

**Attention is drawn to the order
prohibiting publication of certain
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 25 /08
5088521

BETWEEN

JOHN JESSOP
Applicant

AND

CHIEF EXECUTIVE OF THE
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Karen Spackman and Jennifer Jones for Respondent

Investigation Meeting: 2 November 2007 at Auckland

Determination: 30 January 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant seeks a finding that he has been unjustifiably disadvantaged by how his manager dealt with a complaint about him from another employee. His manager found there was insufficient evidence to warrant further inquiry into the complaint but decided the Applicant should be provided with feedback about some staff perceptions of his management style. The Applicant considers that he was disadvantaged by his manager not interviewing him before making that decision and then by his manager subsequently expressing critical views to the Applicant and two other employees about the Applicant's management style.

[2] In reply the Respondent denies there has been any disadvantage to the Applicant. Rather the Respondent says his manager acted as a fair and reasonable employer's representative would by considering the complaint, conducting an informal fact finding inquiry, and while deciding no formal inquiry was warranted, reasonably provided "feedback" to the Applicant in the form of "information" about some staff perceptions.

The investigation

[3] The parties did not resolve this problem in prior mediation. To assist the Authority's investigation, two written witness statements were lodged – one from the Applicant and one from his manager, the Waitemata Area Manager for the Respondent's Community Probation and Psychological Services (CPPS), Alastair Riach. Also provided were relevant documents including some of the Respondent's operating policies, various meeting notes, work reports and documents from the Applicant's personnel file such as his regular performance reviews.

[4] During the investigation meeting the witnesses answered questions from the Authority and additional questions put by both parties. The Applicant and Respondent counsel provided oral closing arguments.

[5] This determination does not record all the evidence provided in statements, documents and answers to questions or all the arguments given in submissions from the parties, but all that material and the relevant case law has been carefully considered in preparing it.

Order prohibiting publication

[6] I record here the order made orally at the start of the investigation meeting prohibiting publication of any names or other identifying details of any offenders or former offenders referred to in the statements, the background documents and the oral evidence given in this matter.

[7] That order does not extend to the names of employees of the Respondent referred to in evidence. However for the purposes of this determination there is no

need to include the names of those employees in a way that would identify them publicly, particularly as they did not give evidence or have the opportunity to comment on references made to them in the evidence I received. For that reason, where it is necessary to refer to another employee's name, this determination uses their initials only. I consider further steps to attempt to completely anonymise those individuals would be artificial in respect of the particular workplace as I expect most staff will likely know who is being referred to in any event.

The facts

[8] The CPPS monitors offenders on community-based sentences or on release from prison, provides the courts with pre-sentence reports on offenders, and carries out assessments for the Parole Board.

[9] The Applicant is one of eight service managers reporting to Mr Riach. In that role the Applicant manages a team of six probation officers and an administrator. The team's work largely comprises supervision of offenders on home detention.

[10] In January 2007 Mr Riach received a complaint from an employee in the Applicant's team. I refer to her as Ms HJ. Her complaint was that the Applicant had bullied her and she wanted something done about it. In a meeting with Mr Riach, Ms HJ provided a three page document summarising her account of events since being assigned to the Applicant's team. She was not willing to sign a complaint against the Applicant or agree to a copy of her summary being provided to him.

[11] The next day Mr Riach advised the Applicant that Ms HJ had made a complaint of bullying against him. The Applicant was about to go on leave but asked Mr Riach for a formal investigation to be conducted as this was a serious allegation. Mr Riach replied that he did not know if there was enough evidence to warrant an investigation but said he would look into it while the Applicant was on leave.

[12] Mr Riach began what he describes as an initial fact finding inquiry. He met again with Ms HJ seeking further information and checked written records regarding offenders mentioned in her summary of events. He concluded that the written material showed nothing that could be construed as bullying and decided to ask other

staff about interactions between Ms HJ and the Applicant and the context of events she mentioned. Ms HJ was asked to suggest other staff that Mr Riach could talk to who might be able to substantiate her allegations. She suggested eight staff, who either at the time or previously worked with the Applicant.

[13] Mr Riach then individually telephoned or met with six of the suggested staff. He asked each of them whether they had observed any bullying in the office and for comments on how the Applicant treated staff.

[14] One of these employees criticised how he was treated by the Applicant but took up a suggestion from Mr Riach that he talk to the Applicant about his concerns and subsequently told Mr Riach that those concerns had been resolved satisfactorily.

[15] Mr Riach says that from those interviews he concluded “*that there was no-one who could give concrete examples of [Ms HJ] being bullied by [the Applicant]. Therefore, I decided that there would be no formal employment investigation undertaken in regard to her complaint.*”

[16] However he says that he was concerned “*that four of [the Applicant]’s staff, past and present, had commented that they felt unsupported and had a loss of self esteem while working for [the Applicant]*”. He considered this was “*information*” that needed to be raised with the Applicant.

[17] He then met with Ms HJ and told her there were “*no specific instances of bullying*” that had come from his interview of other staff but “*there were common themes in the information provided*”. Mr Riach told her there would be no formal employment investigation but that he would speak with the Applicant to give him “*feedback*” and work with him regarding his “*professional development and managerial style*”.

[18] Meeting on 12 February 2007, shortly after the Applicant returned from leave, Mr Riach says he told the Applicant:

... there was no evidence of bullying behaviour, but that there were common themes among those who we talked to regarding his management style. In particular, some staff felt undermined,

unsupported and overly criticised, and that [the Applicant] needed to work on giving team members feedback that makes them feel supported.

[19] The next day the Applicant sent Mr Riach an email advising of concerns regarding Mr Riach's inquiry and conclusions. He asked for details of the allegations made and copies of notes of interviews with employees.

[20] By an email in reply Mr Riach agreed to provide the material requested and made the following comment:

In general I want to reiterate to you that the feedback I gave you yesterday was about the pattern some people reported about how they have felt receiving feedback from you or observing you give it to others. I think that as your manager I am obliged to give you that feedback and for us to work on any areas of professional or managerial development which arise.

[21] Around this time Mr Riach also answered an email query from another employee, Ms LL, whom he had interviewed as part of his inquiry. She was also aware of Ms HJ's complaint and wanted to know why there was to be no formal employment investigation. Ms LL's email and Mr Riach's reply were subsequently provided to the Applicant. Mr Riach told Ms LL that he had given the Applicant "*the feedback I received from several people in general terms*" and that "*providing open and direct feedback [was] most likely to result in changed behaviour*".

[22] On 26 February Mr Riach met again with the Applicant and provided a written summary of his inquiry regarding Ms HJ's complaint.

[23] Under the heading "Basis for decision making" this summary included this comment:

This was the first instance of an allegation of bullying against [the Applicant] that I was aware of, certainly during my time as his manager. My feedback to [the Applicant] over the years has included comment on his occasionally blunt or intractable communication to other managers but not bullying.

[24] He summarised what he called "*common themes of complaint*" about the Applicant from Ms HJ and the other six staff spoken to as being:

- *Lack of positive feedback or an imbalance weighted towards negative feedback.*
- *Feeling unsupported resulting in a loss of confidence or self esteem.*
- *A sense that other staff were treated differently, in regard to time spent or quality of interaction.*

[25] Under the heading “Action required” he stated:

My decision was that as [the Applicant]’s manager I must give him feedback regarding the complaint and the information I had received during the fact finding. The common themes of complaint that I had identified should be acted on by him as part of his ongoing professional and managerial development.

...

I consider that the principal area of development for [the Applicant] to focus on is in giving feedback to staff in a supportive manner that encourages growth and potential within the role. Other staff have said [the Applicant] already does this ... [The Applicant] will need to consider what he has done differently with the people I spoke to and how he can adapt his managerial style to still give feedback where required but in a manner that promotes a positive and supportive environment. I think addressing that issue will address the issue that was reported of staff sensing favouritism.

[26] The Applicant prepared an 18 page type-written response to Mr Riach’s summary. The response comprised a detailed critique of Mr Riach’s actions, the content of staff comments (as set out in Mr Riach’s notes of his conversations with them) and the conclusions that Mr Riach reached regarding the so-call “common themes of complaint”. The Applicant’s concerns were that:

- (i) the background to staff comments had not been investigated; and
- (ii) Mr Riach’s conclusions amounted to “*a clear censure*” about the Applicant’s style of management and an “*inference*” that the Applicant had behaved unprofessionally; and
- (iii) That the feedback to Ms HJ and Ms LL would be seen as “*a partial vindication*” of Ms HJ’s complaint; and
- (iv) Mr Riach’s conclusions were reached without giving the Applicant the opportunity to comment on statements made by interviewed staff and without speaking to other employees who would have provided “*a more balanced perspective*”.

[27] Mr Riach’s response to this critique was a four-page letter from which I highlight the following statements:

I want to make it clear that I was giving you feedback about your management style. I was not taking any sort of disciplinary action against you. I don't believe that I have treated you unfairly as all I was doing was bringing things to your attention which I had become aware of. It is my responsibility as your manager to do this. ... I made it clear that you are considered a good and valued service manager. I made it equally clear that giving and accepting feedback by my managers is a normal expectation.

...
I accept your criticism that the response to [Ms HJ] and [Ms LL] could have been later to allow you to comment on the preliminary fact finding exercise first. I apologise for that. The reason I didn't give you that opportunity was because I did not think it was necessary as I had decided that an employment investigation was not required.

...
Further to the feedback I have given you so far, it is important that I point out that it is an expectation in the Department's performance management of managers that they accept constructive criticism without being defensive. They are also required to create an environment of open communication. I accept that it is your right to request details from the fact finding I completed and for you to respond to my summary. However, upon receiving this response, you now need to accept my feedback as your manager and take some actions.

The law

[28] As described in *Mason v Health Waikato* [1998] 1 ERNZ 84, 97 (EC) there is a two-step test to establish a disadvantage grievance under what is now s103(1)(b) of the Employment Relations Act 2000 ("the Act"). Firstly, whether the employer's actions or conduct disadvantaged the Applicant in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified? That second step regarding justification is now answered, under s103A of the Act, on an objective basis in response to the question of whether the disadvantageous action was what a fair and reasonable employer would have done in all the circumstances at the time of the action.

[29] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If the employer establishes justification for its disadvantageous actions, there is no grievance: *Mc Cosh v National Bank* (unreported, EC AC49/04, 13 September 2004).

[30] Disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the employee's

employment, considering the effect of the employer's action on what Goddard CJ in *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452, 457 called the “total environment” of the employment and includes “de facto disadvantage”.

[31] However, while an employee may feel distressed and resentful about circumstances and events in her workplace, “a personal grievance claim [for disadvantage] depends upon an act or omission by an employer having disadvantageous consequences to the employee and not merely the employee's subjective dissatisfaction at her circumstances”: *Bilkey v Imagepac Partners* (unreported, AC 65/02, 7 October 2000) at [33].

[32] For the purposes of the present matter, I accept that a manager (as the relevant employee is in this case) could be disadvantaged by an employer forming conclusions that include negative or critical inferences from information gathered before allowing the manager to comment on that information. Similarly a manager could be disadvantaged by an employer telling other employees that the manager's work (or management style) needed to be improved, without first having heard from that manager. Neither circumstance appears consistent with the employer's duty of trust, confidence and fair dealing.

[33] Both set of circumstances could give rise to the disadvantageous consequence of undermining the manager's standing and reputation with the staff reporting to him or her.

[34] This disadvantageous consequence may seem as slight as the “sense of injustice” considered part of the loss of status, and therefore disadvantage, by the Employment Court in *New Zealand Shipwrights Union v G N Hale & Son Ltd* [[1991](#) [3 ERNZ 931](#)] at 935, but may nevertheless be *de facto* a disadvantage to that manager in the total environment of his or her employment.

The issues

[35] The following issues arise for resolution in this matter:

- (i) Did all or some Mr Riach's actions in dealing with Ms HJ's complaint and his subsequent dealings with the Applicant, cause the Applicant any disadvantage?
- (ii) If any of Mr Riach's actions did cause the Applicant disadvantage, were those actions unjustified?
- (iii) If there were any unjustified actions, what is the appropriate remedy?

Discussion

Disadvantage

[36] I accept that the Applicant suffered a disadvantage caused by some of Mr Riach's actions while inquiring into and deciding on Ms HJ's complaint.

[37] The disadvantageous consequences of these actions include the Applicant's sense of injustice and the potential effect on his standing with some staff which may have a real effect on his authority and effectiveness as a manager in his work environment. While I accept there is a real disadvantage arising from those actions, I also accept the Respondent's submissions that if there were such a disadvantage, there was no tangible evidence of the extent of its effects or consequences. The Applicant accepted that it was difficult to produce hard evidence or quantify any lasting effect but referred in his oral closing submissions to "*the taint that these allegations [of bullying and favouritism] were made and I've never been cleared of them*".

[38] It is however no more than that "*taint*". As the Respondent's evidence showed, and I do not take the Applicant to have contested, there has been no other effect of the Applicant's employment situation or conditions since these events. He has not been subject to any disciplinary action. He has had satisfactory performance reviews conducted by Mr Riach and has been awarded salary increases. His duties and responsibilities have not been diminished and his job is no less secure.

Justification

[39] I am satisfied that the disadvantage suffered by the Applicant arose from three specific actions by Mr Riach that were not, I find, justified. These actions were:

- (i) asking only Ms HJ to suggest further staff to talk to and talking with 6 out of the 8 staff she suggested; and
- (ii) on the basis of the “perception” of those staff, deciding that the Applicant needed to be told to improve his style of management, before first giving the Applicant the opportunity to comment on the circumstances giving rise to those perceptions; and
- (iii) telling Ms HJ and Ms LL that changes would be recommended to the Applicant when he had not yet fairly had the opportunity to make comments which could affect Mr Riach’s assessment of what changes might be necessary or desirable.

[40] Each action was inconsistent with the employer’s general duty of trust, confidence and fair dealing.

[41] I do not accept the effective thrust of the Respondent’s submissions that the preliminary nature of Mr Riach’s inquiries lowered the standards of fairness required. His own evidence was that there were other staff he could have spoken but did not do so because he knew they would respond favourably about the Applicant. He subsequently formed what an objective observer must see as a negative inference about the quality of the Applicant’s management without giving him a fair opportunity to influence that assessment, which was particularly unfair in reliance on surveying only staff those suggested by Ms HJ. Such a skewed sample would have suggested to a fair and reasonable employer that extra caution should be taken in coming to a view on any necessary action. And that extra caution would be exercised at least by allowing the Applicant to comment first before recommendations for change were made to him and before telling complainants that a process of requiring change by the Applicant would be implemented.

[42] However I do not accept that Mr Riach’s subsequent actions were unjustified. Once the Applicant raised his concerns, Mr Riach properly provided the background material on which his views were based and gave a detailed explanation of his inquiry and conclusions. He then considered the Applicant’s detailed critique and came to, I accept, a considered conclusion that took proper account of the Applicant’s

comments. That included Mr Riach accepting the Applicant's criticism and apologising to him for the premature response given to Ms HJ and Ms LL.

[43] I accept, on the basis of the information available to me, that a fair and reasonable employer would have been entitled to reach the conclusion that Mr Riach did arising from his inquiry into Ms HJ's complaint – that there was no need for any formal investigation under the Respondent's employment procedures but the relevant manager, the Applicant, should be advised how some staff felt about their experience of working under his direction. Mr Riach considered, correctly in my view, that this was information that should be communicated to the Applicant. He also, as a matter of management prerogative, decided that the existence of such perceptions showed that the Applicant needed to undertake some professional development training to more effectively communicate with those of his staff who needed feedback on improving their work. I do not find that to be an unjustified action in all the circumstances at the time. Neither was it a finding by Mr Riach that the Applicant had been wrong in providing any negative feedback or criticism he may have given to some staff. Rather it was a proper measure intended to assist the Applicant's increased effectiveness as a manager to deal with some employee's subjective perceptions, without suggesting the views of those staff were necessarily objectively correct.

Determination

[44] For the reasons discussed above, the employment relationship problem is resolved by the following findings in respect of the Applicant's claim.

[45] The Applicant suffered a disadvantage that was unjustified because Mr Riach's failed to seek and consider the Applicant's comments on the content of some staff interviews before forming a conclusion about them and what actions might be required, and because Mr Riach informed two employees of his conclusions before hearing from the Applicant.

[46] The Respondent's subsequently apologised for those failures and provided fair and reasonable opportunity for the Applicant to comment on the information gathered and the conclusions reached. The Respondent's decision not to change its conclusions

that the Applicant needed to work on developing on how his manner could be perceived by some staff is a decision that, I accept, was not unjustified in all the circumstances at the time. It was one a fair and reasonable employer would have made.

[47] Accordingly I find that the Applicant has a personal grievance for unjustified disadvantage for part of his claim. He did not seek any monetary remedies but rather wanted an “acknowledgement” and an apology. An apology is not a remedy that the Authority can award but I note that by letter of 2 April 2007 Mr Riach has already provided an acknowledgement and apology on what have now been found to be two unjustified actions. Through this determination, that is now in the public domain. That, with the findings made here, are all that is required by way of remedy in the circumstances of this case .

Costs

[48] The Applicant sought costs of \$480, relating to representation in some meetings with his manager. The Respondent’s reply and submissions do not appear to have touched on any question of costs. In light of the partial success of each party and the context of the ongoing employment relationship, costs are likely best to lie where they fall. If either party has a contrary view and wishes to have the Authority determine any question of costs, they may apply within 28 days of the date of this determination for a timetable to be set for lodging of memoranda on costs.

Robin Arthur
Member of the Employment Relations Authority