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## Thomson v Dispute Resolution Services Ltd CA 78/07 (Christchurch) [2007] NZERA 580 (12 July 2007)

Last Updated: 17 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 78/07 5047946

BETWEEN	VICKI THOMSON Applicant
AND	DISPUTE RESOLUTION SERVICES LIMITED Respondent

Member of Authority: Philip Cheyne

Representatives: Jeff Goldstein, Counsel for Applicant

David Patten, Counsel for Respondent Investigation Meeting: 16 March 2007 at Christchurch Determination: 12 July 2007

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] Vicki Thomson has worked for Dispute Resolution Services Limited (DRSL) since 1999 when it took over the ACC review function and for ACC before then as a Review Officer. In her statement of problem, Ms Thomson says that DRSL unjustifiably disadvantaged her in her employment and breached express terms of her employment agreement. The problem arises from Ms Thomson's performance review for the year to 30 June 2006.

[2] DRSL says that it has always acted in accordance with its policies and contractual obligations and took steps to avoid any perceived prejudice when Ms Thomson raised concerns about the June 2006 review process.

[3] To resolve the problem, I will first need to set out relevant parts of the employment agreement and performance review policies. Next, I will explain the sequence of events that gave rise to Ms Thomson's concerns and make findings about

whether there was any breach of agreement or if a personal grievance has been established. During the investigation, Ms Thomson and DRSL disagreed with one another on a number of points but for the most part the relevant facts are not contested. I intend in this decision to resolve only the disputes of fact and interpretation necessary to determine the employment relationship problem.

#### Employment Agreement

[4] There is a written employment agreement applicable from 20 May 2002. One of DRSL's obligations is to act as a good employer (see clause 4.1(a)). Clause 8 says that DRSL will pay remuneration as set out in the attached Schedule which records the rate of salary payable as at May 2002.

[5] The terms of clause 9 are at the heart of the present dispute so it is helpful to set out that entire clause:

**9. Performance Review.**

*9.1 By the end of each financial year, you and your Manager will endeavour to agree in writing on the way in which your performance will be measured, and the standards and objectives to be met for the new financial year. Failing agreement, your Manager's decision shall be final.*

*9.2 By 31 July, you and your Manager will endeavour to meet to review and assess your performance against the standards set for the previous year and the manner in which the objectives were achieved. Nothing shall prevent your Manager reviewing your performance more frequently if required; the dynamic review of performance is encouraged.*

*9.3 In assessing performance your Manager shall take account of:*

*(a) your performance against your individual performance targets;*

*(b) your performance in handling any special projects or assignments, or any unexpected or adverse events that emerged during the year;*

*(c) your compatibility with and contribution to team performance and the achievement of the corporate goals and mission established by DRSL;*

*(d) the quality and timeliness of reporting to your Manager.*

*9.4 Following such review your Manager shall form a preliminary view as to your rate of remuneration for the new financial*

*year. Your Manager will discuss this view with you prior to making a decision.*

*9.5 Should any dispute arise over the review of your performance, both you and your Manager shall try to resolve the dispute. If the dispute cannot be resolved to your satisfaction, it shall be referred to the Chief Executive for decision, and such decision shall be final.*

[6] The operation of clause 9 resulted in Ms Thomson's salary being increased each year after the employment agreement came into effect.

[7] Clause 11 of the employment agreement refers to the ACC's HR policy manual which details how DRSL administers various contractual environments. Clause 18 of the employment agreement says that it and the *personnel policies manual* determine all the terms and conditions of the employment.

[8] There is no dispute about the application of these provisions prior to the year ending 30 June 2006. It is the performance review for the year ending 30 June 2006 that needs to be canvassed.

**2006 Performance Review**

[9] Neil McKellar is DRSL's General Manager. By email dated Friday 24 June 2005, he circulated a memo dated 21 June 2005 setting out a proposal for conducting performance reviews. The email provided some information about the reasons for the proposed changes. The memo included some commentary but also described the proposal and indicated that it would be trialled before any decision to adopt it for the 2005/06 performance reviews.

[10] The performance review involved assessing the subject against four categories: numbers, timeliness, quality and value. Each category counted for 25% of the overall result. The first two categories were quantitative. Quality was assessed externally and values assessed internally. Previously, the values component was assessed by the Manager's observation, peer assessment from two subject nominated colleagues, self assessment and some customer feedback. The memo proposed a change from two subject nominated colleagues to six subject nominated colleagues (three peers and three from other roles) who would be surveyed anonymously. The trial proposed in the memo was voluntary and Ms Thomson participated.

[11] Mr McKellar provided an update on the trial and the proposal in an email dated 1 September 2005. That outlined feedback from the trial and invited further response. The email foreshadowed office feedback meetings but they were not actually convened. Mr McKellar's evidence is that the trial feedback was very positive so they could not justify across the company the time for these meetings.

[12] Part of the performance review process is an interim review midway through the review period. Peter Jackson is DRSL's Manager of Review Operations, Ms Thomson's direct Manager. He commenced that role on 1 July 2005. It involves managing staff located in Auckland, Wellington and Christchurch. Mr Jackson conducted the interim review for Ms Thomson. Following his interim review meeting with Ms Thomson, Mr Jackson produced a draft report which was given to Ms Thomson for her response. Ms Thomson signed the interim review. There is some disagreement between Ms Thomson and Mr Jackson about what they discussed during the interim review, but it not necessary to resolve the point.

[13] Leading into the interim reviews, Mr Jackson circulated an email to staff that contained a document stating that the values component of the current year's performance review would be assessed using the method trialed following Mr McKellar's 24 June email. Ms Thomson says that she does not recall reading Mr Jackson's email, but she accepts that it was received by her.

[14] On 1 June 2006 Mr McKellar sent an email to Ms Thomson and other staff which included information about the forthcoming review for the year ended 30 June 2006. Reading the email and an attached document, Ms Thomson understood that DRSL intended to conduct the peer feedback component of the values assessment by surveying six observers from Ms Thomson's office randomly selected by a consulting firm contracted to DRSL (JRA). This differed from the trialed process in that those surveyed were no longer to be selected by the subject of the review.

[15] Several days later, Ms Thomson received an email from JRA. The wording of the email caused Ms Thomson to question whether observers were randomly selected so she sent an email to JRA asking how and by whom the participants were selected. JRA forwarded that query to a DRSL Manager and there were some exchanges between Ms Thomson and that Manager about how observers were selected. The correspondence confirmed that observers were randomly selected by the consultancy (JRA). It is not disputed that JRA did randomly select observers.

[16] Ms Thomson formed the view that DRSL was unfairly changing the established method for assessing the values component of her performance review so she resolved not to participate in the survey. Ms Thomson did not communicate that to DRSL management. JRA collated the observers' and the Manager's survey responses for Ms Thomson. The report was forwarded to Ms Thomson. It includes comments from one or more of the anonymous observers that are critical of Ms Thomson.

[17] On 13 July 2006 Ms Thomson met with Mr Jackson as part of the 30 June 2006 performance appraisal. There are some evidential disputes about this meeting, but they need not be resolved at this point. In any event, Ms Thomson made it clear that she objected to the use of the anonymous surveys. Mr Jackson suggested use of the former method for assessing value, but Ms Thomson also objected to that on the basis that the survey information was already known to Mr Jackson.

[18] On 14 July 2006, Ms Thomson wrote to Mr Jackson raising an employment relationship problem about the anonymous surveys obtained as part of the 30 June 2006 performance review.

[19] On 7 August 2006, Mr Jackson provided Ms Thomson with a draft performance review. It rates Ms Thomson *outstanding* for her quantity of decisions and *exceed* for quality and timeliness. The draft does not include any rating for values but it does refer to Ms Thomson's objections.

[20] Subsequent communications between Mr Jackson and Ms Thomson's lawyer resulted in DRSL agreeing to delay the outcome of Ms Thomson's performance review until 11 September 2006 to allow the opportunity for mediation but advising that a decision would be made after 11 September 2006 even if they had been unable to meet before then.

[21] There was a mediation on 31 August 2006 which did not resolve the problem. Shortly after that date, Ms Thomson received a letter dated 29 August 2006 from Mr McKellar advising of her overall performance rating for the year ended 30 June 2006 of *Exceeded* and her new rate of pay. Ms Thomson received backpay and the new rate of pay paid into bank account on 5 September 2006.

[22] Subsequently Ms Thomson received a letter dated 8 September 2006 from Mr Jackson concluding her performance review for the year ended 30 June 2006. The letter advises that Ms Thomson is rated *achieved* for values and *exceeded* overall.

[23] From this sequence the first question is whether there has been any breach of the terms of the employment agreement.

## Breach of Agreement?

[24] This turns on the meaning of clause 9.1. Both parties have to *endeavour to agree in writing* the two matters described in the first sentence. The last sentence entitles the manager to decide both matters *failing agreement*. It is not immediately clear whether the opening phrase *By the end of each financial year* applies both to agreement and to the manager's decision. Its application only to the former leads to the absurd result that required standards and objectives and the method of measurement could lawfully be set late during the review period or even after its end. It is a well recognised principle of construction that ambiguities should be interpreted to avoid absurd meanings: see *Auckland Hotel Employees IUOW v Air NZ Ltd* [1986] ACJ 218. Accordingly, I find that both the required standards and objectives and the method of measurement for the next year must either be agreed or subject to the manager's decision *By the end of each financial year*.

[25] Given this finding, by no later than 30 June 2005 there needed to be either agreement or the manager's decision on the required standards and objectives and the method of measurement for the review of performance during the year ending 30 June 2006. There was not. What happened was the process of proposal, trial and consultation reflected in Ms McKellar's emails of 24 June 2005 and 1 September 2005. What did not happen until Mr Jackson's email of 1 June 2006 was a decision on the method of measurement. That amounts to a breach of the employment agreement.

[26] Ms Thomson objected to her employer's announced intention to measure her performance by seeking anonymous comment from peers selected randomly by the survey firm, but she did not raise that point immediately. Meantime, JRA sought anonymous comments about Ms Thomson from randomly selected observers and forwarded that material to Mr Jackson. I accept Ms Thomson's evidence that some of the comments are critical of her. If Ms Thomson had chosen those to be surveyed as

in the previous year it is unlikely that critical comments would have been included in the material provided to Mr Jackson. Ms Thomson has been upset by the comments and she believes the criticisms resulted in or at least contributed to a lower than merited assessment. That is harm or damage that would have been avoided if DRSL had complied with its contractual obligations. I will return to a remedy later. For the present I need to assess whether any pecuniary loss resulted from the breach.

## Pecuniary loss?

[27] The performance review process is linked to remuneration: see clause 9.4 of the employment agreement. The employee receives an overall performance rating of either *outstanding*, *exceeded*, *achieved*, *under achieved* or *unacceptable*. *Outstanding* is described as *25% of performance has been at the outstanding level and 75% at the exceeded level*. Ms Thomson was rated *Exceeded* overall. If *values* had been assessed as *exceeded* Ms Thomson would have received an overall rating of *Outstanding*, at least prior to moderation. Accordingly, the two points for resolution are whether Ms Thomson would have been rated *exceeded* for *values* but for the breach of the employment agreement and whether an *outstanding* overall rating would have resulted in a higher salary increase.

[28] The evidence is to the effect that managers' ratings are moderated at a meeting of all managers when final ratings are determined. Managers bring their draft ratings to this meeting. It was after this meeting that Ms Thomson was sent the letter dated 29 August 2006 advising her of the outcome of the performance review and her new salary. That should not have happened because Mr Jackson had undertaken to delay the outcome of Ms Thomson's performance review until 11 September 2006 to allow for mediation. DRSL's explanation is that the letters for staff were completed by a mail merge process which resulted in a letter being generated for and sent to all staff including Ms Thomson. That means that someone gave the appropriate data for Ms Thomson's *overall PRS rating* field to the person who generated the letter. It was at best careless on the part of the person who supplied that data. Counsel for Ms Thomson submitted that it indicated that Mr Jackson predetermined the performance review outcome for Ms Thomson, but that is not relevant for present purposes.

[29] Mr Jackson prepared a spreadsheet of draft ratings for his direct reports. Ms Thomson is ranked fourth on this list. The top two are rated *Outstanding* overall.

Those ranked above and immediately below Ms Thomson are rated *exceed* for values. Ms Thomson's rating for values is shown as ?. All the DRSL Review Officers with a rating of *Achieve* for values received an overall draft rating of *Achieve* or less.

The critical comments from the anonymous survey exercise apart, there is no credible evidence to indicate that Ms Thomson should not have been rated on her values as highly as the person ranked immediately below her on Mr Jackson's spreadsheet. Those rated *Achieve* for values had overall rankings well behind Ms Thomson. Finally, I note that one of those with an overall rating of *Outstanding* did no better across all four categories than Ms Thomson. From this, I find that Ms Thomson probably would have received a rating of *Exceed* on values which would have given her an overall rating of *Outstanding*. There is no reliable evidence to indicate that an overall rating of *Outstanding* was likely to have been reduced by the moderation process. Accordingly I find that Ms Thomson probably would have received an overall rating of *Outstanding* but for the breach of the employment agreement.

[30] It follows from the above analysis that the indications from the contemporaneous, documentary evidence are a better guide than the necessarily subjective evidence now given by both sides about Ms Thomson's performance.

[31] I am not in a position to assess the actual pecuniary loss arising from this finding. The proper course is for DRSL to revisit its decision on Ms Thomson's salary commencing 1 July 2006 and assess what it would have been with an overall PRS rating of *Exceeded*. Leave is reserved if there is any disagreement between the parties.

## **Personal grievance**

[32] An employee has a personal grievance if their employment is affected to their disadvantage by some unjustifiable action by the employer. In the present case, the unjustifiable action is DRSL's breach of the employment agreement and I find that Ms Thomson's employment was disadvantageously affected. Her performance review understated her level of performance for the year. Her work performance is a source of considerable pride for Ms Thomson and DRSL's failure to properly assess that for the year under review caused Ms Thomson considerable upset.

[33] The pecuniary loss arising from the personal grievance has been assessed above so need not be reconsidered here.

[34] There is a claim for \$20,000.00 compensation for distress. I was referred to *Alton-Lee v Victoria University of Wellington* [2000] 2 ERNZ 152. That case involved an almost complete failure to undertake performance appraisals during the employment and so is quite removed from the present matter. What is needed is an assessment of the harm caused to Ms Thomson by DRSL's relatively limited breach of the employment agreement. There is no reason to doubt the evidence given by Ms Thomson's husband about her distress arising from the grievance and the breach of employment agreement. It refers to her significant distress and upset but does not prove any clinical problems. I assess the appropriate award of compensation for the effects of the grievance at \$5,000.00. DRSL is ordered to pay that sum to Ms Thomson.

[35] As indicated above there is also a claim for unspecified damages in the sum of

\$20,000.00. However, all the proven harm has been compensated for by the foregoing orders so it is not necessary to consider this further.

[36] Ms Thomson did not contribute in any blameworthy way to the situation giving rise to the grievance.

## **The future**

[37] In the evidence there is a complaint that DRSL did not meet its contractual obligations towards Ms Thomson in respect of the year ending 30 June 2007. The complaint is somewhat unrealistic. The employment agreement entitles DRSL to stipulate the required standards and objectives and the method of measurement for the review of performance. While Ms Thomson is correct to say that DRSL's communications during the year ended 30 June 2006 could not amount to compliance with its contractual obligations for that year, they could be seen as seeking agreement to then determining the required standards and objectives and the method of measurement for the year ended 30 June 2007 and following if need be.

[38] Ms Thomson also expressed concern about the future impact on her of taking these proceedings against her current employer. There is often a strong emotional overlay in employment relationship problems such as this. However, I accept that DRSL endeavours to be a good employer and that Ms Thomson is a valued and skilled

employee. The issues between them are resolved by this determination. Because both parties are experienced in dispute resolution, they know that the proper

course is to accept that the legal process has resolved their differences and they should now focus on the many positive aspects of their relationship.

## Summary

[39] Ms Thomson is entitled to have her remuneration from 1 July 2006 set on the basis of an overall PRS rating of *Outstanding*. Leave is reserved if there is any difficulty arising.

[40] DRSL is to pay Ms Thomson compensation of \$5,000.00 pursuant to [section 123](#) (1) (c) (i) of the [Employment Relations Act 2000](#).

[41] Costs are reserved.

Philip Cheyne

Member of the Employment Relations Authority

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