

**Suppression of evidence from publication. Orders enclosed
At page 2 paragraphs 5 and 6.**

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Dee Anne Winterburn (Applicant)
AND The Open Polytechnic of New Zealand (Respondent)
REPRESENTATIVES Ian Hard for the Applicant
Aaron Martin for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Wellington, 16 August 2006
DATE OF DETERMINATION 18 August 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dee Anne Winterburn has applied to the Authority for **interim reinstatement** to her position as a lecturer with the Open Polytechnic of New Zealand (“The Polytechnic”). She held a specialist teaching position in the Communications section of the School of Information and Social Sciences at the Polytechnic. She was summarily dismissed from her employment on 26 June 2006 (without notice).

[2] The Respondent has opposed the application for interim reinstatement.

[3] The application, in a statement of problem with an undertaking for damages and sworn affidavit (from the Applicant), was lodged on 27 July 2006. The Respondent has co-operated in dealing with this matter urgently. The parties attended mediation on 7 August 2006 in regard to the employment relationship problem filed in the Authority. A statement in reply was lodged on 10 August 2006 and affirmed affidavits (from the Centre Manager for Social Sciences in the School of Information and Social Sciences at the Polytechnic, Dr Raymond Young, and Associate Professor

and Dean of the School of Information and Social Sciences, Dr Axel Laurs) were received from the Respondent on 14 August 2006.

[4] The Applicant swore an affidavit in reply and Mr Peter McLuskie a lecturer at the Open Polytechnic affirmed an affidavit on 15 August 2006 that is part of the proceedings. The Respondent has objected to it being produced.

Suppression of evidence

[5] By consent I have ordered that the details of medical evidence from Dr Raymond Young be suppressed from publication and restricted to the use of the parties only involved in these proceedings.

[6] Also, by consent the affidavits and documents to be used in the proceedings are suppressed from publication, except for the matters reported in the Authority's Determination. The evidence is available for the use of the parties and witnesses. The suppression order applies until the matter is fully heard. The parties understand that the Authority's Determination is a public document and able to be reported.

The facts

[7] Since October 2005 there have been a number of difficulties in the employment relationship between the Applicant and her immediate manager, Dr Raymond Young. These have involved his attempts to manage the Applicant and the Applicant's allegations about his management style; including allegations about racist conduct, bullying and harassment. The Applicant made her first complaints on 6 December 2005. The complaints were repeated by the Applicant on 23 February 2006 in an emailed to other people. The Respondent took issue with the Applicant's action. Subsequently the Applicant conceded that she should not have sent the email (page 128, notes of 2 June 2006 meeting), though she now says it was reasonable of her to send them the email as they were on the union's executive and were her support people.

[8] The Applicant was requested to substantiate and provide evidence of her allegations. She delayed her response and relied upon a change of union representative and poor advice from her union official at the time as the reasons for her delay.

[9] On 24 February 2006 the Applicant's lawyer at the time notified the Respondent of an employment relationship problem in regard to an unresolved 2006 individual performance appraisal involving the working relationship with her manager, Dr Young. No other details were provided. But some general work related outcomes were identified by the Applicant's lawyer to resolve the problem.

[10] The Applicant continued to delay her response to her allegations and the Polytechnic became concerned that she was unable to provide information in support of her complaints. She now says that her allegations were detailed in her lawyer's letters dated 24 February 2006 and 29 March 2006 and an email involving her partner, Mr Cunningham that was not produced but Mr Hard says it could be produced for the full hearing. The Applicant says she complained verbally and complained to Robyn Morete the Maori Learning Support Advisor. The Respondent has denied that the Applicant formally provided any detailed complaints to enable it to pursue an investigation.

[11] Mediation was proposed by the Respondent. In the meantime the Applicant went on sick leave from 27 February 2006, and remained on sick leave, until 22 May 2006. There was an issue about the Applicant's sick leave being paid but this was not subsequently pursued by her.

[12] Dr Young expressed concerns in a letter dated 9 March 2006 to the Polytechnic about the Applicant's allegations and the Polytechnic's decision on the method of resolving the problem in mediation (document 33, page 342). However, during this time the parties went to mediation, which was held on 20 March 2006. Following mediation the Polytechnic advised the Applicant and Dr Young that the Applicant's complaints of racial discrimination and bullying had no substance and that the complaints would not be pursued (24 March 2006). In other words, the complaints were not investigated further because the Polytechnic says there were no details provided and the complaint was not formally made. The Applicant has a very real issue with the Polytechnic not following its investigation process.

[13] On 13 April Dr Young formally complained about Ms Winterburn's conduct in regard to false allegations and her actions in disrupting the working environment (including refusing to follow instructions). He went on sick leave from 31 March 2006 to 17 April 2006. He says he took the leave because of Ms Winterburn's conduct and the effects of it on him.

[14] On 15 May the Applicant's lawyer (Ian Hard) wrote confidentially to the Polytechnic complaining about the procedure being followed by the Polytechnic in regard to her complaints of harassment, bullying and racial discrimination. He did not refer to any details involving the complaints.

[15] The Applicant was also advised in a letter dated 22 May 2006 from the Polytechnic that her complaints against her manager appeared to be in breach of the Polytechnic's Disciplinary Policy. Parts of the letter sent by the Respondent setting out the alleged breach of policy are quoted below:

"...Any other unwelcome and unreasonable behaviour that demeans and/or humiliates any person at work in a way that creates a hostile, uncomfortable or offensive work environment for that person.

Your behaviour in alleging Raymond was guilty of bullying and racial discrimination without apparent cause and/or deliberately refusing to supply information to enable Raymond to respond to them and for your complaint to be dealt with by the employer was and is regarded by Raymond as demeaning and humiliating.

He alleges you created a hostile, uncomfortable and/or offensive environment for him.

...

Raymond's letter of 13 April 2006 is attached for your information.

If this complaint is substantiated it would constitute serious misconduct under Polytechnic's disciplinary policy and may give rise to suspension with or without pay, or summary dismissal.

Your use of the Polytechnic's email resources for transmission of allegedly defamatory material would also constitute a breach of the Polytechnic's disciplinary policy. Your allegations of bullying and racial discrimination against Raymond is (sic) not true would constitute 'defamation' if they were:

- *false*
- *tend to lower Raymond in the estimation of right-thinking people*
- *without justification calculated to injure Raymond's reputation.*

By email dated 23 February 2006 at 6.23pm you published your allegations of bullying, harassment and discrimination to eight people. This email is attached.

It would also appear that if your allegations are false it is likely they would lower the reputation of Raymond in the estimation of right-thinking people and again if they are false it is hard to see any justification for them. If this complaint were substantiated it would constitute 'serious misconduct' under the Polytechnic's

disciplinary policy and may give rise to suspension with or without pay, or summary dismissal.

Furthermore your seemingly untrue allegation of bullying and racial discrimination against Raymond would seem to constitute a serious breach of the implied duty of trust, confidence and fidelity you owe to the employer and your behaviour would be likely to undermine the relationship of trust and confidence between you and the employer.

If this breach were substantiated it could also justify summary dismissal...."
(Document 47)

[16] Upon returning to work on 22 May 2006 the Applicant was required to report to Dr Laurs, instead of Dr Young. At the same time the Respondent allocated the Applicant a new office in response to her complaints about a colleague's body odour, which she says caused her nausea and depression.

[17] The Applicant and Respondent met on 2 June 2006 where for the first time she and her partner raised the issues they relied upon in regard to the allegations. The meeting was adjourned to enable Dr Laurs to make further investigations. Dr Laurs interviewed various people and prepared a disciplinary report. The Applicant was given the report and had an opportunity to respond to the report, and did so, in writing. The Applicant now says this was unfair considering its timing. Tentative conclusions were reached on the issues and the Applicant was afforded a further opportunity to comment, including on the proposed disciplinary action, before any final decision was made (document 131-142).

[18] Another meeting was held on 22 June 2006 with the same parties and their representatives and support people present. The Applicant was informed of the Respondent's decision. The Applicant was dismissed and this was confirmed by letter on 26 June 2006 (document produced by the Respondent 160 letter dated 26 June 2006). The Applicant says the dismissal was harsh and unfair.

[19] The Respondent relied upon "*unwelcome and unreasonable behaviour that demeans and/or humiliates any person at work*" and "*breached the implied duty of trust, confidence, and fidelity by making untrue allegations of bullying and racial discrimination*".

The issues

[20] The matter for determination is whether the Applicant should be reinstated to her former position on an interim basis until the substantive investigation meeting can be held?

[21] I am required to determine if there is an arguable case. Next I am required to consider if alternative remedies exist. Then I must weigh the balance of convenience to the parties and the overall justice of the situation. The above is predicated on the basis that the Applicant will be able to establish her case.

Determination

[22] The issue of an arguable case will rest on whether or not the reasons relied upon by the Respondent satisfy the grounds of serious misconduct. On the face of it the Respondent has followed a procedure that was not likely to have prejudiced the Applicant.

[23] The Respondent's conclusion was that the Applicant's unsubstantiated allegations of bullying and racial discrimination against Dr Young breached the implied term of trust and confidence. This is not a case of asserting there has been a breach of trust and confidence that should prevent the Applicant from being reinstated on an interim basis. It goes to the very heart of the employer's reasons to justify its decision to terminate her employment. The question will be whether or not a fair and reasonable employer would have reached this conclusion in all the circumstances. How the Respondent determined that there was a deliberate course of conduct and behaviour by the Applicant in making a false complaint will need some scrutiny by the Authority bearing in mind that at the very least the Respondent has relied upon the Applicant's failure to provide detail and specificity about her complaints against Dr Young. In addition, it is clear from the evidence that the Applicant did not reasonably provide details when asked, although she relies upon being given poor advice and that simply making the allegations should have been sufficient for the employer to invoke a disciplinary process.

[24] It is likely that the Respondent will be able to support its contention that the Applicant did not substantiate the allegations she made. There were underlying issues in the employment relationship about the Applicant's performance that the employer was entitled to raise with her. The Respondent is emphatic that it did not have regard to the underlying performance issues in the disciplinary process or take them into account in reaching its decision. The documents produced tend to support this.

[25] My conclusion is that the Applicant's position is likely to be very weak even though she was dismissed. The focus of the Authority's investigation will go on the employer's justification of the dismissal and not necessarily focussing on what the Applicant considers should be investigated by the Authority, including her claim that there was no investigation by the Polytechnic of her complaints. She has not raised any grievance about the employer's actions or omissions in this regard.

[26] This conclusion is supported by the background matters raised by the Applicant. They can only be used as background since some of them may be out of time for a personal grievance claim. They cannot be reactivated as grievances now (without the appropriate leave) but will be relevant as background if the matter proceeds later.

[27] The matters raised in the parties' employment relationship include: marking another student's work (allegedly favouring that student), hours of work, the use of Polytechnic time and resources for social and personal purposes, involvement with ASTE (the Applicant's union), an issue about the use of a bookcase that the Applicant was not allowed to take to another office, student feedback, and her performance and study arrangements. The issue before the Authority is about the Applicant's dismissal and whether the Respondent had grounds to say the Applicant's allegations lacked detail and specificity in regard to bullying, racial discrimination, and harassment to enable it to reasonably reach a conclusion that the Applicant's actions amounted to serious misconduct. Also, the circumstances will require some scrutiny to be given to whether or not the Respondent investigated the complaints since the Applicant has been very critical of the Respondent's investigation process. The Applicant may have genuinely felt bullied and discriminated against, and I have noted, she says she felt isolated and was not sure what to do about her feelings. She says she took advice, albeit she says now that advice was inadequate and wrong at the time not to divulge the detail of her allegations. Dr Young has denied at least two of the Applicant's allegations including bullying or acting in a racist manner at a meeting held on 17 October 2005, (some 4 months earlier than when this was actually raised with the Respondent), and the issue of whether Dr Young's decision about the use of the bookcase was racially motivated. The Applicant, in her affidavit in reply, has raised some credibility issues between her and Dr Young. She has also made an allegation that institutional racism exists in the Polytechnic when her personal grievance was raised by her lawyer on 3 July 2006 (document page 167). This allegation has also been denied by the Respondent.

[28] There is a question over whether or not reinstatement would be practicable.

[29] There is an arguable case.

[30] The next consideration for me is if any alternative remedies exist. They do in the form of reimbursement of any lost wages and compensation if the Applicant is found to be successful. Furthermore the remedy of reinstatement is not lost since it is the prime remedy. Just because it is the prime remedy it does not follow that interim reinstatement should be granted. This is especially so when the Applicant has likely contributed to the situation that has given rise to the personal grievance and where the Respondent seems to have a very strong case to justify the dismissal substantively, and procedurally, and resists reinstatement on the grounds that it will not be practicable.

[31] The balance of convenience favours the Respondent because:

- An investigation meeting will be provided to the Applicant as quickly as possible, treating the matter with some urgency. In the meantime the parties will be required to attend further mediation.
- The Respondent is an organisation that would be expected to meet any financial remedies awarded. There would appear to be no issue about any inability to pay.
- The fact that the Respondent has filled the Applicant's position on a permanent basis has no bearing. It is a problem of its own making and the Applicant should not suffer if reinstatement was later ordered. The Respondent will simply have to manage the situation.
- Ms Winterburn would likely require active management in her performance if she was returned to her position.
- The Applicant commented in an email produced that "she is unconcerned about dismissal or being an academic" (Lauris B). She made no reply to this evidence but the submission was made that she reacted with the knowledge of the likelihood of being dismissed.
- The Applicant has raised further allegations of institutional racism after her dismissal and made other allegations against two other people. They have been denied by the Respondent and the Applicant has not produced any evidence to substantiate them.

- The Applicant is only now raising some detail of what she considers amounted to inappropriate behaviour by Dr Young. For example including an allegation that Dr Young had bullied or acted in a racist manner at a meeting held on 17 October 2005, (some 4 months prior to the time she raised the matter). Also, there is an issue whether Dr Young's decision about the use of the bookcase was racially motivated as alleged by the Applicant. He has denied her allegation. There will be credibility issues on these matters if they are relevant to the dismissal.
- Dr Young's health. He, like the Applicant, has supported his circumstances with medical evidence but his circumstances have a causal linkage to his work environment that involved the Applicant.
- Workplace safety issues raised by four other staff members who found it impossible to work with the Applicant, although one of them has left. This report was made on 2 May 2006 (albeit before the Applicant returned to work on 22 May).
- The likely prospect of an escalation of tension in the work place.
- Both parties have recognised that there are difficulties in the Applicant returning to her previous position.
- The Applicant does not seek to return to the Communications section. She is looking to work in another area, of what she calls a large organisation, claiming it is the single largest employer in the "entire" Hutt Valley. There was no evidence produced of how this could be assisted. Alternatively her representative suggested putting her on "garden leave".
- The Applicant has been selective about what she has informed me about in regard to her dismissal and the documents that exist. This could very well be a factor and affect the outcome on the disputed issues.
- The Applicant's delay in activating the process for interim relief and the complete absence of any imperatives about her work and financial circumstances to assist her application. She has relied upon the lost opportunity in regard to her study. No compelling circumstances were raised on this matter.
- The Applicant left it to the Respondent to explain that she had actually been dismissed instead of putting the full details, including some documents in her application.

[32] I now turn to the justice of the matter. No issue has been raised about the availability of witnesses for a substantive investigation meeting. Alternative remedies exist that include full

consideration of reinstatement, which will not be affected by the Respondent having filled the position. The Applicant has not been able to convince me that it will be likely that her problem will give rise to a personal grievance and that reinstatement would be a strong prospect given her conduct and the reasons and grounds relied upon by the Respondent. I have also had regard to the availability of dates for a substantive investigation meeting. Dates have been offered to the parties in October but their representatives are not available on the same dates for a 2 day investigation meeting. Unless the parties' circumstances change notice will be given of an investigation meeting to be held on 5 and 6 December 2006. There is no prejudice to the Applicant given the likelihood that the practicability of the claim for reinstatement will be an issue and contribution will need to be considered.

[33] Overall the application has not been made out by the Applicant. I will not grant interim reinstatement. The application is dismissed.

[34] The parties have consented to attend further mediation and by consent I direct them to further mediation under s 159 of the Act before the full investigation meeting.

[35] Costs are reserved.

P R Stapp

Member of the Authority