

EMBARGOED UNTIL THURSDAY 29 OCTOBER 2009

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 161/09
5136018

**Prohibition order on
publication of certain
evidence made
permanent-see
Paragraphs 9, 13, 22 and
31.**

BETWEEN CHERYL KENT
 Applicant

AND MASSEY UNIVERSITY
 Respondent

Member of Authority: P R Stapp

Representatives: David Burton for the Applicant
 Hamish Kynaston and Bridgette Shone for the
 Respondent

Investigation Meeting: 29 and 30 July 2009 at Palmerston North

Written Submissions by: 25 August 2009

Determination: 22 October 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Cheryl Kent has been employed at Massey University since October 1999 as its Physical Resources Manager

[2] Ms Kent reported to her manager Mr Joseph Hollander, who resigned from Massey University on 19 September 2008.

[3] Ms Kent's employment relationship problem has its genesis when she complained about a performance review plan (PRP) with Mr Hollander in 2006 and 2007. She says first that she signed the 2006 PRP under duress from Mr Hollander.

Second, in December 2007 she complained about how Mr Hollander treated her and that he bullied her.

[4] On 11 February 2008, Ms Kent and Mr Hollander met with Dr John Griffiths, Mr Hollander's manager after she and Mr Hollander were unable to resolve their issues regarding the PRP.

[5] Dr Griffiths was hopeful that what he considered was a PRP issue about the allocation of work projects would be resolved. He considered that the problem arising out of the PRP was more to do with a relationship issue between Ms Kent and Mr Hollander. Dr Griffiths was assisted by Miriam Wallace, a Massey University Human Resources adviser. She attended the meeting also. The meeting was recorded and a transcript subsequently provided.

[6] Dr Griffiths decided not to take Ms Kent's complaints any further, but left open any further reconsideration of the matters that she had raised. Subsequently, Ms Kent says she continued to have difficulties about her work allocation with Mr Hollander. Dr Griffiths supported Ms Kent's right to undertake certain work projects and he reinforced this with Mr Hollander (email produced). On 13 May 2008, Ms Kent raised a personal grievance because she considered her complaints had not been properly dealt with and resolved.

[7] One of the outcomes of the meeting held on 11 February 2008 was that it was agreed that Mr Hollander and Ms Kent would attend a private mediation facilitated by an independent mediator on 3 June 2008. At that mediation they agreed amongst a number of things that the University would investigate Ms Kent's historical bullying complaints when she lodged a formal complaint.

[8] On 23 June 2008, Ms Kent provided a written historical outline of her complaints about Mr Hollander that included bullying, intimidation and threatening behaviour: the allegations involved Ms Kent's personal experience about Mr Hollander's conduct and she referred to problems involving other people and him.

[9] Dr Griffiths undertook to consider her complaint. However, there was one particular allegation that he considered was so serious that he channelled it to another senior person to investigate. I have decided not to publish the details of that matter. He decided that until that serious matter was disposed of he would defer the allegations about the bullying and harassment. In the meantime, Ms Wallace started

investigating Massey University's documents associated with the people that Ms Kent had referred to being bullied and harassed and any prior complaints involving Mr Hollander. Dr Griffiths requested Ms Kent to be patient while all this was happening, and he sent her emails to keep her apprised that the matter was still alive for him.

[10] On 28 August 2008, Ms Kent raised another personal grievance but this time through her lawyer. A mediation meeting with the Department of Labour was arranged for 22 September 2008, but before this occurred, Mr Hollander resigned on 19 September 2008. There was no settlement reached during the course of that mediation.

[11] Dr Griffiths and Ms Wallace say that because Mr Hollander left it appeared, and they believed, that Ms Kent's complaint would be disposed of, but they acknowledged to me that they never consulted Ms Kent about that view. Instead, Ms Kent says her complaint has not involved any closure for her. There was no oral advice from the University and no report made in regard to any investigation on the complaints. The complaints policy is silent about any report.

[12] The parties attended mediation. The matter has been left to the Authority to make a determination.

Information prohibited from publication

[13] I have decided to continue the interim prohibition on the publication of evidence surrounding Mr Hollander's departure from the University. My reasons are that the evidence was not required to be used by me in determining the matter and did not have direct relevance in resolving the employment relationship problem in the end. I am satisfied that the prejudicial affect of the evidence outweighs any public interest disclosing the information: clause 10 (1) of Schedule 2 of the Act, *Anderson v Employment Tribunal* [1992] 1ERNZ 500 applied. Therefore I prohibit the publication of the evidence surrounding Mr Hollander's departure from the University, including the reference to it in the complaint dated 23 June 2008, statement of problem, statement in reply and the parties' written statements and submissions. The details are not referred to in this determination.

Ms Kent's claims

[14] Ms Kent claimed that Massey University has breached:

- The 3 June 2008 mediation settlement; and
- Her employment agreement.

[15] In this regard various claims have been made that Ms Kent had been unjustifiably disadvantaged because:

- She has been subjected to bullying and harassment.
- She has been subjected to an unsafe and unhealthy workplace.
- The University failed to take her complaints of bullying and harassment seriously and failed to resolve the complaints speedily.
- The University breached its duties to provide a safe and healthy workplace and to act in good faith, including not misleading or deceiving Ms Kent and where it was required to be active and constructive in maintaining a relationship built on being responsive and communicative.

Massey University's position

[16] Massey University has denied all Ms Kent's allegations and claims.

Issues

- What is the nature of Ms Kent's personal grievances raised on 13 May and 28 August 2008?
- Were Massey University's actions and omissions in handling Ms Kent's complaint fair and reasonable?
- How best is this employment relationship problem resolved?

Determination

[17] First I am satisfied that Dr Griffiths did respond to Ms Kent's allegations of December 2007. He was active and constructive. Her concerns were expressed in general and comparatively moderate terms at that time, as they were connected with her annual PRP process. Dr Griffiths set up a meeting, facilitated that meeting and considered the matters Ms Kent had made; including proposals she had requested to resolve her issues with Mr Hollander. Dr Griffiths replied by letter dated 17 February 2008. He was not obliged to agree to the proposals Ms Kent requested, and I accept it was open to him to reject them because they did not have sufficient substance to warrant further investigation at that time. Therefore Dr Griffiths' action was not unjustified in relation to the first personal grievance raised on 13 May 2008 in which Ms Kent considered her complaints had not been properly dealt with and resolved. In the meantime the parties had agreed to go to a private mediation where an agreement was reached.

[18] Second, I find that Massey University and Ms Kent reached a settlement in private independent mediation on 3 June. That settlement included:

- Dr Griffiths would facilitate the relationship between Mr Hollander and Ms Kent.
- At the end of 3 months there would be further mediation if it was required.
- Certain work protocols would be established.
- Ms Kent would provide details of her allegations to enable Dr Griffiths to conduct an investigation.

[19] In this respect the University was responsive and communicative. It engaged actively and constructively.

[20] I further hold that Massey University did not breach the terms of that mediation settlement because:

- There were meetings on 18 June and 1 July. Some work protocols and Ms Kent's work programme were agreed.
- The University decided to prioritise the complaints.

- It commenced an investigation into one part of Ms Kent's complaints. It kept her informed of developments and she did not complain/respond.
- The University agreed to resume mediation before Mr Hollander decided to resign.
- Mr Hollander resigned and the University based its decision on that information and action.

[21] Ms Kent properly followed up her complaints in writing with details and specifics on 23 June in regard to the PRP and 11 February meeting and in terms of the mediation agreement. Also, having regard to the PRP procedures, Mr Hollander's and Ms Kent's roles, Dr Griffith's meetings and communications, the University can hardly be accused of subjecting Ms Kent to work in an unsafe and unhealthy workplace, I hold.

[22] Third, I find that Ms Kent was entitled to make a complaint and cannot be criticised for that. Indeed she had genuine concerns about her complaint and she raised some serious issues when she provided the detail that required investigation. She raised one very serious complaint that Dr Griffiths considered was serious enough to pass on to someone else to investigate. I will call this the first complaint. I have decided not to publish the details of that complaint. In the meantime the other matters relating to bullying and harassment were put in limbo, but Ms Wallace set about to find any documentation about Mr Hollander and the other people that Ms Kent referred to having issues with him. Ms Kent was led to believe by Dr Griffiths that he would reply to her allegations. Later he kept her informed in writing of what was happening. She did not complain or make any other suggestions. He was being communicative and responsive, I hold. Dr Griffiths did take Ms Kent's complaints seriously, I hold. Thus the University has been able to explain the time involved in dealing with the matters, and I do not accept it can be criticised for failing to resolve the complaints speedily. I also conclude that the University did not mislead and did not deceive Ms Kent because it communicated accurately with her and kept her informed.

[23] Although there is evidence of Dr Griffiths keeping Ms Kent informed of developments she was entitled to expect a response from the University on what was

going to happen to the bullying and harassment complaints after Mr Hollander decided to resign. The University concluded that since Mr Hollander had left it could not investigate the issues any further. It made this assumption without involving Ms Kent. The University failed to properly consult and engage Ms Kent to bring closure to her complaint. Despite the above Ms Kent has not established any disadvantage because by that time Mr Hollander, the alleged perpetrator, had left the University. They no longer had to work together. Other working arrangements were by then in place. Arguably Dr Griffiths and Ms Wallace could have done more to engage Mr Hollander to continue an involvement in the investigation, but they could not compel him to do so. I hold that clearly Ms Kent's enjoyment and emotional well being in her employment were affected by her feelings associated with her complaint and that for her there had been no closure. A fair and reasonable employer would have consulted Ms Kent and kept her informed instead of assuming that the complaint came to an end because Mr Hollander had left. For reasons that will follow this was not fatal, I hold.

[24] Fourthly I find that the University did not breach its harassment and bullying policy because it set about through Dr Griffiths to follow up and investigate the complaint. The policy permitted Dr Griffiths to act as the investigator, although it is the practice elsewhere to use external investigators. The process was not challenged by Ms Kent or her union and her lawyer, Mr Burton, at the time. The policy omits to provide any procedure to explain the conclusion of an investigation and what can be expected in the delivery of any findings and conclusions. It must be implied that there would be some feedback. Best practice would involve a fair and reasonable employer providing feedback. It was obliged to provide feedback on the assumption it made about the complaint coming to an end because Mr Hollander had left.

[25] When the University decided to bring closure to its investigation because Mr Hollander left, Ms Kent's rights were protected under its harassment and bullying policy to raise a personal grievance.

[26] Ms Kent did raise two personal grievances: the first had been raised through the union and the second by Mr Burton. However, both grievances sought mediation rather than to make any specific claim for other remedies to resolve the employment relationship problem, such as the remedies claimed in the statement of problem: compensation, penalties and a recommendation. Also, whilst Ms Kent had a number

of issues about Mr Hollander's conduct and behaviour these have been superseded by her complaints about the process followed by the University. Thus, I find that it is not necessary to make any findings on the complaints on bullying and harassment, although for completeness I will make an observation on this in more detail later. Also, there is no need for me to reach conclusions on Ms Kent's specific allegation of collusion between two staff members, the allegations about destroying a file, allegations about Mr Hollander's demands of Ms Kent following her 2001 car accident and the 2004 complaint about a conversation she says she had with another staff member. I note that the University has not consented to any of the claims that have been raised by Ms Kent that it considers are outside the ninety days required under the Employment Relations Act to raise a personal grievance. I have not needed to deal with this because I have considered all the claims as background in the matter since there were so many claims covering a considerable period and many of which were not raised before 23 June and were not included as causes of action relating to the raising of the personal grievance claims.

[27] In conclusion the only outstanding matters are the University's failure to consult Ms Kent to bring closure to her complaint and the assumption that was made that it could not investigate the matter further because Mr Hollander had left.

[28] First I hold that Ms Kent does not have a personal grievance. This is because it would be open to a fair and reasonable employer to make a conclusion that it could not investigate the matter further. However, the University made an assumption about this, which a fair and reasonable employer would not have done without keeping Ms Kent informed. Whilst the University's failure to consult and keep Ms Kent informed, and to discuss the matter further with her, before making a reasoned and considered decision on discontinuing the investigation, would not have been the action of a fair and reasonable employer and a breach of good faith, Ms Kent was not disadvantaged in her employment. This is because the alleged perpetrator had left and that the personal grievances were raised with the aim of getting a resolution for Ms Kent having to work alongside Mr Hollander. She was cleared to return to work and new work arrangements had been put in place which she agreed to.

[29] There are a number of further considerations relevant to Ms Kent's claims that the impact of the situation on her has disadvantaged her in her employment and her terms and conditions of employment. These are: (1) the University's investigation

was not completed and there were no findings on the allegations made because Mr Hollander left the University. (2) Ms Kent did take sick leave, which on the face of it suggests that there was some impact of a medical nature on her, but there has been no evidence to make a linkage between her illness and the alleged actions of Mr Hollander. (3) The University responded appropriately to try and ascertain the impact of the situation on her and requested an independent assessment when it received the medical certificate that she had to take time off work, but this was not required due to the intervention of Ms Kent's lawyer. (4) There were no independent findings on the cause of Ms Kent's sickness and it is possible her sickness was due to other matters in her life. (5) Ms Kent was cleared to return to work. (6) All the claims relating to lost benefits and loss of career development have been withdrawn by Ms Kent and her representative. This was properly so because there was sufficient evidence available to the University to defend the claims that involved Ms Kent's salary reviews, travel and attendance at conferences. On balance there has been no disadvantage, I hold.

[30] Second, I also hold that given the context of all these matters above the University has not acted wilfully or maliciously in not properly communicating its assumption on ending the investigation when Mr Hollander left. The University made an assumption on reasonable grounds that the complaint ended when Mr Hollander left and that Ms Kent would no longer have to work with him. Consequently the breach was not serious enough for a penalty.

[31] I also conclude from the above findings that there has been no breach of the mediation settlement dated 3 June and Ms Kent's employment agreement. Those claims are dismissed.

[32] Finally I would like to make an observation on the allegations of bullying and harassment. The complaints from Ms Kent are numerous and varied covering many years of her employment at the University while Mr Hollander was there. I agree that for the allegations of bullying and harassment to be determined would require an assessment of credibility. Ms Kent's evidence on which she relies to support her claims has to be off set with the position the University has put to the Authority. Ms Kent's recollection of the events may not be accurate. There were some inconsistencies in her evidence, and contemporaneous documents do not support her. Some of the claims were not witnessed by people close to Ms Kent despite the length of time in which the claims cover and the close working relationships that existed.

Ms Kent did not complain at the time of many of the complaints that she has now raised. There are no documents supporting many of the events during the period of time relating to Ms Kent's allegations. Ms Kent's recollection of different events changed. Ms Kent's evidence and that of her own witnesses could not be relied upon as sufficiently consistent and accurate enough to establish her claims. Despite Ms Kent's allegation that some of the witnesses have told lies, their evidence was consistent, credible and supported by the documents. That is not to say that Ms Kent's perception of Mr Hollander's manner and his way of dealing with her had an impact on her that she felt was bullying and harassment. They had issues on the allocation of work that Dr Griffiths had become involved in. There was also the issue of the first complaint raised by Ms Kent on 23 June and in her statement of problem I have decided not to publish, and she has relied on it in regard to Mr Hollander's credibility. That does bring into question his reliability since it was raised by Ms Kent. However, she worked with Mr Hollander for eight years and never raised the first complaint until the 23 June and referred to it in the statement of problem for credibility reasons alone. Her complaint on 23 June was immediately followed up. The first complaint involved an entirely separate issue, occurring in another context and I am satisfied it did not relate to Ms Kent's claims of bullying and harassment. Mr Hollander has denied bullying and harassing Ms Kent. In conclusion Ms Kent's reliance on her perception and feelings does not assist her in establishing as a matter of law and fact a personal grievance having regard to the above factors and the list of considerations in paragraph 29 above.

[33] Ms Kent's claims for personal grievance and claims for penalties are dismissed. There is no need for the Authority to make a recommendation.

[34] Costs are reserved.

P R Stapp
Member of the Authority