting his explanation, that the matter was potentially a serious one, and that he had a right to legal representation.
12. In the meantime, Dr Dady became aware of the Board’s actions and he raised a personal grievance in a letter dated 9 December 2004. In essence, Dr Dady says:
 - That the Cancer Society (through Mr Gray) failed to discuss its concern with him and he says a pre-planned attack was launched on him in regard to the meeting on 4 December 2004;

- The subcommittee's confidential report was prepared and circulated without his input and it was a document containing misleading information that was both unwarranted and an attack on him.
 - That the confidential report involved the Board having made up its mind in regard to the matter and had initiated disciplinary proceedings.
13. On 28 January 2005 Mr Gray replied that the Society did not accept that Dr Dady had a grievance. The Society took a position that it was unable to comment further in the absence of any particulars. Dr Dady was referred to the confidential report and requested to provide an explanation. Mr Gray says that the Board agreed with the authors of the report and that Dr Dady appeared not to have appropriately or accurately presented the Society's position on the screening issue. Mr Gray raised the prospect with Dr Dady of disciplinary action and recommended that he should seek legal advice.
 14. From this point, the issue of the substance in the matter, whether or not there were discrepancies between what he said in the interview and the Society's policy, was effectively put on hold. The Board had certainly taken a position to agree with the authors of the confidential report by this time. The issue of the personal grievance became the key problem and was delegated to Mr Chave, (letter in reply produced).

The issues

15. Was the Board's decision not to give Dr Dady the 1 December complaint from Dr Allan, before the Board meeting on 4 December, an unjustified action to his disadvantage?
16. Was the failure to give Dr Dady an opportunity to participate in the Board's telephone conference on 8 December 2004 an unjustified action to his disadvantage?
17. Was the decision not to give Dr Dady an opportunity for input into the confidential report prepared by Mr Gray and another member, following the Board's telephone conference on 8 December 2004, an unjustified action to his disadvantage?
18. Was Dr Dady entitled to be put on notice immediately, and is an employer entitled to see if there is an issue, before pursuing such a matter? In this case, there is an overlapping problem involving the issue raised by Dr Allan being raised in the context of a governance matter, and the obligations placed on the Cancer Society in an employment setting, and how it deals with a complaint.

Determination of the Employment Relationship Problem

19. Dr Allan's complaint was a professional matter relating to a policy issue, ie a complaint being raised by one professional against another. Dr Dady was entitled to be in attendance at the Board meeting where Dr Allan's issue was raised. Mr Gray was entitled to deal with the complaint himself because it appeared to relate to a professional issue in regard to the Society's policy and the NHPC reported to the Board. Mr Gray decided not to communicate with Dr Dady about the issue beforehand and this decision is open to criticism and I will return to this later.
20. There is insufficient evidence to establish that Dr Dady was "*attacked*" at the Board meeting when Mr Gray shut the issue down. Who initiated raising the matter at the Board is not a crucial issue. It is also probable that some other members might have had the relevant documents. There was a clear intention by Mr Gray and Dr Allan to have the matter raised at the Board meeting on 4 December. Dr Dady was not put on notice and he was not informed of the complaint, and not given the emails and the transcript of the interview before the Board meeting. Given that Dr Dady was attending the meeting a fair and reasonable employer could be expected to disclose the issue and material in advance and at the very least seek some agreement on process.
21. The decision made by Mr Gray to allow and permit the matter to be raised at the Board's meeting is supported by his belief that the radio interview had "*provoked, embarrassed and directly challenged him as President*". However, the evidence does not establish that there was a "*secret briefing*" of Board members beforehand, as suggested by the applicant, and that Mr Gray allowed the alleged "*attack*" to take place as opposed to allowing the issue to be raised.
22. The evidence does not establish that the Board's meeting on 8 December was a "*secret*" Board meeting because Dr Dady knew the matter had been deferred at the previous meeting. Although Dr Dady was not invited. His early input might have assisted resolve the problem.
23. Mr Gray can be criticised for his action of allowing the matter to be raised at the Board meeting and not allowing Dr Dady an opportunity for some input and early agreement on the process to be followed when Dr Dady did not know anything about the matter. The situation was compounded when the Board later escalated the matter and considered it was serious enough to inform Dr Dady of his right to representation. In this regard the Board has

appeared to become involved in its own investigative and disciplinary process, which would normally be the preserve of the Chief Executive. As such the concerns Dr Dady had about the situation, including access to the confidential report produced, are understandable since he was not involved in any negotiated process.

24. However, the way the Board acts and governs itself is a matter for it to determine, and in this case, Dr Dady has not been disadvantaged in his employment because the matter was left for him to respond to and reply when the Board found that it had an issue with his *Morning Report* interview. In this regard the Board's action, whilst it can be criticised as unfair, fell short of disadvantaging Dr Dady in either his employment and his terms and conditions of employment on the issue. This is because Dr Dady's action of subsequently raising a personal grievance brought any investigation and enquiry to a halt and limited any damage. He also has the opportunity to reply.
25. I am satisfied that it is open to conclude that the Board's process was a preliminary action taken to determine if there was any merit in Dr Allan's complaint. This resulted in the confidential report written by Mr Gray and the other Board member. However, the Board's decision that Dr Dady had an issue to respond to could have better handled if he had been properly approached earlier and his agreement sought on a process to be followed. In this regard there is nothing to support Dr Dady being disadvantaged when he was ultimately given an opportunity to respond (letter 25 January) and provided with the necessary information. Indeed this is supported by Mr Chave on 28 January 2005 when he replied to the grievance raised by Dr Dady on 9 December 2004. As such Mr Gray's decision on handling the matter has caused some unfortunate consequences that Mr Gray and the Board is responsible for.
26. Any failure can be rectified and put right before it causes any damage (*Rankin v A-G* [2001] ERNZ 476 at page 478 paragraph 7 and page 527 at paragraph 132). Even if I am wrong on determining there was no disadvantage, the amount claimed in compensation by Dr Dady is nominal and reflects his concern more about the process followed. I believe his employment relationship problem can be resolved with the following solution.
27. Any failings of Mr Gray and the Board can be remedied by the consent given by Mr Gray to the recommendations suggested by the applicant. Mr Gray agreed that the recommendations; bar one in the statement of problem, were not unreasonable. I summarise the recommendations in the following way for the parties to consider:

- o Any complaint about an employee should be copied to the employee as soon as practicable.
- o A process be agreed to deal with a complaint made at Board level against an employee.
- o Such a process must include the principles of natural justice, such as, the employee being given adequate notice of the complaint and the employee being given the right to be heard.
- o If any investigation involves a report on an employee that employee should have the opportunity to comment on it; that might include the opportunity to comment before the report is circulated.

28. In determining costs it is usual for them to follow the event. However, both parties have incurred costs that should have been better spent on fixing the problem much earlier. It is my decision that costs should follow the event in Dr Dady's favour considering the outcome of the problem and the nature of the problem. The respondent is to pay to Dr Dady a contribution to his reasonable costs that I fix in the order of \$2,500 and \$35 disbursements and the \$70 filing fee. Mr Gray's concessions in regard to the recommendations suggested by the applicant, at the Authority's investigation meeting, could have been narrowed much earlier to avoid the costs of an investigation.

P R Stapp
Member of Employment Relations Authority