

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Kathleen Joan Henderson (First Applicant)  
AND Kathleen Joan Henderson (Second Initiating party)

**AND** Unitec Institute of Technology (First Respondent)  
AND Unitec Institute of Technology (Second Responding party)

**REPRESENTATIVES** Malcolm English, Advocate for Applicant  
Emma Butcher, Counsel for Respondent

**MEMBER OF AUTHORITY** Dzintra King

**INVESTIGATION MEETING** 28 July 2005

**SUBMISSIONS RECEIVED** 8 August 2005

**DATE OF DETERMINATION** 15 September 2005

**DETERMINATION OF THE AUTHORITY**

Ms Kathleen Henderson claims that she has been unjustifiably dismissed by the respondent, Unitec Institute of Technology (“Unitec”). The respondent says the dismissal was justified. Ms Henderson initially sought reinstatement but the reinstatement claim was withdrawn. Ms Henderson was employed in 1993 as a Senior Academic staff member and was dismissed summarily on 17 June 2005 for serious misconduct.

Ms Henderson had an affair with another staff member whose wife worked at Unitec on a part-time basis. In 2003 matters came to a head when the wife discovered Ms Henderson and her husband together. The wife’s son also seems to have been involved, having taken photographs of Ms Henderson. Three people laid complaints of assault with the police. Ms Henderson subsequently had injuries treated at hospital, although they were not major. Ms Henderson subsequently also made a complaint pursuant to the Harassment Act against the wife. The parties reached an agreement about the return of the photos and what contact was to be countenanced between the parties. None of these matters was formally brought to the employer’s attention at that stage, although it appears that Ms Henderson’s superior was aware of the incident leading to the assault complaints.

Ms Henderson was upset that the wife continued to be present on Unitec premises at what she believed to be inappropriate times. She sought the assistance of Ms Glenda Grant, Unitec’s conciliator. She also involved a lawyer in trying to resolve the situation. Unitec’s response was to tell her that as a result of a reorganisation it was possible that the wife would be moved to another building and the need for contact would be minimised.

However, the wife was not moved and Ms Henderson became increasingly stressed and frustrated. This culminated in her sending two anonymous letters to the wife. The first was an email sent by the husband to Ms Henderson when they having the affair. The other letter contained a list of emails sent by the husband to Ms Henderson during the affair. Ms Henderson said she believed the wife thought she had been responsible for the affair and she sent the emails to show her that it was her husband who was doing the pursuing.

The husband and wife wrote to the employer complaining about the sending of the emails. The husband wrote:

*I am appalled that such documentation should be sent through the post. This is confirmation of my fear that Kathleen Henderson has retained and is prepared to use these emails to harm me and in particular in this instance to harm my relationship with [my wife], and this fills me with anxiety.*

...

*I also have a very real fear, that as well as the hurt she has caused me to date, that she is now attempting to provoke a response in order to rationalise further action to harm [my wife] and me.*

The wife wrote:

*I am considerably shaken and distressed by the receipt of this unwelcome mail. It is offensive to me. While I knew in general the type of emails my husband and Kathleen exchanged it is a far cry from being confronted with such explicit information....*

*I believe that Unitec's Harassment Policy and Procedures and Code of Conduct are contravened by this person's actions. Not only because they were actions against me but also because the items of mail are obviously from Unitec's mail system.*

*In placing this information before you I have considerable anxiety that I may be on the receiving end of further malicious acts, particularly those that may be triggered by my making formal complaint....*

The complaints were investigated by Ms Yvonne Hawke, the Vice President, Community pursuant to the Disciplinary Policy. Ms Hawke interviewed a number of people but did not tell Ms Henderson who she had interviewed or what had been said. The rationale for this was that the interviews had not elicited any new information. A reading of the interview notes shows that information was gleaned which may well have been helpful to Ms Henderson in putting her case to her employer, notably the interviews with Mr Birchmore and Ms Williamson. Ms Henderson had three meetings with Ms Hawke, the first unrepresented when the allegations were given to her; and represented at the second. The third meeting took place without representation and consisted in Ms Henderson being handed the letter of dismissal without any opportunity to comment on why she should not be dismissed. The dismissal was summary.

The dismissal letter stated that Unitec had found that the sending of the emails was behaviour that caused unreasonable distress to a staff member, amounted to improper use of property belonging to Unitec and to intimidation of a staff member. Unitec also found the harassment policy had been breached in that the actions involved use of written language directed at another employee which was intimidating and threatening in nature and was repeated. Ms Hawke said she did not accept the reason given by Ms Henderson, which was that the emails had been sent to show the wife that the initiative and impetus for the affair came from her husband. Ms Hawke formed the view that the explanation was "inconsistent" with the content of the emails and that sending them was clearly

going to aggravate the situation. This allegation of inconsistency was not put to Ms Henderson to answer. Neither was Ms Hawke's view that the sending of the emails was "sinister". The dismissal letter also states that Ms Henderson had had a reasonable opportunity to put her case and to explain why she should not be dismissed. Given that there were only two meetings with Ms Henderson, the first to give her the letter containing the allegations and the second a meeting with Ms Henderson and her representative to discuss the allegations; and that Ms Henderson was afforded no opportunity to say why she should not be dismissed before the letter of dismissal was read out to her at the meeting of 17 June, this is inaccurate.

The dismissal letter also states "the conduct described above is destructive of the necessary relationship of trust and confidence". This was never put to Ms Henderson and it was not explained how the behaviour destroyed that relationship.

#### Ms Henderson's Complaints to Unitec

Ms Henderson first contacted Ms Grant on 16 August 2004 shortly after an incident she found distressing, when the wife stood outside her lecture room, folded her arms and stared at her. On 18 August Ms Grant met with Ms Rebecca Ewart, the Registrar, and informed her there was an issue within the School. Ms Grant then had a meeting with Ms Bev Cullen of Human Resources on 20 August. Ms Ewart said Ms Grant told her that Ms Henderson was concerned about her safety following this incident. Ms Grant also spoke to Mr Roger Birchmore, the Head of School, on 20 August and then met with him on 23 August and again with Mr Birchmore and Ms Ewart together on 30. Ms Ewart said Ms Grant met with her and Ms Cullen "to make us aware of certain concerns held by Kate regarding her safety in the workplace."

Although Unitec insisted that Ms Henderson was required to make, and had not made, a formal complaint, the evidence runs counter to this. First of all, it is clear that the Harassment Policy does not require a formal complaint. Secondly, Ms Henderson clearly had made a formal complaint, if by that is meant a complaint in writing to an appropriate person.

On 22 September Ms Cullen and Mr Birchmore met with Ms Henderson and Ms Toni Nelson, Ms Henderson's lawyer. Ms Ewart said she understood a number of Ms Henderson's concerns were reviewed and that Ms Henderson spoke about concerns regarding her safety at work. Ms Cullen said Unitec took it very seriously. Surprisingly, Ms Ewart said "No allegations of harassment had been made by Kate to that date" yet she has said at para 3 of her brief that in mid August she was approached by Ms Grant who made her and Ms Cullen aware of safety concerns held by Ms Henderson.

On 22 September Ms Nelson wrote to Ms Ewart saying that she and her client were still waiting for a response and that the delay was perceived "as an ongoing indication of Unitec's ambivalence and disregard for her situation and her concerns". Ms Nelson stated that Ms Henderson would be off work "as a direct result of the stress and harassment she has been subjected to in the workplace". It is difficult to see how it could be claimed that Ms Henderson had not raised a formal complaint.

On 8 October Unitec received advice of a personal grievance. Ms Ewart replied on 13 October asking that full details of all instances be provided so she could ensure the matter was dealt with in accordance with the Harassment Policy.

On 18 October a letter of reply was sent by Ms Cullen to Ms Nelson's letter. Ms Cullen said:

*In your letter you have stated generally your feelings about your safety at work and outline alleged incidents during 2004, on the part of [the wife], which you believe to be in breach*

*of the agreement into which you have entered with [the wife]. I am not aware of the terms of this agreement. It would appear that this agreement relates to the settlement of private matter between yourself and [the wife]. In such circumstances I do not believe that it would be appropriate for Unitec to have any involvement in enforcing an agreement entered into by two staff members in their private capacity unless this is a legal requirement.*

*If you believe that you have been or are being harassed then you should report the matter in accordance with Unitec's Harassment Policy to enable the appropriate action to be taken.*

On 27 October Ms Nelson replied saying that Ms Henderson's perception was that she has been very much the victim of harassment and callous disregard by Unitec. She went on to say that Ms Henderson wanted to continue as a full time employee "subject to her being satisfied that the harassment she complains of has been investigated and addressed, and that Unitec are able to provide her with a safe working environment". Ms Nelson noted that "the general tenor of the response received from you of 18 October is that these grievances are none of Unitec's business." She stated that Ms Henderson maintained there had been harassment and that in an attempt to resolve the problem Ms Henderson wanted a constructive proposal as to how her concerns could be addressed. Ms Nelson added: "Clearly, a key issue is to ensure that [the wife] is not put in a position where she can continue to harass Ms Henderson".

Ms Henderson said that Unitec kept telling her it was not a Unitec problem and, looking at the emails and reading the evidence, it is very clear that this was Unitec's stance. This was in marked contrast to the action taken when the husband and wife complained of harassment.

Ms Ewart said that after discussion Ms Henderson decided that dredging up the past was not a desirable course of action and that it would be better to look to the future. In this regard, Ms Henderson's concern was with the wife's ongoing presence which made her feel uncomfortable and unsafe Ms Ewart was aware that the administration of examinations was to be centralised and that that might be a solution as the wife's office was likely to be moved to another building. She made it clear this could not be guaranteed but that she would look into it and keep Ms Henderson informed.

Ms Henderson emailed Ms Ewart saying she wanted an acknowledgement that the wife had harassed her which Unitec declined to give.

At a meeting with Mr Birchmore and Ms Ewart and Ms Henderson on 23 November it was agreed that Ms Henderson was to be provided with a computer and an internet connection so she could work from home and the moving of the wife was also discussed.

Ms Henderson had expected that the move would have taken place by the time she returned to work in 2005 but it had not. She made a number of enquiries about the timeframe for this. A promised meeting to deal with the matter on 20 January did not take place. Ms Hawke and Ms Ewart were at pains to say that the move had not been promised and that it was a separate matter from Ms Henderson's concerns. The upshot of that is that Ms Henderson's concerns were not being dealt with. If the move that might have largely resolved the problem could not take place or was not taking place sufficiently swiftly there were other mechanisms that Unitec could have put in place. While there appear to have been some desultory discussions with the wife nothing formal was ever put in place as to how and when the two women would relate in the workplace. It was what Ms Henderson perceived as inaction by Unitec – and quite rightly so – that precipitated the unfortunate episode of the sending of the emails. As late as 12 February 2005 Ms Henderson emailed saying she felt that Unitec was not providing her with a safe work environment.

### Was the Dismissal Justified?

This was obviously a highly emotionally charged situation for all three participants and upsetting for all three people. What was initially a private matter ultimately made clear inroads into the workplace when the relationships between the three deteriorated and began to impact on the workplace.

Unitec could not say that Ms Henderson's concerns were to be dealt with outside Unitec and then proceed to deal with the harassment complaints differently. Ms Hawke said that Unitec saw Ms Henderson's complaint as being a complaint about the wife's presence and not a harassment complaint. The complaint about the amount of time the wife was spending on Unitec premises related to Ms Henderson's feeling that she was there excessively in order to harass and intimidate her by her presence. Ms Hawke's interview notes with Ms Grant indicate Ms Hawke saying: "What I'm hearing - Kate's feeling of being unsafe is valid from her perspective". Ms Grant also disclosed that Ms Henderson had had two biopsies recently and that that would have been stressful.

It was unfortunate, and foolish of Ms Henderson, not to include a note explaining why she was ending the emails. That may well have lessened the anxiety created by their receipt. However, I think it ill behoves the husband to complain about the receipt of material created by him resulting from a situation created by him. To categorise the sending of the emails as "threatening" and "intimidating" is, objectively, an overstatement. According to the Concise Oxford to threaten is to "announce one's intention to do an undesirable or unexpected thing; to give warning of the inflection of (harm etc)". To intimidate is to frighten. The sending of the emails anonymously did exacerbate an already unpleasant situation and was most unwise.

There are varying degrees of misconduct and it is only serious misconduct that can justify termination of employment. Such actions must be ones which cause a loss of trust and confidence in the employee. As set out in North Island Wholesale Groceries Ltd v Hewin (1982) ERNZ Sel Cas 27, 36 (CA) this means not a loss of confidence in the employee's nous or competence but a loss of confidence in the employee's faithfulness.

While it was misconduct it was not of a sufficiently serious nature to fall within the ambit of serious misconduct. The email sending also has to be considered in the context of Unitec's failure to act to address Ms Henderson's concerns about the degree of time spent by the wife on Unitec premises; and the purpose for which she might have been there. It is a great pity that despite having a Harassment Policy and Procedures Unitec did not look at using those procedures to deal with this matter.

Unitec cannot say that there was a misuse of Unitec's property. The emails were no more the property of Unitec than a letter delivered to a staff member using Unitec's address or the contents of a handbag left in a Unitec desk drawer could become the property of Unitec. Under certain circumstances Unitec may well have the right to inspect all emails, letters received or handbag contents but that does not make those the property of Unitec any more than the act of leaving a car parked in a Unitec car park renders that car the property of Unitec.

Furthermore, the dismissal was procedurally unfair. Ms Henderson had asked that certain material be looked at and it was not; she was not given access to the interview notes and an opportunity to comment on them. She was not able to comment on the view that the sending of the emails was inconsistent with their content or that it was sinister. Finally, she was informed of the dismissal without an opportunity to comment on it.

Ms Henderson was unjustifiably dismissed.

### Remedies

When I heard the closing submissions there was a dispute as to whether or not I could hear certain material. I indicated that if I were to make a finding that there had been an unjustifiable dismissal it might be appropriate for the contested material to be put before another Authority Member. Before taking that course of action, I think it would be sensible for the parties to return to mediation and attempt to resolve the issue of remedies. If this is unsuccessful the applicant should let me know and I will organise a conference call with both parties.

### Backdating of Salary Increase

This issue was raised during the course of the hearing. Unitec offered a salary increase to Ms Henderson contingent upon her acceptance of that offer by a particular date. Unitec says no acceptance was received by the due date. Ms Henderson says she signed it and sent it but that for some reason it was not received by Unitec. The copy of the signed letter of offer produced by Ms Henderson has the date of 15 April on it, which is odd, given that the letter of offer is dated 20 May and acceptance was required by 30 May. There was evidence that Unitec sometimes chased up people who had not returned offers by the due date and Mr English submitted that Ms Henderson should be paid the amount of the increase. From a strictly contractual point of view I accept that Unitec did not receive Ms Henderson's acceptance and is therefore under no obligation to pay the amount of the increase. However, it may be that this issue can be a negotiating point when remedies are being considered.

### Costs

Costs were reserved. I will leave this matter in abeyance until I hear whether the parties have been successful in resolving the issue of remedies. It would also be sensible for the parties to see whether they can resolve any costs issues.

Dzintra King  
Member of Employment Relations Authority