IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 66/08
5102647

	BETWEEN	VICKI THOMSON Applicant
	AND	DISPUTE RESOLUTION SERVICES LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Jeff Goldstein, Counsel for Applicant Geoff Davenport, Counsel for Respondent
Investigation Meeting:	19 February 2008 At Christchurch
Determination:	14 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Thomson) alleges that she has been unjustifiably disadvantaged in her employment in that the Respondent employer (DRSL) has breached express terms, being clauses 9.4 and 9.5, of her employment agreement.

[2] DRSL resists that allegation by denying that it has breached those express terms, by denying as a consequence that there has been any unjustifiable action causing disadvantage and by alleging that, in the event that a personal grievance is found by the Authority, the contribution of Ms Thomson to the grievance will be found to be significant.

[3] Ms Thomson commenced employment with DRSL's predecessor in August 1993 and has worked for DRSL since July 1999 in a half time position as a reviewer.

[4] The dispute between the parties concerns the interpretation and application of the terms and conditions of Ms Thomson's employment as they pertain to her performance assessment.

[5] I note in passing that this matter has been the subject of disputation between these parties in the past; the Authority issued an earlier determination (CA78/07) in relation to an earlier dispute between these parties relating to the performance appraisal process.

[6] Clause 9 of Ms Thomson's employment agreement sets out the way in which her performance is to be measured and broadly requires an *endeavour* to arrange a meeting between the employee and the manager before 31 July in each year.

[7] No such meeting took place in the year in question despite a variety of efforts by the responsible DRSL Manager (Mr Pullen) and Ms Thomson. After a number of abortive attempts to meet earlier in July, the protagonists finally scheduled a meeting on 31 July itself and then that meeting did not proceed because of arguments about who could be present. Those arguments are frankly symptomatic of the difficulties the parties had in communicating effectively with each other.

[8] There having not been a meeting by 31 July as the relevant provision in clause 9 required, Mr Pullen then emailed to Ms Thomson his performance review assessment. This happened on 13 August 2007. This document, which Mr Pullen says was his *preliminary view* as required by clause 9.4 was signed by Mr McKellar the DRSL Chief Executive as well as by Mr Pullen. Despite Mr Pullen's evidence that this document was preliminary in nature, Ms Thomson regarded it as *her finalised performance review*.

[9] Clause 9.4, which Ms Thomson alleges was breached by DRSL reads as follows:

> *9.4 Following such review* (that is the review of the employee's performance against the standards set) *your Manager shall form a preliminary view as to your rate of remuneration for the new financial year. Your Manager will discuss this view with you prior to making a decision.*

[10] The performance review promulgated by Mr Pullen on 13 August 2007 was in some respects exceptional. On quality of decisions, productivity, and timeliness Ms Thomson was rated either outstanding or as having exceeded expectations. However, on the fourth criteria entitled *Values,* Ms Thomson was rated as having *under achieved.* The effect of the under achieving in the values component of the performance review was to drag down her total rating to simply one of *achieved*.

[11] The values component of the Performance review contained four elements namely feedback from colleagues (which rated Ms Thomson very highly), the observations of her Manager Mr Pullen (who rated Ms Thomson poorly) a self assessment which Ms Thomson had not completed because she disagreed with the criteria for assessing values and had signalled her intention not to participate, and finally feedback from customer satisfaction surveys which DRSL had not disclosed.

[12] There were then exchanges between Ms Thomson and Mr Pullen, Ms Thomson asking Mr Pullen to withdraw the performance review because he had not complied with the process and Mr Pullen refusing to withdraw his assessment and asking for Ms Thomson's feedback.

[13] Ms Thomson then invoked clause 9.5 of her employment agreement which in effect is an appeal provision. Ms Thomson indicated it would not be appropriate for Mr McKellar the Chief Executive to act on her appeal as he had already signed the disputed Performance review.

[14] Clause 9.5 is in the following terms:

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

[15] Ms Thompson says that Mr McKellar could not consider her appeal because he has already signed the disputed performance review assessment. DRSL say that Mr McKellar is the Chief Executive and the person nominated in clause 9.5 to conduct the appeal and it is not for Ms Thomson to "pick and choose" which parts of the clause she will accept and which parts she will not.

[16] DRSL then proposed that the parties attend mediation which Ms Thomson accepted and that mediation proceeded although it was not successful in resolving the employment relationship problem. On 30 August 2007 Ms Thomson raised a personal grievance.

Issues

[17] The issue about whether the email communication of 13 August 2007 containing the performance review assessment was, in truth, a preliminary view or not is the first issue that the Authority needs to determine.

[18] The second issue which the Authority will need to decide is whether DRSL has breached its obligations in respect to clause 9.5 of the applicable employment agreement.

[19] Determinations of those two issues will enable the Authority to reach a conclusion on the resolution of the employment relationship problem between these two parties.

Clause 9.4

[20] The simple question is whether DRSL has breached its obligations to Ms Thomson in terms of its application of this clause.

[21] In her evidence, Ms Thomson points to a number of aspects to DRSL's behaviour in relation to this particular clause which suggests to her that her manager has not, as the clause requires, formed *a preliminary view* at all, but in fact formed a final review and that in doing that, DRSL are in breach of their obligations.

[22] DRSL submit, in my view correctly, that it is not a matter of what Ms Thomson believed at the relevant time but a matter for the Authority to decide whether, **in fact** Mr Pullen's views were something other than the preliminary view that the clause in question, requires.

[23] While accepting that submission from DRSL's counsel, it remains appropriate for the Authority to consider what evidence Ms Thomson adduces to support her contention that these were concluded views rather than preliminary views.

[24] It is appropriate to consider each of these aspects in turn. The first is the contention that the document must be a final one because there was no meeting. In fact, although that issue was raised in Ms Thomson's evidence, in her counsel's closing submission, the point is conceded that the clause does not require a meeting to take place before a preliminary view is formed. That may well be usual but in the circumstances of this particular matter where the parties continued to talk past each other, as seems to have been the pattern with this employment relationship, it is not surprising that there was no meeting arranged.

[25] The next issue that falls for consideration is the question whether the process that was used in relation to Ms Thomson was different from the process that was used for other staff. I am satisfied on the evidence that I heard that the process was indeed different but that that was because DRSL was unable to arrange a meeting with Ms Thomson. The email exchanges between Ms Thomson and Mr Pullen are simply redolent of an unhelpful, uncooperative stance which frankly does neither of them much credit. For instance, one would have thought that Mr Pullen, who is not based in the same city that Ms Thomson is based in, would have taken the trouble, as her Manager, to find out what days she worked and to not suggest as he did on more than one occasion, that they should meet on a day when she did not work. Equally, one would have thought that Ms Thomson would have been able to communicate effectively enough with Mr Pullen such that he clearly understood when she would be available and when she would not be available.

[26] Next, there is the issue of Mr McKellar, the Chief Executive signing the performance appraisal document along with Mr Pullen. Ms Thomson alleges her colleagues did not receive a document signed by Mr Pullen and by Mr McKellar. Conversely, Mr McKellar is very clear in his evidence that he in fact signed all of the *preliminary view* documents prepared by Mr Pullen.

[27] Given that I did not hear from any of Ms Thomson's colleagues and I did hear from Mr McKellar and I was impressed with the way in which he gave his evidence, I am disposed to accept Mr McKellar's testimony that Ms Thomson is mistaken in her contention that other staff were treated differently.

[28] This view is supported by the evidence of Mr Pullen who says unequivocally that Mr McKellar *signed the performance review documents for all of the staff covered by the review process….* I am satisfied then that nothing turns on Mr McKellar's signature appearing on the performance review document.

[29] Nor am I troubled by the appearance of Mr Pullen's signature on the document either. There is an implication in Ms Thomson's evidence that because Mr Pullen had signed the document, that in itself represented somehow a final conclusion from Mr Pullen. That of course is simply not an inference that is appropriate to draw. I accept Mr Pullen's evidence that he signed the document because he stood by the comments in it; he, after all, wrote the document and he wished to indicate, by signing it, that he stood by the comments that he had recorded therein.

[30] In the final analysis, Ms Thomson's contention that the performance assessment document was a final one really flies in the face of the language and structure of the document itself. There are, as counsel for DRSL points out in his closing submission, numerous examples throughout the text of the document wherein Mr Pullen endeavours to make clear that this is only his assessment and that it requires input from Ms Thomson before it can be taken further. Perhaps the most graphic example of this is that the employee statement area of the document is completely blank for the very good reason that Ms Thomson had chosen to have no input whatever into the performance appraisal process.

[31] Furthermore, I accept Mr Pullen's contention in his evidence that Ms Thomson was fundamentally wrong headed in her assertion that his covering email of 13 August gave her two options but only if she accepted the assertion first. Having carefully assessed Mr Pullen's email, I am at a loss to understand how Ms Thomson can have read it in the way that she did; it seems

to me that a proper construction of Mr Pullen's email is that it requires response without a commitment to any particular weighting of the performance assessment. Even if the email could have somehow created the wrong impression, the plain words of the performance appraisal document that accompanied it required input from the employee.

[32] I accept the evidence of DRSL that the fundamental challenge for them was to get Ms Thomson to engage with them at all, in any meaningful way, in the process of her own assessment. She has an obligation to do that under s.4 of the Employment Relations Act and her failure to engage appropriately with her employee on the substantive issues of her performance assessment is in my judgment a breach of the good faith that ought to infuse all employment relationships and which by the effect of s.4, is a statutory obligation visited on both parties to an employment relationship.

Clause 9.5

[33] Clause 9.5 gives an employee a right to refer the matter to the chief executive for decision in the event that there is dispute about the review of performance.

[34] Ms Thomson's position is that she invoked the benefit of this clause when she believed that DRSL had failed to deal properly with her in terms of its obligations under clause 9.4 (a view which, as I have just explained, I do not agree with) but that in raising the issue of invoking clause 9.5 for her benefit, Ms Thomson also sought to exclude Mr McKellar from providing that appeal process because he was compromised, having signed the initial performance appraisal document.

[35] The position of DRSL is that by seeking to as it were "pick and choose" which bits of clause 9.5 she wished to have and which bits she did not, Ms Thomson was not in fact invoking the clause at all and it was not available to her to choose some bits and not others.

[36] In effect, what Mr Pullen says in his evidence is that Ms Thomson certainly sought a review or appeal of the DRSL position in relation to clause

9.4 but that *she did not properly invoke clause 9.5* [and she] *said that she had a dispute, but requested that it be addressed other than under the process set out in clause 9.5*.

[37] I think that is an accurate statement of what happened. There is no ability to pick and choose which bits of a clause in an employment agreement are to be complied with and which bits are not. I am absolutely satisfied that Mr McKellar did nothing wrong in signing Ms Thomson's initial performance assessment document particularly as I am satisfied that he signed everybody else's as well.

[38] It follows that I do not think clause 9.5 was properly invoked by Ms Thomson at all.

Determination

[39] I am satisfied on the balance of probabilities that Ms Thomson has no grievance in relation to the behaviour of DRSL and that therefore she is not entitled to remedies.

[40] I commend to the parties the notion that they engage with each other to try to put matters on a sounder footing with a view to developing a wholesome employment relationship which will stand the test of time. Ms Thomson is clearly a highly talented staff member who DRSL seeks to continue to employ. If the Mediation Service of the Department of Labour can assist the parties to rebuild the employment relationship, that avenue remains open.

[41] There have been a number of attempts to resolve this dispute before this determination issued. Amongst other things, DRSL made what can only be described as a handsome offer in its Statement in Reply, which if nothing else, is a sign of considerable good faith on its part.

[42] This is a continuing relationship. At the behest of Ms Thomson, the parties have now been to the Authority twice in relation to performance appraisal issues. In my considered view, in the instant case, Ms Thomson is the architect of her own misfortunes. She needs to engage with the employer

on the substance of issues rather than troubling herself with anxieties about procedure. After all, the Act requires of both parties that they are *"…active and constructive in establishing and maintaining a productive employment relationship"* and that they are *"…responsive and communicative…"* in that relationship: S4 (1A) (b) Employment Relations Act 2000.

Costs

[43] Costs are reserved.

James Crichton
Member of the Employment Relations Authority