

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Gerard French (Applicant)  
**AND** The Chief of Defence Force (Respondent)  
**REPRESENTATIVES** In person, for Applicant  
Nigel Lucie-Smith, for Respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 8 March 2007  
**SUBMISSIONS AND FURTHER  
INFORMATION RECEIVED** 8, 15 and 20 March, 11 May 2007  
**DATE OF DETERMINATION** 30 May 2007

DETERMINATION OF THE AUTHORITY

**Employment relationship problem**

[1] Mr French was employed by the Chief of the Defence Force ("NZDF") as a civilian employee from 23 February 2004 until 30 June 2006. He was employed as a human resource advisor and was based at the Devonport Naval Base. He says that the manner in which his former employer handled a complaint about his behaviour unjustifiably disadvantaged him in his employment. Mr French seeks compensation for hurt and humiliation consequent to this alleged disadvantage, recovery of costs incurred and an order that NZDF writes to employees involved in the process and advise them that process was inappropriate and that any views formed about Mr French as a consequence were premature and false.

[2] NZDF says that preliminary inquiries to ascertain the genuineness of the complaint were justified, that Mr French suffered no disadvantage in his employment as a consequence of those inquiries or that any disadvantage suffered was justified.

[3] The parties have attended mediation.

[4] I received evidence from Mr French, Mr Donald Edwards, Manager Human Resources Service Delivery and Captain Clive Holmes, Commanding Officer of HMNZS Philomel. HMNZS Philomel is the entity responsible for administration of the Devonport Naval Base.

[5] To determine this employment relationship problem the Authority must consider whether any of the following amount to an unjustified action causing disadvantage to Mr French in his employment:

- (i) that Mr Edwards made some preliminary inquiries to test the genuineness of the complaint made against Mr French before he was advised a complaint had been received;
- (ii) that NZDF acted on a complaint of bullying behaviour against Mr French before that complaint was put in writing;
- (iii) that Mr French was told the complaint had been withdrawn and was later advised that the complaint was proceeding to a formal investigation; and
- (iv) that the outcome of the investigation was unfair and unreasonable.

[6] On Tuesday 23 May 2006 Mr French and a colleague ("the complainant") had a disagreement following a request he made from her for information. It appears there was a degree of tension in their relationship. Mr French complained to her manager about her conduct towards him and telephoned his manager, Mr Edwards, to advise him of the incident.

[7] The following day Mr Edwards received a telephone call from Commander Suzanne Dean to advise a complaint had been made about Mr French's conduct towards the complainant on 23 May 2006. Mr Edwards was advised that the complainant had sought advice from the Human Rights Commission.

[8] Mr Edwards then telephoned Mr French to advise him of his conversation with Commander Dean. Mr Edwards asked Mr French to speak with Commander Dean about the situation which he agreed to do. At this stage they were unaware that Commander Dean did not work Fridays and Mr French was unable to discuss the matter with her.

[9] On Friday 26 May 2006 Mr Edwards received a telephone call from the HR Advisor in the area where the complainant worked to advise the complainant intended to raise a personal grievance. Mr Edwards then decided to go to Auckland to, in his words, try to take some of the heat out of the situation and resolve it at the lowest possible level. He was mindful of previous complaints between Mr French and the complaint which had been dealt with as a management issue and no disciplinary action had been taken.

[10] On Monday 29 May 2006 Mr Edwards spoke with the complainant. She told Mr Edwards that she was making a complaint and wanted it investigated. She said she had been repeatedly bullied by Mr French. After some discussion the complainant advised Mr Edwards that she did not want the matter mediated, that she wanted it investigated internally first and that she reserved her right to pursue a personal grievance. Mr Edwards said he wanted to

ascertain that the complaint was not malicious or vexatious. To this end he spoke with the HR advisor in the complainant's area, with two potential witnesses to the Tuesday incident and with three other employees who had worked with the complainant and Mr French.

[11] Following these preliminary inquiries Mr Edwards concluded that there was a proper complaint and that Mr French should be advised. A meeting was set up for 4.15pm that afternoon. Mr French was not told the purpose of the meeting or advised to bring a support person.

[12] The meeting commenced at 4.15pm. Capt. Holmes was present as the commanding officer responsible for the investigation of any complaint on base. Mr Edwards advised Mr French that a complaint had been made by the complainant arising from the Tuesday incident, that he had made some preliminary inquiries which indicated a "pattern of behaviour" on Mr French's part, that the complaint warranted further investigation and if proven could result in disciplinary proceedings which could include dismissal. Mr Edwards referred to Mr French's relationship with other HR staff and Mr French asserted a conspiracy on their part. Capt. Holmes then interjected to refocus the meeting. He restated that a complaint had been raised, that as the CO of Philomel he would be responsible for the investigation of that complaint and that Mr French would be advised once the complaint had been received so the investigation could proceed.

[13] Mr French wrote to Capt Holmes and Mr Edwards on Wednesday, 31 May 2006:

*I want you both to know that I have confidence in the ability of the Naval Complaints Process to undertake a full and fair investigation of the complaint that has been made against me.*

*You also need to know that on Tuesday evening, given I had no prior warning of the content of this meeting, no offer of a support person being made available, and given little time to prepare, as my mind was focused on picking up my daughter, the announcement and speed that this information was relayed to me took me completely by surprise.*

*I was shocked, and understandably upset, and felt "numb" for the rest of the evening. I am now in a position to reflect on this event and make preparations for this investigation, and are [sic] confident in the process Navy has available.*

*However you also need to know that to date no information pertaining to the substance of this complaint has been made available to me, and given the seriousness of the accusation and my intention to seek legal representation, I ask that this information be made available to me at the earliest available opportunity, preferably prior to the close of business today.*

*Thank you for your support and advice."*

[14] Mr French took paid stress leave on 1 June 2006.

[15] On 2 June 2006, at Mr French's request, he meet with Mr Edwards and tendered his resignation. His resignation was not connected to the complaint. Mr French was accompanied by a support person. During this meeting Mr Edwards advised Mr French that the written complaint had not yet been received and that he expected to have it by 6 June 2006.

[16] Later that day Mr Edwards and Mr French meet informally on the base. The conversation turned to the complaint. During the course of this conversation Mr Edwards said he was unsure of his ongoing role and Mr French expressed his concern that he had this complaint hanging over his head and that it had taken the shine off his new position. Mr Edwards acknowledged Mr French's concerns and apologised for the circumstances. He then arranged for the complainant to be advised that Mr French had resigned and whether in light of this she wished to proceed with the investigation.

[17] On 6 June Mr Edwards spoke with the complainant and she advised she would not proceed with the complaint given Mr French's resignation. He understood she conveyed this information to Commander Dean's HR Advisor. Mr Edwards left messages advising Mr French that the complaint had been withdrawn and spoke with him the following day. During this conversation Mr Edwards apologised to Mr French for what he had been put through.

[18] Notwithstanding the complainant's advice to Mr Edwards, the written complaint was lodged with Commander Dean on 6 June 2006. With the complainant's agreement, the written complaint was locked in Commander Dean's desk drawer prior to her departure overseas on duty from 6 to 16 June 2006. I understand the complaint was locked in Commander Dean's drawer because the complainant was in two minds as to whether or not to proceed with her complaint.

[19] On Friday 9 June 2006 Mr French spoke with Capt Holmes' Complaints Administrator and advised her that he had been advised by Mr Edwards that the complaint was not going ahead. The Complaints Administrator then contacted the complainant who advised she had written the complaint and forwarded it to Commander Dean. Capt Holmes was advised of this on either Monday 13 or Tuesday 14 June and meet with Mr French on Monday 19 June 2006 to advise that the complaint intended to continue with her complaint when Commander Dean returned from duty.

[20] On 22 June the written complaint was received by Capt. Holmes's office. An email was sent to Mr French that same day advising the complaint had been received, that mediation was not an option and that a copy of the complaint and details of the investigation process would be provided to him. Also on 22 June a minute was sent to Mr French formally advising of the complaint, that it would be investigated, the names of the two investigators and enclosing a copy of the complaint. Mr French meet with the EAP counsellor for the second time that day.

[21] On 27 June 2006 Mr French wrote to Capt Holmes:

*"As you are aware, on 29 May 06, I was informed by Don Edwards of the presence of an allegation, and that this allegation would proceed to a formal investigation through NZDF Complaints Process.*

*Reference A formally notifies me of that process.*

*However on 07 June 06, Don Edwards, informed me that this allegation has been retracted. I asked for this to be placed in writing and was advised that this was unnecessary.*

*According to DFO 08/2004, Civilian Management Delegations, "CDF is the employing authority of Civil Staff under the defence Act, and as such managers should be mindful they represent CDF making management decisions."*

*Therefore, I request clarification as to why the NZDF informed me that the allegation was retracted, only subsequently to change its mind. The initial complaint placed me under significant stress and its retraction and subsequent reinstatement has enhanced the anxiety I am experiencing. I am left with serious concerns as to the intention behind the reintroduction of the complaint. These concerns have been heightened by advice that this process is to be finalized by Friday which leads me to conclude that the intention is to rush the process at the risk of me, that little if any consideration will be given to my defence.*

*Before I respond to the complaint I would like these procedural concerns answered in writing."*

[22] Capt. Holmes meet with Mr French and his support person on 27 June to discuss Mr French's concerns about the process. Capt. Holmes told Mr French that his office (Capt. Holmes') was the owner of the complaint process that Mr French had been advised of this and accordingly Mr Edwards was not authorised to communicate the retraction of the complaint.

[23] On 29 June 2006 Capt Holmes replied to Mr French's letter 27 June 2006:

*"1. Further to your letter (Ref A) advising of your concerns and seeking clarification on communications made to you regarding an allegation of harassment. I confirm my advice to you, at a meeting in my office on 29 May 06 that, as CO PHL I am the process owner of complaints in the Naval Support Command and as such it is my responsibility, and mine alone, to take any and all action in relation to complaints. Although I was made aware of the complaint at that meeting, this did not occur until 22 Jun 06; consequently you received written notification of the complaint on 23 Jun 06.*

*2. I was unsure of the advice given to you retracting the complaint and am currently investigating the source of that information. I will advise you of the outcome shortly.*

*3. I can assure you that the Harassment Investigation is not being undertaken to attribute blame but rather to establish facts and resolve issues for all parties concerned. Furthermore, there is no intention to rush the investigation process it was just anticipated that the investigators would be able to interview you prior to your leaving in order not to cause disruption to your new employment."*

[24] Mr French's employment with NZDF ended on 30 June 2006. The investigation into the complaint continued. Mr French was interviewed by the investigators on 29 June 2006 and provided with five weeks to comment on the investigators report from 14 August 2006. Capt.

Holmes then issued a decision on 20 October 2006 in which he criticised both Mr French and the complainant for their behaviour towards one another and, what he described as, the intractable positions they had taken in their professional relationships. The complainant, who was still employed by NZDF, was required to undertake management training to avoid a recurrence of this type of problem in the future.

[25] Mr French's concerns were also further investigated. Capt Holmes provided a further reply to Mr French's 25 July 2006 letter on 27 June 2006:

*"Further to my minute to you dated 29 June 2006 at reference A I reiterate my previous advice that as the Commanding Officer PHILOMEL I am the process owner of harassment and normal complaints in the Naval Support Command and as such it remains my responsibility to close off the various stages of the NZDF complaint process, after any such complaints have been brought to my attention.*

*I have now completed my investigation into the circumstances relating to you being misinformed regarding an apparent retraction of the related complaint. Your manager did attempt to resolve the situation separately to the actual complaint process, which was already in motion and being handled by my office. He was working in your best interests to resolve the situation quickly, however it is acknowledged that his efforts caused some confusion and misunderstanding.*

*The information that the allegation had been withdrawn was provided in good faith, but had it been a managed through my office, you would have been informed that official confirmation was required from the complainant's line manager, who apparently had the complaint in writing in her S.I.C files whilst overseas on a short Tour of Duty. We were unable to proceed in concluding or proceeding with the harassment complaint process until the line manager's return, which my staff and I repeatedly advised you both verbally and by email.*

*Consequently, I believe this provides the redress you required and identified where the confusion arose.*

*I trust the above answers all the concerns noted in your letter dated 27 June 2006 and we can now consider this aspect of the related harassment complaint process closed."*

## **Discussion**

[26] The following sections of the Employment Relations Act 2000 are the appropriate statutory provisions under which the Authority must consider a claim of unjustified action causing disadvantage in employment:

***"103 Personal grievance***

*(1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim-*

...

*(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;*

...

**103A Test of justification**

*For the purposes of section 103(1)...(b), the question of whether... an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred."*

[27] For a personal grievance to be established under this head it must be established that unjustified actions of the employer disadvantaged the employee in his or her employment. What is justified requires a consideration of the employer's actions against an objective assessment of fairness and reasonableness in those particular circumstances.

[28] Mr French says the NZDF unjustifiably escalated the complaint to a formal investigation process by failing to follow its own procedure when it commenced an investigation without a written complaint. He is particularly critical that Commander Dean's HR Advisor should have become involved in the early stages of the complaint by supporting the complainant on her visit to the Human Rights Commission and placing the telephone call to him from Mr Edwards to set up the 29 May meeting. Mr French's criticism is twofold; first that the HR Advisor is not a trained Anti Harassment Advisor ("AHA") as promulgated by the NZDF Discrimination and Harassment policy<sup>1</sup> and therefore should not have had any dealing with complaints of that nature and second that she was his colleague and that it was humiliating for him that she was involved.

[29] The NZDF Discrimination and Harassment policy does not limit the provision of support or information to complainants to AHAs. Clause 27.75 refers to a number of categories of personnel who may advise or assist or be involved in the investigation of such a complaint; commanders, managers, AHAs, chaplains, psychologists, social services staff and personnel in the chain of command. It seems sensible and practical that the nominated HR Advisor for an area should provide assistance and information to a complainant of harassment. This is anticipated by the policy. While I accept Mr French would feel embarrassed that a complaint of this nature was known to a colleague that knowledge was entirely justifiable given her position in the organisation. No grounds for an unjustified action causing disadvantage arise from the HR Advisor's involvement in the complaint.

[30] Were the preliminary inquiries justified? Mr French was never made aware of the detail of the preliminary inquiries made by Mr Edwards because they were not relevant to the investigation which was eventually carried out. Mr Edwards said he spoke with the complainant, witnesses to the Tuesday incident and employees with knowledge of the

relationship between Mr French and the complainant to ascertain the genuineness of the complaint. Given the nature of the complaint and Mr Edwards knowledge of the history of the relationship these inquiries were reasonable. Further, given Mr French's position in the organisation it would have been inappropriate and unfair to him if the matter had not been drawn to his attention and Mr Edwards had not taken any steps to test the genuineness of the complaint. Mr Edwards' conclusions as to those preliminary inquiries could have been put more delicately to Mr French, however given the circumstances I find those inquiries were justified. There is no suggestion that these preliminary inquiries predetermined or influenced the final outcome.

[31] Mr French is critical of the constitution of the meeting of Friday 29 May 2006. He says he was not told what the meeting was about or given an opportunity to have a representative present. He says the information provided at the meeting was distressing and shocking.

[32] At the meeting Mr French was not required to answer any questions and was not provided with any detail of the allegations. I find the purpose of the meeting was to advise Mr French that a serious allegation had been made and to outline the process for managing the allegation. While it is not ideal that Mr French was not supported at the meeting or advised of its purpose, there is no evidence that he was disadvantaged as a consequence of these procedural infelicities. This finding is further supported by Mr French's letter of 31 May which expresses his confidence in the NZDF process having had an opportunity to consider the information provided on 29 May 2006.

[33] Mr French has concerns about the timeliness of the written complaint being drawn to his attention. The evidence shows the lodging of the complaint was determined by the complainant and was beyond the control of NZDF. Given the nature of the complaint and the necessary sensitivity with which such matters must be handled, I cannot see that there was anything NZDF could have done to move the receipt of the written complaint along in a more timely manner. No unjustified actions arise from the provision of the written complaint.

[34] Mr Edwards' advice to Mr French of the retraction of the complaint seems to me a very unfortunate consequence of the complainant's tergiversation. There was no evidence to suggest Mr Edwards received the complainant's advice that she had withdrawn her complaint in anything but good faith and that he passed the information to Mr French in the same spirit. To establish a personal grievance on this ground there would have to be evidence that Mr Edwards' actions were unjustified. There is no evidence to support such a finding.

[35] Mr French's concerns about the findings of the investigation inquiry fall outside the

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<sup>1</sup> Defense Force Order DFO 4, Ch 27 "Prevention and Management of Discrimination and harassment in the New

boundaries of section 103(1)(b). The findings were reached after the employment relationship ended. It follows that there can be no finding that the employee's employment was disadvantaged when the employment did not exist at the time the alleged disadvantage arose.

### **Determination**

[36] For the above reasons I find Mr French was not unjustifiably disadvantaged in his employment with NZDF.

### **Costs**

[37] Costs are reserved. I would indicate to the parties that given the nature of the employment relationship problem I am minded to let costs lie where they fall.

Marija Urlich

Member, Employment Relations Authority