Determination Number: WA 140/06
File Number: 5030767

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Martin Lally (applicant)
AND	The Vice-Chancellor Victoria University of Wellington (respondent)
REPRESENTATIVES	Philip Bartlett for the applicant Derek Broadmore for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 19 September 2006
SUBMISSIONS RECEIVED	2, 9 & 16 October 2006
DATE OF DETERMINATION	18 October 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Dr Lally seeks resolution of his personal grievance arising from a formal warning issued to him on behalf of the University for alleged misconduct – statement of problem received on 8 May 2006. He asks for a finding that he has not acted in breach of the University's Policy on Staff Conduct and costs.

2. The University says its written warning to the respondent was fully justified and commensurate with the seriousness of his actions – statement in reply received on 25 May.

3. Mediation did not resolve this employment relationship problem.

4. In a telephone conference on 8 June the parties agreed to, if necessary, a two-day investigation in Wellington starting on 19 September. As it happened only one day was required. The parties usefully supplied witness statements and bundles of documents in advance of the investigation.

5. Efforts to settle the problem during and after the investigation were unsuccessful.

Background

6. I am satisfied that the following is an accurate summary of key facts and events.

7. Dr Lally has been employed by the University on its academic staff since 1980 and currently holds the position of Associate Professor in the School of Economics and Finance.

8. On 21 December 2005 Dr Lally wrote, by email, to the Vice-Chancellor, Professor Pat Walsh, regarding a disciplinary process in which Dr Lally had been involved as a support person for another employee. The email took specific issue with the University's process, describing those aspects as deficient. The email was also copied to, *"an address book of about 200 people, mostly NZ academics"* (page 2, respondent's bundle).

9. By letter dated 16 January (page 4, above), the Vice-Chancellor responded to Dr Lally's communication. Professor Walsh expressed his concern that Dr Lally had copied his email to an address book of about 200 people. While acknowledging the applicant's *"right to criticise or raise concerns about an internal employment process … I expect you to do this in a reasonable way"* (above). In particular, the Vice-Chancellor expressed his view that there was *"no justification for publicly criticising an*

internal disciplinary process before you had even given the Director, Human Resources, an opportunity to respond to your concerns" (above).

10. The Vice-Chancellor's letter concluded with the following:

> *"In my view, your email was motivated by an intention to bring the University into disrepute, and may have breached the implied duty of good faith and fidelity that you owe to the University.*
>
> *The University has processes in place to deal with matters such as the complaints raised in your email and I expect you to use them in the future. Accordingly,* ***you are instructed not to disclose information about University related matters to other staff or external contacts where such disclosure is intended, or could reasonably be interpreted as being intended, to bring the University into disrepute****. You should be aware that if you breach this instruction then disciplinary action could follow."*
>
> (emphasis added)

11. On 18 January Dr Lally sent a number of emails to the University, including one to the Vice-Chancellor challenging his instruction. He once again copied his emails to *"… an address book (around 200 people, mostly NZ academics)"* (page 6, above). One of those emails incorporated the Vice-Chancellor's instruction of 16 January.

12. Predictably, by letter dated 19 January the University advised it was commencing disciplinary proceedings against Dr Lally. At issue initially were the applicant's three emails of 18 January and the respondent's concerns they were in breach of the Vice-Chancellor's instruction of 16 January. The University identified Dr Lally's actions as a potential breach of clause 4.2.10(n) and/or 4.2.10(j) of its Policy on Staff conduct (the Policy).

13. Like other communications between the parties during this disciplinary process, Dr Lally also copied the 19 January advice of disciplinary proceedings to his address book.

14. In a letter dated 24 January the University referred to two other emails copied by Dr Lally to his email address book and advised that they also were the subject of its disciplinary process.

15. Shortly afterward, Dr Lally agreed to the University's invitation to meet with its representative, as part of its disciplinary investigation, provided the meeting was convened in a lecture theatre, so as to accommodate what Dr Lally described as *"the wide public interest in the matter"* (page 30, above). As it happened, the University declined to do so and no face to face meeting eventuated between the parties before the respondent completed its disciplinary investigation.

16. By way of an 8-page letter dated 3 February, the University advised Dr Lally of its findings, in particular that his:

> *… copying the emails concerning your concerns about the particular process and generic disciplinary process without taking these up with the University first are likely to suggest to outsiders that the University does not have or does not enforce the common requirement of most organisations that concerns about internal processes are raised internally first.*
>
> (The University considers) *that either perception … is likely to bring the University into disrepute.* (The University) *therefore decides that these actions by you constitute misconduct.*
>
> (page 57, above)

17. In determining what consequences should attach to Dr Lally's misconduct, the University advised it had had regard to an agreement between the parties reached in 2000, the Vice-Chancellor's letter of 16 January, the absence of any apparent serious ongoing consequences for the University arising out of the applicant's actions and the possibility Dr Lally did not appreciate the limits to the notion of academic freedom. Dr Lally's views were sought.

18. Dr Lally communicated his response to the University's letter of 3 February by email dated 7 February: it attached the respondent's advice of 3 February. Like most if not all of the exchanges of correspondence, it also was copied to an

address book of around 200 people, etc. Dr Lally continued thereafter to communicate with his address book, advising of the progress of his employment relationship problem.

19. The applicant was subsequently issued with a formal warning for 12-months against repetition of the same misconduct. He was advised that failure to comply could lead to a final written warning and/or possibly dismissal (letter of 10 February 2006, page 82, above).

Parties' Positions

Respondent's Argument

20. In a submission received on 9 October the University advanced several arguments including the claim that this is an uncomplicated matter that should not be confused by the applicant's unnecessarily semantic approach (e.g. paras 14-17 inclusive). No one disputes the applicant is entitled to raise concerns with the University about its processes, and to seek the views from others at an appropriate time. But it was the failure of Dr Lally to give the University a genuine opportunity to respond, and the contemptuous manner in which he raised his concerns, that led to the common sense instruction from the Vice Chancellor.

21. It is important that the matter be kept in perspective: Dr Lally has not been dismissed but instead has received a mild sanction in the form of a written warning issued as a result of his deliberate and provocative breaches of an instruction from the Vice Chancellor.

22. Whereas the University could not ignore the applicant's behaviour in these circumstances, this matter could be described as trivial and the proceedings issued by the applicant as an overreaction. While the Vice Chancellor chose not to embark on a disciplinary process as a consequence of the applicant's initial email (because – as he said in his evidence – he did not want to over react), he did wish to send a clear message to Dr Lally that he had overstepped the mark on this occasion. It was the latter who failed to pursue internal means of resolution despite an earlier mediated settlement that clearly placed the applicant on notice

of the requirement to do so, and who elected instead to make a defiant and aggressive public response.

23. Because of his actions Dr Lally caused considerable distress to other staff.

24. The instruction set out by the Vice Chancellor in his letter dated 16 January 2006 was lawful and reasonable. Read as a whole it clearly states the University's requirement that staff raise issues through internal channels before making public comment. The instruction is consistent with its Policy on Staff Conduct (clause 4.2.10). Employees have obligations to their employer in relation to public comment, in particular that they must not undermine the implied duty of trust and confidence, and that they must raise issues of concern internally before going public: *Hobbs* v *North Shore City Council* [1992] 1 ERNZ 32, Schedule 1B Clause 14 of the Employment Relations Act 2000, etc.

25. The argument that Dr Lally has been placed in a different position from other staff does not bear scrutiny as it ignores the prior actions of the applicant that gave rise to the instruction. The Vice Chancellor could and would likely have given the same instruction to other staff that behaved in the same way, or give a different instruction to another that does not apply to Dr Lally – this is the nature of tailored instructions.

26. The instruction was not inconsistent with the prior acceptance of similar emails from Dr Lally because, as was made clear in the investigation, those emails related to matters already in the public domain.

27. There is no evidence to support the claim Dr Lally is being treated differently than other staff. It is anyway submitted as a general proposition that it is usually matters that are already public that form the basis of critical comment in the media.

28. The University does not accept that Dr Lally complied with the instruction by first raising matters with the University before going public, during an unrelated disciplinary meeting.

29. The primary purpose of requiring staff to raise matters through internal channels before making public comment is to allow for a considered response, further discussion if appropriate and, ideally, an agreed resolution. The requirements of good faith in an employment relationship require nothing less.

30. The claim that the instruction was issued without a proper process preceding it is being raised for the first time. The instruction any way did not involve a disciplinary process and nor was it a disciplinary outcome: in the circumstances the Vice Chancellor was fully entitled to issue the instruction in the manner he did.

31. Dr Lally breached the instruction on a number of occasions, as he copied his emails without exception to his address book, in an open defiance of the Vice Chancellor's instruction and with provocative language. The University's attempts to obtain an explanation from the applicant, in respect of the allegation that his disclosure of 18 January was intended, or could reasonably be interpreted as being intended, to bring the University into disrepute, were repeatedly declined by Dr Lally's failure to cooperate. Nowhere in his correspondence does Dr Lally address the issue of his intention or otherwise to bring the University into disrepute. The University was obliged to decide that question on the information it had before it, without the benefit of being able to discuss the matter with the applicant. Because of the language he employed, the University reject Dr Lally's claim he was seeking debate on the issues he had raised.

32. The nature of the matters raised in Dr Lally's emails, and their language and tone, amply demonstrate the applicant's intention to belittle the University. From the correspondence, a reader would likely conclude the University had inadequate or unfair disciplinary procedures, that it was heavy handed and that its staff was incompetent.

33. There is no validity in the applicant's claim, that in sending out the emails to his address book, he was acting within the scope of academic freedom. That is because, consistent with s. 161 of the Education Act 1989, in general academic freedom is primarily exercised within the sphere of expertise of academic staff. Its purpose is to allow experts in their particular fields to state views in areas where they have expertise over and above that of the public. Academic freedom involves

a corresponding responsibility and is not to be interpreted as equivalent to uninhibited licence: *Rigg* v *University of Waikato* [1984] 1 NZLR 149. Dr Lally is an economist and has no expertise in the field of human resources or employment law. Pursuant to his employment agreement, and the implied duty of trust and confidence, the applicant has an obligation to fully raise his concerns about the disciplinary process with the University before going public. Any public comment should be made in a manner that did not jeopardise the employment relationship, by not bringing the University into disrepute.

34. The University's process was fair, full and careful, and its conclusions were set out in a reasoned, justified decision.

Applicant's Argument

35. In submissions received on 2 & 16 October, Counsel for Dr Lally, Mr Philip Bartlett, set out his client's position. Amongst other arguments he proposed that the first issue was whether the instruction issued by the respondent on 16 January was lawful and reasonable? By way of an answer, the applicant argued that a lawful instruction must not be illegal, that it must be within the scope of an employee's contractual obligation and that it not demand the performance of an impossible or dangerous task: *Wellington's Clerical Workers' Union* v *College Group Limited* [1984] ACJ 315.

36. Professor Walsh's instruction was not legal as it was contrary to clause 4.2.10 (j) of the Policy, failed to comply with clause 4.4.2 of the Policy, omitted reference to the significant exemption in respect of academic freedom, was extraordinarily wide-reaching, placed the applicant under a perpetual, and probably an individualised, restraint, that applied for the maximum permissible period, invoked the possibility of dismissal, and was inconsistent with previous reactions to Dr Lally's criticisms of internal processes and to criticisms of internal processes by other staff members.

37. The second issue is, was the instruction breached? Dr Lally says it was not. This is because, as explained to the University, the purpose of the disclosure was to generate interest in a significant University process. Drawing conclusions about a

person's motivations are difficult. No reasons have been provided by the respondent for rejecting Dr Lally's explanation; but it wrongly asserted no explanation was offered.

38. Third, were the issues first raised internally, with the appropriate person? The applicant says, notwithstanding the University's apparent application of a range of tests in respect of the first requirement, that - by putting relevant matters to the respondent's in-house solicitor – he complied with the University's requirement. Matters were raised in such a way that, as the evidence makes clear, the University was able to make both case-specific and generic responses to the applicant's concerns. It is inconceivable the University could have considered Dr Lally's concerns as set out in his email of 21 December without considering in turn its general practices. Dr Lally says he also met the Vice-Chancellor's requirement as to the appropriate person.

39. Fourth, did Dr Lally bring the University into disrepute or was likely to have done so? The University itself concedes if faces no serious ongoing consequences (page 69, par 32 (c)). The University has failed to identify any material disrepute as a result of Dr Lally's actions or that his actions were likely to suggest to outsiders that it did not have or did not enforce common requirements that such matters are first raised internally. The University's conclusion is therefore untenable, particularly as some of Dr Lally's communications specifically refer to its processes. Furthermore, the claim of a common requirement is overstating the law: *Lowe* v *Tararua District Council* [1994] 1 ERNZ 887, distinguishes between rules of polite behaviour and those of law or binding practice.

40. Those instances of employees being held to have been justifiably disciplined for making public comments to the perceived detriment of their employer are distinguishable with Dr Lally's situation: e.g. *Poole* v *Horticulture and Food Research Institute* [2002] 2 ERNZ 869. That case makes reference (par 207) to freedom of communication requiring a balancing of rights and interests and that there is a *"spectrum"* of situations reflecting, amongst other things, the nature of the employer's enterprise and the position of the employee.

41. Section 161 (3) (a) of the Education Act 1989 makes clear that the University, as a public sector body with public accountabilities, is subject to the need for the maintenance of the highest ethical standards, including by way of public scrutiny. University staff are guaranteed freedom of academic expression (refer to the University's own Policy) including criticisms that are reasoned and fair: *Rigg* (above). Dr Lally's email correspondence to his address book is protected by that concept as his arguments are clearly and elaborately reasoned and include the University's replies.

42. No issue of Dr Lally's actions upsetting a staff member arises as the applicant has never been confronted with any such disciplinary charge.

43. Dr Lally signed a settlement agreement with the University in 2000. Clause (d) of the agreement states that the University,

> *… accepts that academic staff have the right to make critical comments in good faith about matters of public interest, but does expect that staff will make every attempt to resolve any internal dispute internally before going public.*

(page 53, above)

44. By first raising matters internally Dr Lally met any requirement set out in the 2000 agreement.

45. Is the matter significant? Dr Lally says the formal warning is not trivial. It is a blemish on his standing within the University community. It raises risks to him in respect of future events including the possibility of dismissal. The applicant is entitled to challenge that warning. The subject matter of Dr Lally's critical emails for which he was disciplined relates to the fair and impartial treatment of staff employed in the public sector and could not fairly be seen to be trivial. Because of the unconvincing basis of the University's decision to discipline him, Dr Lally's grievance cannot be regarded as hopeless or trivial.

46. Dr Lally's decision to challenge the warning is not disproportionate, as alleged by the University. There have been countless cases in employment law of employees challenging formal warnings.

47. The Employment Courts decision of *Hobbs* (above) cannot be relied on as it is a case confined to its own facts. Similarly the Code of Good Faith for the public health sector relates to a unique position and involves considerations that do not apply to universities (including issues of allocation of pubic funding, patient confidentiality, etc).

48. There is no common law duty as argued by the respondent. Good faith is an irrelevant concept in this context as those matters specified in s. 4(4) of the Act are not relevant in this case.

49. The instruction amounts to a form of disguised disciplinary action.

50. It is the University that has throughout adopted an overly sensitive attitude toward criticism.

51. *Rigg* (above) makes clear that academic freedom extends to all aspects of university affairs, so long as any criticisms are fair and reasoned.

52. Dr Lally seeks a ruling that the warning issued to him on 10 February 2006 is unjustifiable; compensation is not sought but costs are.

Discussion and Findings

53. I find that, whereas a great deal of Dr Lally's grievance related to the subsequent disciplinary action, the matter at issue is the justifiability of the respondent's letter of 10 February 2006. I am satisfied that the University has been properly advised from the outset of the nature of the overall employment relationship problem.

54. 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 action occurred – s. 103A of the Act.

55. At issue here is whether the instruction issued by the University on 10 February 2006 was what a fair and reasonable employer would have issued in all the circumstances at the time. Dr Lally says it was not fair and reasonable. He also says he did not breach the instruction, that his comments were reasonable, that they are protected or covered by academic freedom, and that they did not bring the University into disrepute (statement of problem).

56. I find that the University's instruction of 10 February was not lawful. That is because I am satisfied that, in the absence of a prior investigation but instead in reliance on various mistaken findings or conclusions, it was not fairly and reasonably open to the respondent to conclude that the copying of the applicant's email of 21 December 2005 to his address book was unreasonable. Without an investigation it was not open to the University to reach the view that Dr Lally's actions were without justification. Without an investigation, it was not open to the University to conclude that the applicant had not given the Director, Human Resources an opportunity, first, to respond, and that his email of 21 December was motivated by an intention to bring the University into disrepute.

57. Without a proper investigation, including an opportunity for the applicant to address the respondent's concerns, the Vice Chancellor was not in an adequate position to conclude that the applicant may have breached the implied duty of good faith and fidelity owed to the University, and to proceed from that error to issue disciplinary instructions to Dr Lally

58. As Professor Walsh had no specific basis or grounds on which to instruct Dr Lally to not disclose University related matters where such disclosure was intended or could be interpreted as intending to bring the respondent into disrepute, it follows that the University's subsequent disciplinary findings set out in its letter of 3 February 2006 – reliant as they are on the original, but unjustifiable, instruction of 16 January – must be set aside.

Contributory Fault

59. Section 124 of the Act requires the Authority to consider the extent to which the actions of the employee contributed towards the situation that gave rise to their personal grievance and, if required, reduce the remedies accordingly.

60. I take no pleasure in finding that Dr Lally contributed significantly to the University's error resulting in his grievance. This is because of the content of his communications to the University, their tone and because of Dr Lally's practice of copying, apparently at all stages and in their entirety, most of the communications between himself and his employer to his note book.

61. I do not accept Dr Lally's claim that his practice is an exercise of academic freedom and an attempt to draw informed comment from those listed in his note book (for example, so that they might correct any misconceptions or errors he may have). Dr Lally's stance is not credible. I find that an informed but disinterested observer would inevitably conclude that Dr Lally's communications were not constructive nor intended to improve understanding, but served instead to impose his views.

62. Dr Lally's practice, his comments, and the tone of his commentary are gratuitous and non-constructive. Those shortcomings are made worse by the agreement signed off by Dr Lally and the University on 31 January 2000. It provided that, amongst other things, while the University accepted the right of academic staff to make critical comment in good faith about matters of public interest it also expected *"that staff will make every attempt to resolve any internal dispute internally before going public"* (par 43 above). Dr Lally's view of that part of the agreement is instructive: during the investigation he described it as applying to the University only and not to himself. That is too clever by half: while his view is literally correct it is clearly not reflective of the spirit of the settlement. It is a view consistent with the tone of Dr Lally's communications. Dr Lally has, I find, less than a balanced view of the University's obligation to himself in contrast to his sense of obligation to the University.

63. Parties to an employment relationship must deal with each other in good faith: s. 4 of the Act. Without limiting that obligation, they must also, whether directly or indirectly, not do anything to mislead or deceive each other. The duty of good faith also requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship, in which they are to be responsive and communicative: Dr Lally's conduct has fallen short of those requirements.

Outcome

64. As sought by the applicant, the warning issued to Dr Lally on 10 February 2006 is unjustifiable.

65. As no remedy is sought no reduction is applicable. However, this is a case in which I would have no hesitation in otherwise applying 100% contributory fault.

Determination

66. For the reasons set out above, I am satisfied that the applicant, Dr Martin Lally, was unjustifiably disadvantaged by the respondent, the Vice-Chancellor of Victoria University of Wellington.

67. At the request of the parties costs are reserved. I ask that, should it be necessary, any submissions on costs address the matter of why they should not be left to lie where they fall.

Denis Asher
Member of Employment Relations Authority