

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 357/10
5143500

BETWEEN NIHARIKA DAVE
Applicant

AND THE BOARD OF TRUSTEES,
SUNNYDENE SCHOOL,
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Ashley Sharp for Applicant
Paul Robertson for Respondent

Investigation Meeting: 5 and 6 November 2009

Submissions received: 25 November 2009, 17 February 2010 from Applicant
2 and 18 February 2010 from Respondent

Determination: 13 August 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sunnydene School provides education for special needs students. At the time of this employment relationship problem the 'base school' had four classrooms, each with five or six students, one teacher and two teacher aides. All the students at the base school were aged thirteen to twenty one. Other students (including those of primary and intermediate age) and staff were in satellite locations at mainstream primary schools.

[2] Mrs Dave first went to work at Sunnydene in late 1999 as a teacher aide. During 2002 she took a year out to pursue full time teacher training and in 2003 she returned to the school as a qualified special needs teacher. In 2007, after experiencing health issues relating to a work injury, she stopped work.

[3] She has not returned and there appears little likelihood that she ever will. Her medical specialists have now advised that the demands of working with special needs students make that type of work unsuitable for someone with her on-going health problems.

[4] Mrs Dave's employment relationship problem is in two main parts. The first arises out of a claim that the respondent failed to take reasonable steps to prevent Mrs Dave's work injury. Mrs Dave suffered her first workplace injury in 2004. After treatment and time off work her symptoms abated. In 2006 and in 2007 she says the principal, Mr McKeown, sent her back into situations where it was foreseeable that she would reinjure herself and be subjected to stress.

[5] In submissions for Mrs Dave it was acknowledged that she cannot claim compensation for the injury itself since that is covered by accident compensation legislation. She does however claim that the breach of duty associated with the injury caused her to lose satisfaction and enjoyment in her job and to lose trust and confidence in the school and thus constituted an unjustified disadvantage.

[6] The second part of the employment relationship problem relates to a separate claim of bullying. Mrs Dave says that she was bullied by her team leader for some time. She also says that when she finally raised this issue with the principal and with the Board of Trustees they failed to properly investigate and address her concerns.

Issues

[7] The applicant argues that she has three separate disadvantage grievances in relation to the respondent putting her at risk of workplace injuries, subjecting her to bullying and failing to adequately address the allegations of bullying. She also argues that the same matters amount to:

- i. breaches of the school's implied and express contractual obligations to her;
- ii. failures to meet its obligations as a good employer under the State Sector Act 1988, and

iii. breaches of good faith.

[8] These assertions are denied by the School which says that it did as much as it could to assist Mrs Dave with both her health problems and the issues she had with her team leader.

[9] The school says that the grievance relating to the effects of the injury was not raised within the 90 day time limit. Because the injury allegations were said to give rise to other causes of action besides a personal grievance, the Authority's investigation into the substantive allegations has proceeded without prior determination of the 90 day issue.

[10] The following matters therefore fall to be determined:

- i. what led to the workplace injuries and the bullying allegations;
- ii. whether the School met all its obligations to Mrs Dave, acting in good faith and as a good employer, and
- iii. whether the grievance relating to the alleged failure to provide a safe workplace was raised within 90 days.

(i) The injuries and the bullying allegations

[11] Throughout 2003 and 2004 Mrs Dave was under supervision as a "beginning teacher." During 2004 Mrs Dave sustained an injury when her hair was pulled by one of her students (a boy in his teens but intellectually at the developmental level of a toddler.) As a result she began to suffer chronic headaches and pain in her shoulders, neck and back. Although the student was moved from her class and Mrs Dave received physiotherapy and medication it took until mid 2005 for her to return to 80% of normal function.

[12] Mrs Dave acknowledges that in 2004 neither she nor the school could have foreseen that hair-pulling would have such effects. However in term 2, 2006 the

student concerned was returned to her class. When Mrs Dave protested the decision Mr McKeown explained that he had nowhere else to put the boy, who had to be moved from where he was because he was being bitten by one of his classmates. Because it was not appropriate to place students in their late teens with the younger students, Mr McKeown had run out of alternative placement options for the student concerned.

[13] Instead, he suggested they work on strategies for managing the student's behaviour and use the teacher aides to care for the student where possible. He also suggested Mrs Dave call him or other colleagues in to assist whenever necessary. Mrs Dave acknowledged in her evidence that on a personal level Mr McKeown was always helpful and supportive towards her.

[14] Unfortunately, as before, the student pulled Mrs Dave's hair (which she wore loose) and by August 2006, the headaches had returned. Medication did not provide sufficient relief and Mrs Dave ended up off work for much of Term 3 and all of Term 4 2006. Meanwhile Mrs Dave alleges that from approximately August 2006 onwards (despite ACC having accepted that her symptoms were a result of workplace injury¹) her team leader had begun to display a dismissive and disbelieving attitude towards Mrs Dave's recurring health problem.

[15] At the start of the 2007 school year Mrs Dave came back to work full-time with a new class of younger students. She told me that with hindsight she feels she was not ready to go back. She had told her family and colleagues that she was well even though she was not, in fact, 100%, and continued to suffer a constant dull headache and stiffness.

[16] Nevertheless, she said, she felt determined to succeed. This time she was located away from the school's main campus, in a satellite class at a mainstream school. Mr McKeown had also arranged for a young Danish woman to complete a placement in Mrs Dave's classroom as part of her own training in special needs work. Mr McKeown told me such placements were common and usually, the visiting

¹ ACC covered the cost of physiotherapy and medication during 2004 and 2006. Leave Mrs Dave took during those years was either sick pay (for the shorter periods) or leave without pay (as for term 4 2006.) Mrs Dave did not take up earnings related compensation until 2007.

students were a great help. He put the student in Mrs Dave's class in the hope of lightening her load.

[17] Unfortunately this was not to be the case. The student was absent for much of the first term with a sprained ankle and when she rejoined the staff in term two it transpired that she and Mrs Dave had very different teaching styles. Mrs Dave told the Authority she felt undermined in her own classroom and felt that the team leader failed to support her as she should have when conflicts arose between her and the student. Indeed Mrs Dave perceives that the team leader sided with the student against her. Eventually, two to three weeks before the end of term two Mrs Dave called on her union for support. A meeting was held with the outcome that the student was moved out of Mrs Dave's classroom.

[18] Mrs Dave did not feel, however, that this resolved the issue of the team leader's behaviour towards her. Mrs Dave was concerned about what she saw as the team leader's doubts about her health problems and the way the team leader failed to back her up over the Danish student. She also felt the team leader deliberately intimidated her on two occasions by insisting she pat a large dog that came in to the school, when she knew that Mrs Dave was afraid of dogs.

[19] Finally Mrs Dave was concerned about comments made to her in 2006 by the school psychologist. She said that during a meeting to discuss strategies for handling the student who was pulling her hair he asked about Mrs Dave's personal wellbeing. Mrs Dave found this intrusive and suspected that it indicated that she, and her behaviour, might have been the subject of gossip amongst her colleagues.

[20] At this time (shortly before the July holidays) Mrs Dave had been seeing a counsellor who had given her some literature about bullying. After talking it over with her counsellor, Mrs Dave approached Mr McKeown to complain that she was being bullied by the team leader.

[21] Mr McKeown told the Authority that as soon as Mrs Dave raised her bullying complaint he did two things. The first was to place Mrs Dave with a new team leader (effective from the beginning of term three 2007) and the second was to arrange what he called an independent inquiry into the bullying allegations.

[22] In the end, however, Mrs Dave did not spend much time working with her new team leader. By term three, Mrs Dave's headaches and chronic back and neck pain were becoming "*too much.*" Upon seeing a specialist Mrs Dave received steroid injections but this provided little relief. She took a few weeks off and then returned to work three days a week. This had increased to four days a week when in September a seven year old student threw a wooden train in Mrs Dave's direction. The sudden movement she made to avoid it jerked her neck in such a way that all her symptoms were seriously aggravated.

[23] On the advice of her doctors, Mrs Dave left work and requested a year's leave. In due course she was approved for earnings related compensation. She has not returned to the school.

[24] In October 2007 Ron Scott (an education sector consultant) was appointed to investigate the bullying complaint. He interviewed Mrs Dave, the team leader and ten other staff members and reviewed email and other correspondence between Mrs Dave, her team leader and the principal. In November 2007 he provided a written report which concluded that:

"there are clearly genuine circumstances surrounding [Mrs Dave's] distress which need to be appropriately addressed. But the inquiry found very little evidence of actual workplace bullying."

[25] The report's recommendations were:

- i. "That the complaint of bullying ... be dismissed*
- ii. That the staff of the school as a whole receive some training in workplace safety and handling of alleged bullying*
- iii. That the school management and board frame a policy to deal with cases of alleged bullying by staff with procedures for handling complaints*

- iv. *That the Board of Trustees take a session of training in workplace safety*
- v. *That the senior management team have a performance objective based around this issue*
- vi. *That roles and expectations of teachers and visiting overseas student or student teachers be clarified and written down.”*

[26] After reviewing the report Mr McKeown concluded that nothing in the team leader’s conduct warranted any kind of formal action. He felt that Mrs Dave had misinterpreted what he saw as the team leader’s brusque manner. However he told the Authority that he made a point of speaking to the team leader about the concerns Mrs Dave had raised over the dog and the Danish student, reminding her of the need to respect Mrs Dave’s feelings about the dog and the importance of backing up any teacher’s authority with trainees.

[27] Mr McKeown told the Authority that over the next few months, he followed through on the recommendations by developing written policy on emotional safety, arranging training for the staff and Board to back up the policy, and amending the performance objectives of the senior management team as suggested.

[28] Meanwhile, Mrs Dave was provided with a copy of the report. and advised by the Board Chairperson that: *“The report concluded that there were no grounds for this allegation. The Board will not be taking this matter any further.”*

[29] While she found some of its content helpful, Mrs Dave did not feel its conclusions or recommendations went far enough. She wrote to the school on 30 November 2007, enclosing a written *“response to Ron Scott’s report”* the purpose of which seemed to be to supplement the report with additional detail for the Board’s information. This included information on the injury related issues, which had not been part of Mr Scott’s brief, and which Mrs Dave felt should have been.

[30] Nowhere in the written response or in her letter did Mrs Dave set out what further action she sought from the Board, although she noted in the letter:

“you might like to deal with my personal grievance as deemed appropriate by the BOT.”

[31] In subsequent correspondence the Board confirmed with Mrs Dave that it accepted the findings of the inquiry and would be implementing its recommendations but would otherwise be taking no further action.

[32] Mr McKeown told that Authority that he felt he had done everything he reasonably could to make the workplace safe and to support Mrs Dave in getting well. He believed that with his support, a different team leader and the steps that had already been put in place, Mrs Dave would be able to return to work, safe from any risk of bullying.

Whether the school met its obligations

Injury related issues

[33] The school took the following steps to address the risk of injury to Mrs Dave:

- i.* in 2006 when the student of concern to Mrs Dave returned to her class Mr McKeown made himself personally available to assist whenever needed;
- ii.* sick and unpaid leave was granted to Mrs Dave whenever it was sought and for as long as it was needed. Indeed Mrs Dave was still employed by the school at the time of the Authority investigation;
- iii.* Mr McKeown arranged for Mrs Dave to have a younger class from the beginning of 2007, and
- iv.* he placed the Danish student with Mrs Dave to provide extra assistance.

[34] I asked Mrs Dave to tell me what she more she felt the school could or should have done to protect her from personal injury which might arise as a result of behaviours of students. She told me that the steps taken in 2007 (giving her a younger class and more help) were positive ones and agrees that it could not have been foreseen that this would not work out. Her principal criticism relates to the 2006 return to her class of the hair-pulling student. When I asked her what should have been done in relation to that problem her answer was simply that the student should have gone somewhere else.

[35] I asked her whether she had considered changing her hairstyle (which she wore shoulder length and loose) as a way of avoiding her hair being pulled. She said that tying her hair up caused her to have migraines. Sometimes, but not always, she covered her hair with a cap.

[36] I am satisfied that the nature and extent of the harm to her were not foreseeable and that the school took all reasonably practicable steps (in both 2006 and 2007) to make the workplace safe for Mrs Dave. I do not accept that anything more was required of a good employer, acting in good faith. It follows that the respondent is not liable in any way for any of the effects of the injury.

Bullying allegations

[37] The school took the following steps to address Mrs Dave's concerns about the way her team leader treated her:

- i. the very day Mrs Dave raised the issue of bullying Mr McKeown changed her to a different syndicate with a different team leader;
- ii. as soon as it could be arranged he commissioned an independent consultant to follow up on Mrs Dave's concerns, and
- iii. He carried out the recommendations in the consultant's report.

[38] I am satisfied that these were appropriate steps to take. Mrs Dave does not dispute that but as she told the Authority she believes that the school could and should have done more.

[39] Mrs Dave's first concern is that Mr McKeown did not respond sooner to the problems in the relationship between her and the team leader. She said she copied him into emails about her concerns with the Danish student and he should have known that she was not getting full support from the team leader. She felt he should have moved her to another syndicate even before she identified the problem as one of bullying.

[40] I do not accept this concern as valid. The emails in question put the principal on notice of the developing problem with the Danish student but did not indicate that Mrs Dave felt unable to work with her team leader. I accept that it was reasonable (at the point in time to which Mrs Dave refers) for the principal to leave the matter in the hands of the team leader.

[41] Mrs Dave also felt that Ron Scott's investigation was not sufficiently thorough. She said that the investigator did not take up her suggestion of interviewing a former staff member, did not (as she expected he would) consider the health and safety issues, and interviewed her only once, when she expected to be re-interviewed after her colleagues had been spoken to. She felt the school should not simply have taken the report at face value and that the investigator's recommendations did not go far enough. She said she wanted the school to take steps to "*change [the team leader]'s behaviour.*"

[42] I have given particular consideration to this question. Mr Sharp made a very valid submission when he argued that it is not sufficient for an employer to delegate such a task: the employer must be able to show that the inquiry was fair and its conclusions reasonable. The employer must also be able to show that the action it takes in response (whether confined to the report's recommendations or not) appropriately addresses the situation.

[43] For reasons of economy I will not set out in detail Mr Scott's methodology. I can say however that I am satisfied that the investigation was properly conducted, its conclusions reasonable and the recommendations appropriate and constructive. Indeed

Mrs Dave said nothing in her written response to the report, or to the Authority, that substantively contradicted any of Mr Scott's findings. I record also that the respondent acted as it should in following those recommendations.

[44] The School acted on the complaint, investigated it in a fair and reasonable manner, and responded by advising Mrs Dave of the outcome and by implementing the reports recommendations. It met all its obligations in respect of the bullying allegations.

[45] In summary it had not been established that Mrs Dave has been unjustifiably disadvantaged in her employment, nor has the employer failed to act in good faith or as a good employer should. The Authority can do nothing more about Mrs Dave's employment relationship problem.

The 90 day issue

[46] It follows from my conclusion in respect of the substantive issues that there is no need to determine this preliminary point.

Costs

[47] The issue of costs is reserved. In the event that it cannot be resolved the parties have a period of 28 days from the date of this determination in which to make any application for costs.

Yvonne Oldfield

Member of the Employment Relations Authority