

Attention is drawn to paragraph 2 of this determination prohibiting publication of certain information.

Determination Number: CA 138/05  
File Number: CEA 347/03  
CEA 54/05

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** An employee (Applicant)  
**AND** An employer (Respondent)  
**REPRESENTATIVES** The employee in person  
Christine French, Counsel for Respondent  
**MEMBER OF AUTHORITY** Philip Cheyne  
**APPLICANT INTERVIEWED** 22 March 2005  
**INVESTIGATION MEETING** 1 August 2005  
**DATE OF DETERMINATION** 21 October 2005

DETERMINATION OF THE AUTHORITY

***Non Publication Order***

[1] The applicant is a secondary teacher and the respondent a secondary school. There is an existing employment relationship. Initially, the applicant had legal advice and was represented by a solicitor but by the time of an interview I conducted with her and the subsequent investigation meeting, the applicant was no longer represented. It seems that no one had told the applicant that investigation meetings and Authority determinations are usually open to the public. At the end of the investigation meeting I spoke to her and the respondent about whether there should be an order prohibiting publication of the identity of the parties. The applicant supported an order and the respondent also accepted its desirability in the interests of preserving their ongoing employment relationship.

[2] I will write this determination using people's titles rather than their names despite the inelegance of doing so to assist with non publication of the details of the parties. I make an order pursuant to Clause 10 of the second schedule to the Employment Relations Act 2000 prohibiting from publication the names of the parties or any details of the parties which might tend to identify them.

### ***The First Statement of Problem***

[3] On 29 September 2003, the applicant lodged a statement of problem about her employer's decision to investigate her competency and the process by which it carried out that investigation. Those allegedly unjustified actions resulted in the applicant suffering extreme stress and depression for which the applicant sought compensation for her medical costs, legal costs, stress, humiliation, trauma and loss of confidence. A claim was also made for loss of career prospects.

[4] The applicant took a position with the respondent as a Head of Department (HoD) at the beginning of term 1 2001. Soon after the start of the term it became known that there was to be an Education Review Office (ERO) visit to the school in the last week of the term. During that visit, an ERO Member became alarmed by the applicant's classroom management and told the Principal that she had almost intervened during her observation of the applicant's class due to an '*unsafe environment*' where the learning of students was being compromised. As I understand it there was no suggestion that anyone's physical safety was at risk. This was reported to the Principal a day or two before the end of term so he decided to raise the matter with the applicant several weeks later on 23 April 2001 at the beginning of the new term. Subsequently, the Principal arranged for some observations of the applicant in classroom situations, some observations of a specific class with other teachers and some student interviews. These processes took some time for various reasons. Following this the Principal decided that there were matters of the applicant's competency causing concern in terms of Clause 3.3.2 of the Secondary Teachers' Collective Employment Contract. The contract first provides for an appropriate assistance and personal guidance programme to be implemented. If that does not remedy the concern, there is a further process where the concern is put in writing and the teacher is given a reasonable opportunity to remedy that concern. An assessment is then made whether the concern has been remedied. A teacher is at risk of disciplinary action including dismissal if the concern has not remedied by the end that second process.

[5] The applicant was advised on or about 13 March 2002 that she was considered to have met the professional standards for experienced classroom teachers regarding student management, teaching techniques and motivation of students. At that point, the process set out in Clause 3.3.2 of the contract ended.

[6] The first statement of problem also referred to several other matters. Prior to the applicant's appointment, the Deputy Principal allegedly misled the applicant's colleague (her referee) by telling him that the previous Head of Department had resigned due to a heat attack when that person had resigned because of dissatisfaction with the respondent's management. Secondly, the respondent required the applicant to perform various duties as part of being the HoD but did not alert her to this requirement before she was offered and accepted the position. She had to act as a form teacher which included a weekly teaching requirement on subjects such as health issues, careers and study skills. A day before students returned to school, the applicant learnt in passing that School Certificate in her department was internally accessed. These two issues required additional planning and coordination by the applicant which resulted in '*tremendous pressure on [her] in the first few weeks of school*'.

[7] The medical evidence made available to me indicates that the applicant suffered symptoms such as sleep disruption, fatigue, irritability, tearfulness, poor concentration, helplessness and a loss of interest in teaching during the first term. Just before the end of the term, when being interviewed by the ERO Member, the applicant became tearful. She had a discussion with the ERO Member about her work problems and the ERO Member suggested she see a doctor. The applicant did so during the term holiday and was prescribed some anti-depressant medication which she started taking. At this time, the applicant was completely unaware of the ERO Member's complaint to the

Principal that later resulted in the observations and competency process mentioned above. Equally, the respondent was not aware of the applicant's depressive illness.

[8] On 1 May 2001, in response to the respondent's attempts to establish an observation process, the applicant gave the Principal a brief letter from her General Practitioner that stated that '*At present, for health reasons, it would be in [the applicant's] interests to have a delay in the appraisal that is required until the beginning of June. The additional stress at this time would have an adverse effect on her health*'. However, the Principal took the view that if the applicant was fit to attend work, she was fit to participate in the appraisal process. Next, the applicant received several certificates from her doctors stating that she was unfit for work from 4 May 2001 until 23 July 2001. These were provided to the respondent. Subsequently, the applicant's illness has been described at different times as '*clinically significant distress and psychiatric illness*', '*quite severe depression*' and '*major depression*'. The applicant also says that she now permanently suffers from a reflux problem attributable to the stress resulting from her grievances.

[9] To resolve the problem described in the first statement of problem it will be helpful to set out the relevant definition of a personal grievance and then to assess events in some greater detail to determine whether there is grievance. There are further issues raised in a second statement of problem and the applicant's statements of evidence, but I will enlarge on those issues after dealing with the matters in the first statement of problem.

### ***Definition of a grievance***

[10] The Employment Relations Act 2000 defines six types of personal grievance. The only type potentially relevant to the present matter is that exhaustively defined by Section 103 (1) (b). To paraphrase for current circumstances, there is a grievance where the applicant's employment, or one or more conditions of her employment, is or are or was effected to the applicant's disadvantage by some unjustifiable action by the employer.

### ***The Employer's Actions***

[11] As mentioned above, the applicant says that the respondent through its Deputy Principal at the time misled her about the true circumstances of her predecessor's resignation. The Deputy Principal later became the Acting Principal and is now the Principal of the respondent school. He gave evidence about his conversation with the applicant's referee. That conversation occurred prior to the establishment of the employment relationship between the applicant and the respondent.

[12] It is established law that the definition of personal grievance is directed to grievances arising out of the employment activity or the '*on the job*' situation: see *Wellington AHB v. Wellington Hotel IUW* [1992] 2 ERNZ 466. In that case, the employee was made redundant but was entitled under the redundancy agreement to priority in appointments to other vacancies for a period after his employment ended. The employer failed to comply with that agreement and the former employee took a personal grievance against his former employer in respect of those breaches that followed the end of the employment. The Court of Appeal held that there could be no grievance because there was no effect on the employment activity, that having ended before the breaches complained of. The statutory definition of personal grievance was later amended to prevent this same outcome but that change does not affect the reasoning of the Court of Appeal which is still applicable.

[13] In the present case, if the Deputy Principal made misleading comments to the applicant's referee prior to the employment, it is difficult to see how that could have affected the applicant at

that time in the employment activity, there being none. The second difficulty with this aspect of the problem is that the Deputy Principal cannot be said to have misled the applicant herself. At worst, he misled the applicant's referee who was being spoken to for the purpose of the respondent assessing her suitability for employment. The discussion with the referee was not for the purpose of the applicant assessing the suitability of the respondent for employment. The third difficulty is that, having seen and heard the Deputy Principal, I accept his evidence that he did not mislead the referee. Most probably, the referee mistakenly took the Deputy Principal's comments about another staff member who had had a heart attack to relate to the applicant's predecessor. It was simply a case of confusion or mistake.

[14] The applicant is critical of the respondent for not telling her at early stage about the weekly teaching requirement for form teachers and the internal assessments for the fifth form in her department. The result was that the applicant had to prepare and plan work at reasonably short notice which caused her a measure of stress. I note that the Principal wrote to the applicant on 7 December 2000 alerting her to a number of issues that would arise soon after the commencement of her employment. She was given contact details for the Principal and the Deputy Principal and invited to contact either to discuss any issues. The letter indicates that there was an induction process available to the applicant and I have been provided with the staff handbook for 2001 which deals specifically with the form teaching requirement.

[15] I find that the responsibility for communication about the job requirements rested on both the applicant and the respondent. The respondent took reasonable steps to discharge its responsibilities. It must be remembered that the applicant sought and was appointed to a senior position with the respondent which was entitled to think that she could deal with the ordinary incidents of her role such as the two specific requirements now complained of. I also note that no grievance about these issues was raised until well after the expiration of 90-days after the issues came to her attention early in the first term. For these reasons, no actionable grievance arises from the applicant's criticisms.

### ***The Competence Concerns***

More needs to be canvassed about the applicant's major concern which was the respondent's decision to investigate her teaching competence and the methods by which that decision was made.

[16] The Principal was spoken to by the ERO Member on the day before the end of term 1 but he did not tell the applicant about the complaint until a meeting with her on 23 April 2001, the first day of term 2. The applicant referred me to Clause 3.3.2 of the Collective Contract which states '*where there are matters of competence which are causing concern in respect of any employee the employee concerned shall be advised as early as possible.*' The respondent has a '*Communications and Complaints Policy*' that also stresses the importance of advice '*at the earliest possible point*' to the subject of a complaint.

[17] The Principal died in May 2003 so there is no direct evidence from him about why he decided to wait until the beginning of term 2 to speak to the applicant. However, there is evidence from the PPTA Field Officer that the Principal sought advice from him about the matter before it was raised with the applicant. They agreed that the PPTA Field Officer would visit the school early in term 2 in order for him to be available to the applicant once she became aware of the matter. The Principal sought advice from the Deputy Principal and apparently also spoke to some other Principals and the School Trustees Association before deciding what to do about the ERO Member's complaint. A sensible interpretation of the Collective Contract and the School Policy must allow for the Principal to seek advice and to consider how to handle a matter such as the ERO Member's complaint. It was

also reasonable not to trouble the applicant about the matter during the break between the two terms. After all, the applicant was no less able to respond to the complaint. Her evidence is that she thought that the incident witnessed by the ERO Member had been closed because it was not mentioned to her by the ERO Member the following day and it was not raised with her by the Principal until the beginning of the new term. However, the applicant did not know that it had been reported to the Principal so she can not legitimately say that she had formed a belief that the respondent would not do anything about the matter.

[18] There is a further difficulty with attributing any validity to the applicant's criticism about not being notified immediately of the complaint. The respondent's '*Communications Complaints Policy*' requires any formal complaint to be in writing. It is common ground that the ERO Member did not make a written complaint. It must therefore be the case that the communication between the ERO Member and the Principal did not constitute a complaint in terms of the respondent's policies. That no doubt is why the Principal did not deal with it in accordance with that policy. I also accept the respondent's point that there must first exist '*matters of competence which are causing concern*' before the obligations specified in Clause 3.3.2 of the Collective Contract such as notice to the employee are applicable. The point made by the respondent is that it did not have any proven matters causing it concern until after the results of the process of observations that followed the discussions in April 2001 with the applicant.

[19] Present at the meeting on 23 April 2001 were the Principal, the Deputy Principal and the applicant. There are notes made by the Principal after the meeting which I accept as a substantially accurate account of the meeting. To summarise, the Principal told the applicant about the complaint from the ERO Member. There was discussion about the situation observed by the ERO Member and the applicant made it clear that she did not accept that teaching and learning had been excessively compromised. The applicant told the Principal that there was considerable doubt given the conflicting views of the matter so he thought that the only fair approach was to arrange some classroom observations to try and assess whether there was any problem. The applicant then became distraught and began sobbing. The meeting ended on the basis that the Principal would consult further about how to organise the observations with a view to another meeting on Friday 27 April.

[20] The applicant makes several criticisms of the respondent arising from the meeting. She says that she was not advised prior to the meeting on 23 April of the serious nature of the issues to be raised. The applicant says that the respondent had obligations under Clause 3.3.2 of the Collective Contract to handle the matter in a manner so as to protect her mana and dignity and to tell her of her right to support and representation. However, I have already found that Clause 3.3.2 did not apply at this point so I do not accept there is validity to the criticism. In any event, the Principal had actually facilitated a visit by the PPTA Field Officer in order to give the applicant an opportunity to get advice about the situation and that occurred soon after this meeting.

[21] The applicant met with the PPTA Field Officer on 27 April 2001. That meeting did not go well as the applicant expressed a concern that the Deputy Principal's involvement with the PPTA compromised the PPTA Field Officer's independence. It is not necessary to make any finding about that point or the other things said by the applicant about the PPTA Field Officer. As she was entitled to do, the applicant later decided to get legal advice and did not take up the PPTA representation that was available to her.

[22] The Principal met with the applicant again on 30 April 2001. The Deputy Principal was present and the applicant had with her a colleague for support. There are notes of the meeting made by the Deputy Principal which I accept as a substantially accurate account of events. The Principal

outlined his plan to have another employee observe the applicant in classroom situations, for some limited observations by an outside moderator and to conduct some interviews with a sample of students. A proposed written brief for the observations was provided. In evidence, the applicant explained her acquiescence to most of this plan by reference to her clinical depression which had been diagnosed during the preceding term break and for which she had just commenced taking anti-depressant medication. By 30 April, the medication had not become fully effective. The respondent was not at this time aware of the applicant's medical situation.

[23] On 1 May 2001 the applicant sent a memo to the Principal requesting that the assessment process be postponed until June. She included a note from her doctor advising that *'for health reasons, it would be in [her] interests to have a delay .... The additional stress at this time would have an adverse effect on her health.'* In response, the Principal sought advice, including from the PPTA Field Officer, and adopted the view that the observations should proceed as the applicant was apparently well enough to attend to her usual duties. The PPTA Field Officer wrote to both the Principal and the applicant confirming its view that by coming to work an employee indicates that he or she is fit for all duties and counselling the applicant to reconsider whether she should be at work at all if her doctor considered the observations would adversely affect her health. The outcome of all this was the sequence of medical certificates covering the applicant's absence on sick leave until late July 2001 as mentioned above.

[24] In June 2001 the applicant offered to return to work to perform some specific duties but the Principal declined the offer. The Deputy Principal also had a discussion with the applicant and agreed to her earlier request to remove from her the form teaching duties. The Principal set out in writing his reasons for declining the applicant's offer. The respondent can not be validly criticised for adopting that stance.

[25] The other event in June 2001 that should be mentioned is the ERO report. The draft report provided to the school for comment included as an action to be taken the requirement as a good employer to monitor the impact of interventions to support the HoD. That statement was not included in the ERO report once it was finalised. The applicant says that the respondent must not have understood what was required of a good employer if it had to be told this by the ERO. One might take from the exclusion of the statement from the final report that the ERO was satisfied that the respondent was acting as a good employer towards the applicant. In any event, all the ERO could have known about the matter was what had been told them by the respondent so it is difficult to read the statement in the draft report as condemnation of the respondent's actions in respect of the applicant. I do not accept there is any validity to this criticism.

[26] Upon the applicant's return to work, the Principal advised that he intended to implement the observation process but would first give the applicant a week to get back into a work routine. The process was more complicated than initially proposed, but that was in response to the applicant's concerns. In evidence, the applicant is very critical of the Principal about this postponement. She says that it is inconsistent with the stance taken by the Principal before her sick leave. The applicant also says that she had prepared herself to proceed immediately and the postponement simply extended the timeframe over which she was subject to stress and concern for her future. I accept the point reportedly made by the Principal that the applicant's absence on sick leave and the ensuing delay meant that the situation in July was far different from the situation in May. People make different judgements depending on circumstances at a particular point in time as the Principal apparently did here. There is no merit in the criticism about the change in stance as it just reflects the changed circumstances. I should also say that the postponement for a further week did not hinder the applicant.

[27] The process of observations and interviews proceeded. It culminated in a letter dated 27 August 2001 from the Principal to the applicant advising her that he had decided that there existed matters of competence causing him concern in terms of Clause 3.3.2 of the Collective Contract. The applicant is critical of many aspects of the observations and interviews by I do not intend to canvas those criticisms in any detail. None of the criticisms can amount to a personal grievance even if it is assumed they have merit. The applicant suffered no disadvantage as a result of the decision announced in the 27 August 2001 letter.

[28] What came from the 27 August decision was the offer of a structured programme of advice, guidance and support from the school and external sources to assist the applicant to deal with the behaviour issues that existed in some of her classes. Rather than causing any detriment or disadvantage to the applicant, this programme would have provided her with advantages in her day-to-day working situation. However, the applicant declined to engage in the programme as was her right.

[29] In a letter dated 4 October 2001, the applicant, through her Solicitor, raised a personal grievance, the basis of which has been canvassed and rejected above.

[30] I should complete the analysis of the issues raised by the first statement of problem by explaining that in early 2002 the respondent arranged for a further observation of the applicant by an external education consultant who concluded that *'it is considered that overall [the applicant] can be considered to meet the Professional Standards for Experienced Classroom Teachers.'* As a result, the Principal wrote to the applicant on 20 March 2002 and advised her that the competency review process provided for in Clause 3.3.2 of the Collective Contract was at an end.

### ***Second Statement of Problem***

[31] The first statement of problem was lodged in September 2003. There followed protracted efforts by the parties with the assistance of the mediation service to resolve the problems raised by that statement. When these efforts ended without any substantial resolution a telephone conference was organised for 17 November 2004. During that conference, Counsel then acting for the applicant said that there was an additional grievance about how the respondent had dealt with class disciplinary issues. A direction was made for any additional grievance to be lodged within 21 days. Arrangements were also made for an investigation meeting for March 2005.

[32] A second statement of problem was lodged on 23 February 2005 although a facsimile was received in this office on 16 February 2005. Also on 16 February 2005, the Authority received the applicant's statement of evidence and supporting documents in respect of the first statement of problem. That material also related to the issues raised in the second statement of problem. In addition however, the statement of evidence and supporting documents raised significant new allegations, in particular about the behaviour of the Principal over an extended period of time, said to amount to bullying and abuse.

[33] After a second telephone conference I directed that the scheduled three day investigation meeting be abandoned in favour of me interviewing the applicant on one of the scheduled days following which I would make directions about the future conduct of any investigation meeting. During the interview, the applicant gave evidence on oath and responded to my questions. After the interview, I reviewed the substantial volume of material provided mostly by the applicant. I then decided to convene an investigation meeting and required the respondent to lodge statements of evidence addressing its decision to investigate the applicant's competency and whether its method of investigation was unfair to her. I should now explain my findings regarding the issues in the

second statement of problem and the allegations about bullying. It is convenient first to deal with the second matter.

### ***Allegations of Bullying***

[34] In her statement of evidence lodged with the Authority on 16 February 2005, the applicant characterises the Principal as a serial bully. She says that she did not initially recognise his behaviour as that of a bully but had it pointed out to her in mid-2004. The Principal died in May 2003, about a year earlier. The applicant now explains the steps taken by the Principal in respect of the ERO complaint and the competency review as being part of his bullying.

[35] The respondent's ability to fully answer this allegation about the Principal has been seriously prejudiced by the applicant's delay in raising it from March 2002 (by which time the competency issue had ended) until February 2005. No grievance about bullying has ever been raised within 90-days of any of the events said by the applicant to constitute examples of bullying. All of that would be sufficient reason to find against the applicant on this issue and I do not hesitate to do so.

[36] I also take the point further. There is nothing in any of the material that I was provided with, when looked at in a fair and objective way, that supports an allegation that the Principal was a serial bully. Rather, all the material indicates that the Principal acted fairly in all his dealings with the school community, including the applicant.

### ***The Issues in the Second Statement of Problem***

[37] The first issue is characterised as the respondent's unjustified failure to provide support to the applicant in her attempts to discipline errant students. The second is said to be the respondent's failure to conduct itself in an appropriate and justified manner in various ways.

[38] The relevant events relate to interactions between the applicant, the current Principal and the Assistant Principal over some student disciplinary issues and the way in which a parent complaint was dealt with. It is not necessary to canvas the facts any further than that because I am satisfied that there has been no action affecting the applicant's employment or her conditions of employment to her disadvantage. Accordingly, there can be no personal grievance within the definition contained in the Employment Relations Act 2000.

[39] The applicant suffered from a depressive illness from term 1, 2001. For the reasons explained above, no actionable grievance arises from that. The medical information indicates that the illness has waxed and waned somewhat since then. The interactions between the applicant, the current Principal and the Assistant Principal referred to above are simply disagreements between the applicant and others about appropriate responses to particular situations. To the extent that the applicant has been aggrieved about the views and actions of the others, that reflects her illness rather than being caused by any action by the respondent. Similarly, the applicant has not been disadvantaged in her employment.

[40] On a more positive note, the applicant says that there has been a general improvement in the school environment since the appointment of the current Principal. It is to be hoped that she can now put these negative issues behind her and continue with her teaching and other work in that environment. The non-publication order is intended to facilitate that outcome.

*Summary*

[41] The applicant has no sustainable grievance against the respondent.

[42] Costs are reserved.

Philip Cheyne  
Member of Employment Relations Authority