

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 189
5429629

BETWEEN SANDRA MARX
 Applicant

AND SOUTHERN CROSS CAMPUS
 BOARD OF TRUSTEES
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Laura Cole, Counsel for the Respondent

Submissions: 30 May 2017 from the Respondent and 8 June 2017
 from the Applicant

Determination: 3 July 2017

THIRD DETERMINATION OF THE AUTHORITY

A. The application of Sandra Marx in this matter is dismissed without further investigation. Mrs Marx failed to properly participate in the procedure set for the Authority investigation so it could not reasonably progress. She may now elect to challenge this determination and ask the Employment Court to hear and decide her personal grievance claim.

B. Costs are reserved.

[1] This determination explains why a personal grievance application has been dismissed without the Authority completing an investigation of the applicant's claims and how that situation came to be.

[2] Sandra Marx's application has already been the subject of two earlier determinations of the Employment Relations Authority and three decisions of the Employment Court. A preliminary determination, issued on 1 October 2015, found

Mrs Marx could pursue her claim of unjustified dismissal and one claim of unjustified disadvantage but the Authority did not have jurisdiction to investigate some other alleged disadvantage grievances or, as it was sought out of time, to impose a penalty.¹ The Employment Court dismissed a challenge to that preliminary determination on 10 June 2016.² The Court also dismissed an application for a rehearing of its decision on 27 January 2017.³

[3] On 4 April 2017 I dismissed an application from Mrs Marx for my recusal from further investigation of her claim in the Authority.⁴ By letter of 22 March 2017 Mrs Marx had asked the Authority to proceed with its investigation but when sent information about a case management conference to make arrangements for that investigation she sought a change of the investigating member. She did so because she remained dissatisfied with the preliminary determination of 1 October 2015 which had since been confirmed by two decisions of the Court. In the 4 April 2017 determination dismissing the recusal application I encouraged the parties to co-operate in the Authority's continuation of its investigation of the two claims that the Court's decisions had confirmed the Authority could go ahead and investigate. I also referred to the following observation made by Employment Court Judge Inglis in her 27 January decision:

During the course of hearing Mrs Marx made it clear that she was upset that it had been more than three years since her dismissal and her main claim has yet to be substantively investigated. I agree that it would be desirable for matters to be progressed and brought to a final conclusion. The respondent also has an obvious interest in bringing the litigation process to an end.

[4] In a decision issued on 12 May 2017 the Employment Court also ordered Mrs Marx to pay the Southern Cross Campus Board of Trustees (the Board) \$32,742 in costs for the hearings on her challenge and rehearing applications to the Court.⁵

Attempts to continue the Authority's investigation

[5] Timetable directions for an investigation meeting to be held on 12, 13 and 14 July 2017 were set during a case management conference held by telephone with Mrs Marx and counsel for the Board on 7 April 2017. Those directions included arrangements to prepare a common bundle of documents and for witness statements to

¹ *Marx v Southern Cross Campus Board of Trustees* [2015] NZERA Auckland 308.

² *Marx v Southern Cross Campus Board of Trustees* [2016] NZEmpC 71.

³ *Marx v Southern Cross Campus Board of Trustees* [2017] NZEmpC 4.

⁴ *Marx v Southern Cross Campus Board of Trustees* [2017] NZERA Auckland 99.

⁵ *Marx v Southern Cross Campus Board of Trustees* [2017] NZEmpC 54.

be lodged. A written witness statement from Mrs Marx was required by 26 May 2017 with the Board's counsel to then provide written statements from six witnesses by 16 June and Mrs Marx to have the opportunity to provide, if she wished to do so, a reply witness statement by 30 June. The conference call lasted two hours, an exceptionally long time by comparison with such calls in other Authority matters. It included comprehensive discussion with Mrs Marx and the Board's counsel about the documents, necessary witnesses and the procedure for the investigation meeting. The arrangements were set out in a Member's Minute sent to the parties.

[6] Five days later Mrs Marx wrote to the Authority advising she had decided to postpone its investigations while she lodged a complaint about what she called the recusal matter to the Minister of Justice, the Minister of Education, the Human Rights Commission and "the Labour Department" (a reference to a former government department superseded since 2012 by the Ministry of Business). Her letter was treated as an application for postponement. The Board was given an opportunity to respond. Through counsel the Board responded it would abide by any decision of the Authority on Mrs Marx's postponement application.

[7] On 26 April 2017 that application was declined. The reasons were set out in a Member's Minute. The Minute also set out the consequences Mrs Marx might face if she did not comply with the timetable directions in place for the continuation of the investigation that she had requested in March:

... If Mrs Marx does not lodge her witness statements by 26 May 2017, the Authority will need to decide whether or not to continue with its investigation of her application. One option open to the Authority in that situation would be to dismiss her application without further investigation. Effectively she would have forfeited her right to have the Authority investigate her application. The Authority investigation meeting would be cancelled, so there would be no questioning by the Authority of witnesses for the Board and no opportunity for Mrs Marx to question those witnesses as part of that event.

Dismissal of her application would be done by way of a written determination. It would be a determination of her substantive rights. A determination on substantive rights is open to challenge in the Employment Court. Mrs Marx would then have to pursue her case in the Court, if she wished to continue.

Unless there is some change in the situation before then, I will assess the situation immediately after 26 May. If Mrs Marx has not lodged her witness statement by 26 May, I will consider the dismissal option. If Mrs Marx decides earlier than 26 May that she will not lodge her witness statement, she

may advise the Authority so that the dismissal option can be considered sooner.

...

In summary, Mrs Marx now has a choice: to comply with the timetable directions of the Authority or to risk having her application dismissed without further investigation because she has not followed steps necessary to consider her claim.

[8] On 26 May Mrs Marx did lodge a 12 page document described as a “witness statement as presented by Mrs Marx and Mrs Marx litigant”. Its typewritten signature read “Mrs S C Marx/litigant and in person with God”. A two page covering letter ended with this description of the witness statement: “This is written mostly in the third person as our Faith is always expressed through the Holy Spirit, so we are two in person”.

[9] On 30 May counsel for the Board lodged a memorandum objecting to the document Mrs Marx had provided as her witness statement. The Board’s memorandum described the document Mrs Marx lodged as, at best, only vaguely touching to a very limited extent on some issues to be determined and signalling that her evidence would only become apparent at the investigation meeting. It objected to large portions of the document as inadmissible or unhelpful. It said she had not provided sufficient detail to inform the Board of her allegations so it could not respond. It submitted that the document showed Mrs Marx was unwilling to participate and fully engage in the process required to dispose of her claim and was consequently preventing the Authority from carrying out a suitable investigation. It sought a direction that her case be dismissed without further investigation by the Authority.

[10] By Member’s Minute of 1 June 2017 Mrs Marx was given an opportunity to respond to the memorandum of the Board’s counsel by 6 June. The Minute repeated the explanation given in the Minute of 26 April that if the Authority dismissed Mrs Marx’s claim that would be a determination of her substantive rights so she could then pursue her case by challenge in the Employment Court. It also noted that in her statement lodged on 26 May Mrs Marx wrote that her case “needs to be fast tracked to the Employment Court”. In her covering letter, sent with that statement, she wrote that she was “preparing a formal request ... for this case to go straight to the

Employment Court”. No removal application, in the approved form, has been received since.

[11] Mrs Marx did lodge an 18 page response to the memorandum of counsel for the Board on 8 June (but dated 8 May). She described the suggestion that her statement was inadequate and lodged purely to prevent her case being dismissed without investigation as “totally absurd”. She said the Authority’s Minute of 7 April had not required her to write a statement like a brief of evidence for court and, as seen by a brief she filed in the Court in 2016, she was “most capable of writing a brief statement with supportive evidence”. She described the request for a direction dismissing her case without further investigation as “a very conspired and contrived effort” by the Board’s counsel, the school principal and the Board’s chairperson “to avoid the serious consequences of their actions”. She said that she had already “submitted enough documents to fully inform the most intellectually challenged person on matters of her case”. In response to the Board’s suggestion that her statement lacked specificity she wrote that if the principal and chairperson:

... have not comprehended the ‘specifics’ after four years of reading all the documentation they are possibly intellectually impaired and need to resign or admit they are just playing a very sick and deadly game to save themselves.

[12] Mrs Marx also set out a proposed schedule for the Authority investigation meeting, which she said should begin with a “confession” from the Board and “move straight into remedies for the unlawful dismissal”. She considered the remainder of the investigation could then examine her allegations of bullying.

The employment relationship problem

[13] Mrs Marx was dismissed on 7 May 2013. At the time she was employed as a trainee Resource Teacher for Learning and Behaviour (RTLB) based at Southern Cross Campus (SCC), a year 1 to 13 composite school in Mangere East.

[14] The letter from the Board chairperson to Mrs Marx that advised her of her dismissal included the following summary of the reasons the Board’s discipline committee had resolved her employment should be terminated for serious misconduct:

You have failed to take reasonable instruction from your managers, you have failed to cooperate with your managers, [and] you have failed to attend important meetings with your managers and to follow the procedures the

school has outlined for all staff. These matters represent in total, serious misconduct.

The committee has determined that your employment shall be terminated as a result of your serious misconduct. The Board has no confidence that any change in your approach to your managers and to the Board of Trustees is likely to occur. The employment relationship is irreparably broken down and the Board sees that there is no action that they or the managers can take that will remedy this situation.

[15] The letter detailed the committee's conclusions on six allegations Mrs Marx had been asked to answer. In summary it concluded:

- (i) She had been uncooperative by not attending important meetings with other RTLBs she was required to attend in 2012.
- (ii) She had not attended meetings scheduled with the principal on 3 and 18 October 2012, called to discuss concerns about her performance. Part of her explanation for this was that her relationship with the principal had broken down because he was a bully, but when asked in a meeting with the disciplinary committee on 12 April 2013 to provide dates, times and other evidence to support that allegation, she refused to do so.
- (iii) She did not attend a meeting with the Board's discipline committee on 10 December 2012 but instead submitted "a box of uncollated and disorganised documents which were largely irrelevant".
- (iv) She refused to provide weekly claims for reimbursement of travel costs, required as part of a school procedure to check accuracy of claims and manage school finances.
- (v) She did not follow correct procedure to apply for leave and submitted a request for leave on 14 December 2012 after the school closed for the year. Mrs Marx told the committee she had booked her airline travel in April 2012.
- (vi) She was absent from scheduled professional development days on 23, 24 and 25 January 2013, without having obtained leave for the absence. Mrs Marx's explanation was that she had endeavoured to change her travel plans in order to return from an overseas journey before 23 January but could not do so because a blizzard resulted in the cancellation of flights out of London Heathrow airport.

[16] At the 10 December 2012 disciplinary meeting, to which Mrs Marx sent a box of documents but did not attend, the discipline committee decided to issue her with a

final written warning. It also directed her to attend a meeting with the principal and the RTLB manager before 23 January 2013 to resolve issues of concern. In a letter to the Board chairperson dated 14 December Mrs Marx said the box she left for the meeting gave “ample information ... as to why I cannot attend such a bogus meeting”. Her letter also attached a copy of a leave form. She wrote that she had not known at the time she made travel plans in April 2012 she would be required to be back at work on 23 January 2013 and it was too expensive to change dates for her flights now.

[17] As a result of the Authority’s preliminary determination in 2015 and two subsequent Employment Court decisions about the challenge to that determination Mrs Marx could pursue her claims that she was unjustifiably dismissed and that she had also earlier raised a personal grievance about being bullied by the RTLB manager and the principal. She was not entitled to pursue grievances about other alleged disadvantages.

[18] The Board’s statement in reply said the dismissal was justified. Through counsel it also accepted the Authority could investigate whether Mrs Marx had raised a personal grievance in 2012 alleging she was bullied by the principal and the RTLB manager. It did not accept concerns those two school managers raised with Mrs Marx about her conduct and performance were bullying.

How was Mrs Marx’s participation and witness statement inadequate?

[19] Against that background I have concluded the contents of the 12 page document Mrs Marx lodged as her witness statement on 26 May 2017 was an inadequate basis on which an investigation by the Authority could continue.

[20] It included many extraneous, irrelevant or derogatory comments about the school principal, the Board chairperson, the Board’s counsel, the Authority member and the Employment Court judge. It set out no coherent account of what Mrs Marx said were the facts of events or actions relevant to those elements of her claim that the Authority had jurisdiction to investigate and determine. A particularly important example of this failure related to the bullying allegation, relevant to Mrs Marx’s claim that she had raised a grievance about this issue in 2012. The Board’s counsel correctly identified that the lack of specific details of what Mrs Marx said had happened in meetings or conversations with the principal and the RTLB manager

meant the Board witnesses, including those two individuals, could not properly respond in their own witness statements to the general allegation.

[21] Part of the difficulty for Mrs Marx was that she appeared not to accept that the Authority would need to examine the account she and other witnesses gave about the facts of what happened to establish whether the Board's actions met the legal standard, set by judicial interpretation of s 103A of the Act, as being within the range of responses open to a fair and reasonable employer in all the circumstances at the time. Her statement simply said this was "sheer nonsense" and there was "no evidence put before [the Authority or the Court] that the [Board] suspended or dismissed Mrs Marx".

[22] This notion she was never suspended or dismissed by the Board was based on Mrs Marx's view that the people who made those decisions lacked authority to do so. Because she had not appeared before a full meeting of the trustees and no vote of the full membership of the board was taken before the decision to dismiss her was made, Mrs Marx considered she was never in fact dismissed by the Board. This was the foundation of her case but it faced a clear evidential hurdle. By email correspondence on 6 March 2013 the trustees had unanimously agreed to a resolution that the chairperson and one named trustee be given delegated authority to investigate misconduct complaints against Mrs Marx. The resolution expressly allowed those delegated trustees to find Mrs Marx's employment should be terminated, if a misconduct finding was made. The decisions those delegated trustees then made were made on behalf of all trustees.

[23] Mrs Marx's view on this point also infected her view of the directions given for the Authority's investigation. She did not agree with my direction that the Board need only provide witness statements from trustees who had been directly involved in her disciplinary process in 2012 and 2013, and not all trustees. Although it was made plain to Mrs Marx that she could approach other trustees and seek witness statements from them, she considered the Authority had unfairly limited the scope of questions she could ask during the investigation. As a result she focused on criticising the Authority's directions for the investigation rather than putting forward her own best evidence about what had happened.

[24] As a result of these difficulties with what Mrs Marx lodged as her witness statement I accept the Board was inadequately informed of the allegations that needed to be addressed in the witness statements scheduled to be prepared and lodged by its counsel. For example, her witness statement provided no details on what she said comprised bullying of her and of what she did to raise a grievance about it within the relevant timeframe. Rather she wrote only this about her disadvantage claim:

Through cross examination of witness (sic) and evidences (sic) provided Mrs Marx/litigant will expose to the court the bullying took place at SCC and her steps to address this. However at this stage we consider that the ERA and court have been sufficiently provided with documents that outlines areas that we will address in court.

[25] This was plainly inadequate for an investigation by the Authority and did not meet the requirements of the directions given to provide a witness statement on the issues for investigation and determination.

[26] The Authority's role is to resolve matters by establishing facts and making a determination on the substantive merits of the case, without regard to technicalities.⁶ In doing so it must comply with the principles of natural justice, act reasonably and as it thinks fit in equity and good conscience. Its powers in carrying out its investigative role include calling for evidence and following whatever procedure the Authority considers appropriate.⁷ In this case that procedure included the directions set for the investigation meeting and the provision of witness statements. Mrs Marx was put on notice of the prospects for the continuation of the Authority investigation if she failed to follow those directions.

[27] The Authority is a specialist decision-making body which, according to the objects of Part 10 of the Act, will generally conclude its investigations before any higher court exercises its jurisdiction in relation to these investigations.⁸ The word 'generally' in that provision is relevant. The Act does provide a discretionary power for the Authority to determine a matter without holding an investigation meeting.⁹ That particular discretion is normally exercised, as has happened here, after hearing from the parties about that prospect, either by oral or written submission.

⁶ Employment Relations Act 2000, s 157.

⁷ Section 160(1)(a) and (f).

⁸ Section 143(fa).

⁹ Section 174D.

[28] The Act also recognises that there will always be some cases that do require judicial intervention.¹⁰ The Act preserves access to the Employment Court’s adversarial process, by removal or by challenge, where an Authority investigation cannot meet the needs of one or more parties or one or more parties is dissatisfied without the outcome of the Authority’s determination.

[29] The approach Mrs Marx took to the Authority’s requirements for the investigation of her application has been an exception to what ‘generally’ occurs in most proceedings in the Authority. Realistically assessed the statement she lodged on 26 May indicated Mrs Marx was unwilling to properly participate in the process required to determine her claims. In the light of her dealings with the Authority since 2015, a direction to provide a better and more thorough or detailed statement was very unlikely to result in a sufficient document. The inadequate written statement she had lodged was, however, likely to result real difficulties in the Board witnesses preparing their evidence. This created a real risk that an investigation meeting could begin but then need to be adjourned and further days scheduled so those witnesses could respond to unexpected allegations or evidence that Mrs Marx intended not raising until the investigation meeting.

[30] Considering those circumstances, and the parties’ submissions, I reluctantly reached the view that the Authority could not reasonably proceed with an investigation of Mrs Marx’s claim. Rather, it was appropriate to dismiss her application, without further investigation. As a substantive determination of her rights, this automatically generated a right for Mrs Marx to elect to have her case heard and decided by the Employment Court.¹¹ It gave effect to the view Mrs Marx expressed in her 26 May statement that her case “needs to be fast tracked to the Employment Court”. She is now able to ask the Court to hear her case *de novo*, that is anew, albeit within the restrictions of the Court’s earlier decisions about what parts of her claim she could legitimately pursue. In this way her access to justice has been preserved, if she wishes to exercise it, and the Board has not unreasonably and unfairly been put to the time, effort and expense of participating in an Authority investigation for which it could not adequately prepare. The Board, however, still faces the prospect of being to the test of justifying its actions, to the statutory standard, in the adversarial forum of the Court.

¹⁰ Section 143(e).

¹¹ *H v A Limited* [2014] NZEmpC 92 at [27] and [28].

[31] It was possible Mrs Marx has a valid argument that how the Board's delegated trustees and the principal acted and what they decided, at various points in dealing with her, was not what a fair and reasonable employer could have done in all the circumstances at the time. However, despite the many pages of documents and commentary Mrs Marx had provided the Authority, it was difficult to know whether that was so because whatever substance her claims might have been buried by invective and irrelevant detail. Should Mrs Marx proceed with a challenge to this determination, the gravitas of the Court and its more stringent procedures might enable a clearer focus on the matters for decision.

Costs

[32] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority