

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 117
5519228

BETWEEN

SIMON SPACEY
Applicant

AND

VICE CHANCELLOR
UNIVERSITY OF WAIKATO
Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in person
David France for Respondent

Investigation Meeting: 20 April 2015

Determination: 23 April 2015

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

- A. The application for non-publication orders is dismissed.**

- B. Dr Spacey has raised personal grievances within the statutory 90 day period in respect of:**
 - i. Cyberbullying;**
 - ii. Failure to provide advancement information; and**
 - iii. Whether the standard used to assess his performance was different to the standard applied to others.**

- C. The parties are directed to mediation.**

- C. Costs are reserved.**

Employment relationship problem

[1] This matter deals with two preliminary issues. The first is an application by Dr Simon Spacey for non-publication orders in respect of his identity. The Vice Chancellor of the University of Waikato (Waikato University) opposes the application arguing that Dr Spacey has identified no grounds upon which the Authority should interfere with the principle that justice should be dispensed in public.

[2] The second issue is whether Dr Spacey raised his alleged personal grievances for unjustified disadvantage within the statutory period of 90 days.

[3] During a case management call with the parties on 9 March 2015, to ensure the Authority was in receipt of full information regarding the raising of the personal grievance Dr Spacey was directed to ensure that his witness statement for this preliminary issue included information about:

- (a) The date on which each personal grievance arose;
- (b) The actions giving rise to the grievance; and
- (c) How and when the personal grievance was raised.

[4] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Dr Spacey and Waikato University but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[5] Dr Spacey commenced employment with Waikato University on 3 December 2012 as a Senior Lecturer in the Department of Computer Science, within the Faculty of Computing and Mathematical Sciences.

[6] By way of statement of problem lodged on 4 December 2014 Dr Simon Spacey claimed that he had been unjustifiably disadvantaged in his employment with the Waikato University as a result of cyberbullying. Cyberbullying is the act of

harassing someone by using the internet or other technology to hurt or embarrass somebody¹.

[7] The claim regarding cyberbullying was the only claim listed as a problem on the statement of problem. However, in the documents accompanying the statement of problem it became clear that Dr Spacy was raising further matters which he says disadvantaged him including actions that Waikato University:

- (a) Failed to provide information about advancement;
- (b) Re-interpreted intellectual property rules;
- (c) Switched teaching subjects;
- (d) Applied different rules to assess Applicants performance; and
- (e) Workload.

[8] To remedy his personal grievances Dr Spacy seeks remedies equating to more than \$1.8 million and various compliance orders.

[9] Waikato University says the claims are not within the jurisdiction of the Authority as they were not raised as personal grievances within the statutory 90 day period.

Issue

[10] The issues for preliminary determination are whether:

- (a) Non-publication orders should be made; and
- (b) Dr Spacey's claims for unjustified disadvantage were raised by him within the statutory period of 90 days.

Non-publication orders

[11] Dr Spacey claims he has been the victim of cyberbullying attacks through fake websites, posts on social media, vicious emails, and publications in the student paper.

¹ www.cyberbullying.org.nz/teachers "Cyberbullying information and advice for teachers and principals".

Dr Spacey claims these cyber-attacks were supported by staff at Waikato University and other Universities. Dr Spacey says Waikato University has failed to investigate his allegations and that the Cyberbullying has made his personal and professional life a misery.

[12] Dr Spacey does not want the name of the respondent included in the name suppression order. Dr Spacey says Waikato University should not be allowed to hide its identity as allowing it to be hidden could be seen as implicit support for the employer's actions and encourage future employers to take the same route with the knowledge that if an employee raises the case to the Authority, the employer's inaction in not investigating a bullying matter and any group involvement will be hidden.

[13] The Authority has broad discretion to make non-publication orders pursuant to clause 10(1) of schedule 2 to the Employment Relations Act 2000 (the Act) which provides:

12 Power to prohibit publication

- (1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[14] The Employment Court has recently addressed the tests and principles to be applied in applications for non-publication orders.² The Authority must determine such matters in a principled way and from a starting point of "open justice"³ unless the circumstances justify an exception to the fundamental principle.⁴ The threshold to be met before non-publication orders are made is high.⁵

[15] Non-publication orders depend on proof of real and substantial likelihood of undue harm.⁶ The Authority is required to act on evidence and not speculation.⁷ Apart from Dr Spacey's assertions made at the investigation meeting no independent evidence supporting his application has been provided.

² *H v A Limited* [2014] NZEmpC 92.

³ *Ibid* at [76].

⁴ *Ibid* at [78].

⁵ *B v Virgin Australia (NZ) Employment and Crewing Ltd* [2013] NZEmpC 105 [9].

⁶ *C v Air Nelson* [2010] NZEmpC 18 at [16].

⁷ *Supra* n 1 at [53].

[16] This is not a case where Waikato University has made allegations of inappropriate conduct against Dr Spacey which then resulted in an action against Dr Spacey.

[17] I find this case has nothing out of the ordinary which would warrant a departure from the principle of open justice. As noted by Judge Ford in *Timmins v Asurequality Ltd*⁸ persons who engage in litigation as:

... litigants or witnesses will necessarily be publicly identified. They might well prefer that that were not so. However, that is seen as a necessary consequence of the public administration of justice.

Discussion and determination

[18] The substantive matter to be determined by the Authority includes questions of whether Dr Spacey was disadvantaged during his employment as a result of Waikato University's actions.

[19] The respondent is a large University. The non-publication application is advanced on the basis that any publication could impact adversely on Dr Spacey.

[20] Dr Spacey has failed to identify any real risk that he will be adversely affected by publication of his name. A mere assertion of the impact of publication is not enough to displace the principle of open justice. What is required is actual proof of real and substantiated undue harm.

[21] I accept that damage to reputation is a relevant factor in determining whether the orders sought ought to be made. In litigation there is an inherent risk that reputations might be damaged, even in the event that matters raised are found to have substance. However, in *Y v D*⁹ the Chief Judge accepted that a risk of publicity would not amount to an exceptional circumstance.

[22] I am not satisfied the circumstances or the respective interests and concerns are such that the principle of open justice should be displaced. The application for non-publication orders is dismissed.

⁸ [2011] NZEmpC 167 at [17].

⁹ [2004] 1 ERNZ 1.

Does the Authority have jurisdiction to investigate Dr Spacey's disadvantage claims

[23] Whether a particular complaint made by an employee is a personal grievance depends solely on whether it falls within one of the definitions of that term in s 103 of the Act.

[24] The Authority will only have jurisdiction to investigate Dr Spacey's claims if he can demonstrate that a personal grievance has been raised within the statutory 90 day period. The question of whether a personal grievance is raised within 90 days and when this occurred are to be decided in accordance with s 114(2).¹⁰

Are Dr Spacey's complaints personal grievances?

[25] Section 103 defines a personal grievance as:

Any grievance that an employee may have against the employee's employer or former employer because of a claim –

- (a) That the employee has been unjustifiably dismissed; or
- (b) That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or
- ...

[26] At the investigation meeting Dr Spacey seemed to resile from his claim that his employment or one or more conditions of employment were affected to his disadvantage and that he was not raising a personal grievance. Instead he asked the Authority to find that he had an employment relationship problem which was not a personal grievance.

[27] For the following reasons I find the problems Dr Spacey is asking the Authority to resolve are claims that fall within the definition of personal grievance pursuant to section 103(1)(b) of the Act.

(a) The statement of problem lodged in the Authority on 4 December 2014 claims Dr Spacey was disadvantaged as a result of Waikato University's interpretation of its Intellectual Property Rights Policy;

(b) Dr Spacey refers to being treated unfairly in the advancement round;

¹⁰ *Gates v Air New Zealand Ltd* (2009) 7 NZELR 41 at [16].

- (c) Dr Spacey sought remedies only available in resolution to a personal grievance;
- (d) During the case management call with the parties on 19 March 2015 I confirmed with the parties representatives, which included Dr Spacey, that the substantive application included a claim for unjustified disadvantage; and
- (e) In answer to questions at the investigation meeting to deal with the preliminary matters Dr Spacey claimed he had raised a personal grievance on a number of occasions including through an email sent to his manager on 4 December 2014.

90 day issue

[28] The relevant provisions of the Act relating to the raising of a personal grievance are as follows:

114 Raising personal grievance

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[29] Section 114(2) makes it clear that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[30] What s114(2) requires is that there should be a sufficient specification of the employee's concerns as to enable the employer to be able to address that grievance. To do so, the employer must know what to do.¹¹

¹¹ Creedy v Commissioner of Police [2006] ERNZ 517 at [36].

Allegations of cyberbullying

[31] On 23 September 2013 Dr Spacey emailed Dr David Bainbridge, Acting Head of Department, raising concerns and requesting advice and assistance about postings on websites including the social media website Reddit and an abusive email Dr Spacey had received. Dr Spacey believed the postings had been made by students.

[32] On 4 November 2013 Professor Pfahringer advised Dr Spacey that no-one had actioned his complaint dated 23 September 2013 and apologised for the oversight. Professor Pfahringer had reviewed both pages and as appalling as he found them to be advised Dr Spacey to ignore them.

[33] Dissatisfied with Professor Pfahringer's response, on 10 November 2013 Dr Spacey emailed Professor Pfahringer and raised concerns that the conduct complained about and which, in his opinion, amounted to cyberbullying was a breach of Waikato University's harassment policy, amounted to defamation of character and was a breach of copyright.

[34] Dr Spacey advised Professor Pfahringer that he expected Waikato University to take civil proceedings against the perpetrators and to seek damages for defamation and breach of copyright and to take disciplinary action against the students for harassment.

[35] At the time Dr Spacey was communicating about these issues he did not know the identities of those making the online postings. Professor Geoff Holmes, the Dean of the Faculty advised Dr Spacey that he would need to identify those persons making the posts as either staff or students of the University and then to make a formal complaint.

[36] Dr Spacey discovered the identities of those he believed were the perpetrators of the posts and emails and notified Professor Holmes. Professor Holmes provided Dr Spacey with information on how to make a formal complaint, the student identification numbers of the students he had identified and a link to a form and information on who could help him complete the form so that he could make a formal complaint.

[37] As advised Dr Spacey submitted his formal complaint to the Student Discipline Committee on 26 November 2013. An acknowledgement of receipt was

provided to him and a confirmation that the matter would be investigated. That position changed and on 29 November 2013 Dr Spacey was advised that under the Student Discipline Regulations the complaint could not be actioned. Dr Spacey was referred to Waikato University's Harassment and Bullying policy which had a more appropriate process which could be followed.

[38] Dr Spacey sought and received advice from the Tertiary Education Union (the TEU). Dr Spacey is a member of the TEU. On 4 December 2013 with the assistance of Ms Megan Morris, an Organiser with the TEU, Dr Spacey wrote to Professor Holmes registering a formal dispute.

[39] In his email Dr Spacey alleges Waikato University has failed to support him in his workload concerns and that that lack of support culminated in him being subject to cyberbullying. Dr Spacey set out the impact on him of the online student attacks and says they were extremely hurtful, quite vicious and specifically directed at him as the provider of the course.

[40] Dr Spacey says it was personally distressing to have been the victim of such abuse. Dr Spacey outlines concerns he held about the lack of support from Waikato University in particular the discontent that the Student Discipline Committee would not proceed and that the harassment policy appears to exclude anonymous harassment in electronic form that could have been from only a few identified people.

[41] After receipt of Dr Spacey's 4 December 2013 email, Ms Carole Gunn, Head of the Human Resource Management Division, sought confirmation from Ms Morris about the nature of the employment relationship problem being raised by Dr Spacey. Ms Gunn asked Ms Morris to confirm whether she should treat Dr Spacey's message as a personal grievance or notification of an employment relationship problem, or some other form of concern.

[42] Ms Morris advised Ms Gunn that it should be treated as an employment relationship problem and suggested the issues should be able to be resolved. Dr Spacey says Ms Morris did not seek his instructions about this matter before she responded to Ms Gunn and had no authority to make such a decision on his behalf.

[43] On 11 February 2014 Ms Gunn, responded in full to Dr Spacey's 4 December 2013 letter. Ms Gunn in her written evidence says she did not consider Dr Spacey's letter to constitute the raising of a personal grievance.

[44] Having carefully reviewed all of the evidence I am satisfied the catalyst for Dr Spacey's unhappiness and his sense that he was unsupported by Waikato University in respect of his claims of cyberbullying was the email he received from Ms Claire Guthrie on 29 November 2013 advising Dr Spacey that no action would be taken against the students.

[45] I find it was implicit in Dr Spacey's description of his concerns as *Formal Dispute Registration for Unfair Treatment at Waikato University* that he wanted his employer to address the matters raised. It therefore satisfied the requirements of s 114(2).

[46] Having found that the catalyst for Dr Spacey's complaint on 4 December 2013 was the letter from the Student Discipline Committee dated 29 November 2013, the 4 December 2013 email was written and sent to his Managers within the statutory 90 day period.

[47] The Authority has jurisdiction to investigate Dr Spacey's claim that his employment or 1 or more conditions of his employment were affected to his disadvantage as a result of a lack of support from Waikato University for the cyberbullying attacks.

Fail to provide information about advancement;

[48] Dr Spacey is critical of Waikato University for failing to provide him with explicit guidance regarding the distinction between advancement and promotion. Dr Spacey claims that his lack of awareness of his right to apply for Advancement cost him \$1,400 per annum.

[49] Waikato University says the time at which the information about advancement and promotions was to have been provided to Dr Spacey was at the commencement of his employment in December 2012. Raising a personal grievance on 4 December 2013 puts his claim outside the 90 day period.

[50] Dr Spacey received a copy of the Collective Agreement at the time he was appointed in December 2012. That document sets out the rules and availability of advancement and promotion opportunities.

[51] On 9 August 2013 Dr Spacey participated in an annual Professional Goal Setting meeting with his Manager, Professor Pfahringer. During the course of that discussion and as noted in the resulting document, Dr Spacey was specifically asked about whether he intended to apply for promotion or advancement.

[52] Dr Spacey says that he did not know there was a difference between promotion and advancement. He says that when he answered the question he was answering the question with respect to promotion and did not consider that there might be a difference between the two.

[53] Dr Spacey says that he discovered there was a difference when he was advised about this from another new lecturer on 20 November 2013. On 21 November 2013 Dr Spacey emailed a number of people in the Faculty including Professor Pfahringer explaining that when he answered the question in the Goal Setting meeting he was not aware that there were two systems of achieving a pay increase. Dr Spacey asked for the matter to be addressed by backdating his application for Advancement for 2013.

[54] Waikato University refused to backdate the application for advancement and he then raised this issue in the 4 December 2013 email.

[55] Section 114(1) specifically provides for the 90 days to commence on the later of the day the action arose or came to the notice of the employee.¹² I am satisfied Dr Spacey did not become aware that promotion and advancement were two separate and distinct concepts under the collective agreement until a new employee highlighted it to him on 20 November 2013. I find that 20 November 2013 was the date on which the action came to the notice of the employee and is the date from which the 90 days is to be calculated.

[56] I have already found that the 4 December 2013 email raised a personal grievance which included the matter of advancement. I am satisfied Dr Spacey raised

¹² *Warburton v Mastertrade Ltd* [1999] 1 ERNZ 636; *Silver Fern Farms Ltd v North* [2010] NZEmpC 79; [2010] ERNZ 172.

a personal grievance relating to the lack of information within 90 days of the action coming to his notice.

[57] The Authority has jurisdiction to investigate Dr Spacey's claim that his employment or 1 or more conditions of his employment were affected to his disadvantage as a result of not being provided with sufficient information about advancement.

Re-interpreted intellectual property rules

[58] Dr Spacey claims Waikato University has sought to re-interpret the Intellectual Property Rules to his disadvantage.

[59] This matter was not one of the issues raised by Dr Spacey on 4 December 2013. When asked at the investigation meeting if he could assist the Authority by identifying when and how he raised this issue as a personal grievance Dr Spacey referred me to the Goal Setting document which records the discussion he had with Professor Pfahringer. I find that Dr Spacey did not raise a personal grievance in that document. The purpose of the document is to record the discussions between an employee and their line manager regarding the employees achievements and performance over the prior year and looks forward to the year ahead.

[60] Dr Spacey also says he raised the personal grievance on 12 August 2013 when he wrote comments on the back of the Goal Setting document about his unhappiness about the way Waikato University was interpreting its IP policy. I am not satisfied Dr Spacey raised a personal grievance on 12 August 2013.

[61] On 31 January 2014 Dr Spacey made a formal harassment complaint in accordance with Waikato University's Bullying and Harassment Policy.

[62] Dr Spacey told the Authority that if he did not raise a personal grievance on 9 or 12 August 2013 then he raised it on 13 February 2014 when he sent an email to Professor Pfahringer, among others, seeking the inclusion of the IP issues as part of his harassment complaint.

[63] The harassment complaint made by Dr Spacey was for the purpose of having matters investigated so that a determination as to whether he had been harassed in his

employment could be made. The lodging of a harassment complaint does not amount to the raising of a personal grievance.

[64] I find that Dr Spacey has failed to demonstrate that he has raised a personal grievance relating to Waikato University's interpretation of its IP policy. The Authority lacks jurisdiction to investigate this claim.

Switch teaching subjects

[65] Dr Spacey says his employment or 1 or more conditions of his employment has been affected to his disadvantage when Waikato University reassigned his teaching load. Dr Spacey says this happened on or about 5 June 2014.

[66] When asked at the investigation meeting if he could assist the Authority by identifying when and how he raised this issue as a personal grievance Dr Spacey referred me to an email trail in which he says he raised a personal grievance.

[67] I find that Dr Spacey did not raise a personal grievance in the email trail. The emails are a general discussion about the courses Dr Spacey is to teach and sets out the reasons why he was not in agreement with Dr Pfahringer's views.

[68] I find that Dr Spacey has failed to demonstrate that he has raised a personal grievance relating to the change of teaching load. The Authority lacks jurisdiction to investigate this claim.

Different rules to assess Applicants performance were applied

[69] Dr Spacey says Waikato University applied different rules to him than others when it assessed his performance in response to his application for Advancement.

[70] Dr Pfahringer completed his written assessment of Dr Spacey's performance on 5 September 2014. Dr Spacey was then invited to make further comments. He did so on 9 September 2014 and was critical of Professor Pfahringer's assessment of him. Dr Spacey took the opportunity to address the points he did not agree with and which were made by Professor Pfahringer and provided additional information for consideration.

[71] On 21 October 2014 Professor Holmes completed the Deans Recommendation panel on the application form and noted that despite Dr Spacey's comments agreed with Professor Pfahringer's recommendation that the application for advancement would not be supported.

[72] On 25 October 2014 Dr Spacey made further comments on the application which sets out why Dr Spacey held the view that his performance had been satisfactory and that he should be granted the advancement applied for.

[73] Dr Spacey did not raise a personal grievance after the completion of this form. The next time this matter is raised is in the statement of problem lodged in the Authority on 4 December 2014 where Dr Spacey says that the detrimental events he was experiencing at Waikato University continued with unfair treatment in the advancement round. Dr Spacey again takes issue with the the comments made by Professor Pfahringer in his assessment of Dr Spacey. Dr Spacey claims Professor Pfahringer failed to take into account relevant other matters in his assessment of him and "*...apparently compared Dr Spacey's performance to an undisclosed ideal rather than the "satisfactory" level required.*"

[74] Dr Spacey claims that he has been disadvantaged in his employment as a result of not being successful in his application for advancement. Dr Spacey is attributing the blame for his lack of advancement on the comments made by Professor Pfahringer. Professor Pfahringer did not make the ultimate decision about whether Dr Spacey would be successful in his application for advancement. That decision was made after 25 October 2014 when Dr Spacey had provided his final comments to the Dean.

[75] I have concluded that the 90 day period for this matter runs from 25 October 2014. By including his complaint about the assessment of his performance in his statement of problem and the fact that the statement of problem was served on Waikato University within the 90 day period (a statement in response was received by the Authority on 5 January 2015) means Dr Spacey has raised a personal grievance relating to the his concerns about the difference of approach in assessing his performance within 90 days of the action arising.

[76] The Authority has jurisdiction to investigate Dr Spacey's claim that his employment or 1 or more conditions of his employment were affected to his disadvantage as a result of being assessed differently than others in his application for advancement.

Workload

[77] In February 2013 Dr Spacey was asked to add course content to one of the level 2 papers he was to teach in the second semester of 2013. Various communications were had between Dr Spacey, Professor Pfahringer and others in the Department about the content of the changes to be made to the course.

[78] The updated course was delivered in the second semester in July 2013. Dr Spacey became concerned that the course content was too much for a half paper. He raised his concerns with Professor Pfahringer on 13 July 2013.

[79] Dr Spacey also raised concerns about his workload during his Goal Setting meeting on 9 August 2014.

[80] At the investigation meeting Dr Spacey told the Authority he raised a personal grievance when he wrote to Professor Pfahringer on 13 July 2014. I am not satisfied the letter dated 13 July 2013 raises a personal grievance relating to Dr Spacey's workload. Dr Spacey states in the email that he was raising the issue of the overrun lectures for three reasons. The reasons relate to Dr Spacey wanting it on record that he thinks the course is too wide for a half course, that the delivery of the course may affect delivery of back to back lectures and so that any student complaints on timing can be understood.

[81] Dr Spacey also told me that if that email does not raise a grievance then he raised a grievance in his Goal Setting meeting. I am not satisfied Dr Spacey raised a personal grievance through the Goal Setting process.

[82] The next time Dr Spacey raises concerns about workload is in his email dated 4 December 2013. That email was written five months after he first raised the matter with Professor Pfahringer and four months after his goal setting meeting.

[83] I find that Dr Spacey has failed to demonstrate that he has raised a personal grievance relating to his workload within the statutory 90 day period. The Authority lacks jurisdiction to investigate this claim.

Conclusion

[84] I have found Dr Spacey has raised the following personal grievances within the statutory 90 day period:

- (a) Cyberbullying allegations;
- (b) Failure to provide information regarding advancement; and
- (c) Standard used to assess Dr Spacey's performance on his advancement application.

[85] The Authority has not received an application for leave to raise the personal grievances outside the 90 day period and is therefore unable to be of any further assistance to Dr Spacey regarding the other matters raised by him.

[86] For the sake of clarity Dr Spacey is reminded that the substantive investigation will be limited to only the three claims on which he has successfully raised a personal grievance. The substantive investigation into those claims will be done in accordance with section 103A which requires the Authority to scrutinise the employer's actions and how the employer acted.

[87] Now that the issues between the parties have been narrowed, the parties are directed to attend mediation and in good faith, attempt to resolve the matters between them. Following mediation Dr Spacey is directed to notify the Authority whether the matters have been resolved and whether he wishes to progress his application. A conference management call will be arranged to discuss timetabling if required.

Costs

[88] Costs associated with this preliminary matter are reserved and will be dealt with when dealing with any costs issues following determination of the substantive matters (if that is necessary).

Vicki Campbell
Member of the Employment Relations Authority