

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 300/09  
5131016

BETWEEN                      GLENYS RUSSELL  
   Applicant

AND                              VICE CHANCELLOR OF THE  
   UNIVERSITY OF  
   AUCKLAND  
   Respondent

Member of Authority:      Dzintra King

Representatives:            John Woodhouse, Counsel for Applicant  
   David France, Counsel for Respondent

Investigation Meeting:     22 and 23 April 2009 at Auckland

Submissions Received      14 May and 10 June 2009 from Applicant  
   3 June 2009 from Respondent

Determination:              25 August 2009

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**DETERMINATION OF THE AUTHORITY**

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**EMPLOYMENT RELATIONSHIP PROBLEM**

[1]     The applicant, Ms Glenys Russell says that she has been unjustifiably dismissed by the respondent, the Vice Chancellor of the University of Auckland (“the University”). Ms Russell was employed as an office administrator in the University Law School commencing in this role on 7 February 2006. She was dismissed for poor performance on 11 February 2008.

[2]     Ms Ada Marama is the Faculty Registrar in the School of Law. Ms Russell reported to Ms Marama but was supervised on a daily basis by the Office Manager, Ms Christine Calvelo.

[3] Part of Ms Russell's responsibilities entailed the preparation of exam papers. Ms Marama gave evidence about the process for the preparation of exam papers. Papers were typed and then checked by a designated exam paper checker who in most instances was Ms Calvelo.

[4] Ms Marama said experience showed that a paper could be produced from a first iteration after the electronic text had been supplied by the examiner. The performance issue that arose with Ms Russell related to problems with exam paper production.

### **Professor Harris Complaint**

[5] On 23 February 2006 Ms Marama received a complaint from Professor Bruce Harris regarding papers that Ms Russell had prepared for him. Professor Harris had already checked the initial draft and noted the corrections and his concern was that Ms Russell was introducing new errors in later and revised drafts. He also complained about formatting and tabulation errors. He asked for his work to be given to someone else.

[6] On 2 March Ms Marama and Ms Russell met to discuss the concerns. Ms Russell says she was instructed to attend CPD (Continuing Professional Development), word processing courses. I find that she agreed to attend.

### **Exam Paper Concerns Semester One 2006**

[7] On 15 and 16 May 2006 Ms Marama met with Ms Calvelo to discuss concerns with Ms Russell's draft exam papers as she had repeatedly made basic formatting errors; and also regarding the slow turnaround on exam papers for Law 427, which was overdue.

[8] Ms Marama advised key administration staff involved in the exam paper process that she would be checking exam papers for the remainder of the week in addition to the review by Ms Calvelo.

[9] On 17 May Ms Marama checked five of Ms Russell's draft exam papers and identified errors in these. She met with Ms Russell later that afternoon to discuss the errors and suggested that Ms Russell complete Law 427 first. Ms Marama said she expected it would not take more than twenty minutes to amend the paper.

[10] On 18 May Ms Marama received a phone call from the Law 427 examiner asking where the paper was as she had submitted it for formatting eleven days ago. Expected turnaround was two days. She went to see Ms Russell about the status of the paper and asked her where her exam papers were at. MS Russell became tearful and said that Ms Marama was putting her under pressure. She said she had five papers and was becoming confused and was ready to hand in her resignation.

[11] Ms Marama reallocated Ms Russell's papers so they could be completed as a priority.

[12] Later that afternoon Ms Marama emailed Ms Russell asking for a meeting asking her to bring another staff member if she did not feel comfortable with Ms Marama alone.

[13] Ms Marama met with Ms Russell later that day to discuss the incident that had occurred that morning as well as the preparation of the exam papers generally and the corrections to Law 427 specifically. Ms Marama explained that it was important that Ms Russell was able to manage the potential work load. Ms Russell's response was to say *"do you want me to resign Ava, do you want me to resign. I am sick of this."* Ms Marama explained that she understood that Ms Russell was not coping with her current exam work load which was why she had removed the exam papers and associated future typing load from Ms Russell.

[14] Ms Russell and Ms Marama then agreed on a plan whereby Ms Calvelo would act as gate keeper and give Ms Russell one paper at a time to type and format. Two other staff members were brought in to assist.

### **Meeting 7 June 2006**

[15] On 7 June 2006 after the completion of the preparation of exam papers for semester one, Ms Marama met with Ms Russell to explain her expectations in light of the recent exam period and the upcoming semester two exam work load. Ms Marama discussed the exam typing production schedule which had been prepared by Ms Calvelo with Ms Russell and outlined the issues regarding her performance in terms of recurring errors, against what Ms Marama expected. Ms Russell again became upset, refused to acknowledge there were any performance concerns to be addressed and again asked if Ms Marama wanted her to resign.

[16] Ms Marama told her that HR would need to become involved given that the attempt to resolve things informally had not worked.

[17] Ms Marama told her the whole purpose of the meeting had been to discuss an improvement plan and the timeframe in which that was to happen.

### **First Formal Performance Management Stage**

[18] On 9 June 2006 Ms Marama wrote to Ms Russell detailing the issues with her performance and asking her to attend a meeting pursuant to the University's disciplinary procedures on 13 June 2006. On 12 June Ms Russell responded in a letter stating that the performance concerns raised were "*totally unfounded, untrue and unsubstantiated.*" She complained about Ms Marama's treatment of her and advised that she reserved the right to take personal grievance proceedings.

[19] On 23 June the first formal meeting was held, attended by Ms Russell, Mr Don McLennan, her representative, Ms Marama and Ms Cathersides. The University's view was that there was no recognition or acceptance of the issues that were being raised. Mr MacLennan asserted that the performance concerns outlined by the University were due to lack of functionality between Mac and PC computers and denied some of the documentation in question had been prepared by Ms Russell. Mr MacLennan said he would provide a full written response to issues and it was agreed that the parties would meet again in ten days. However, no response was received until 28 July 2006.

[20] Ms Cathersides spoke to Mr Bruce Robinson, the Law Faculty IT Manager, regarding the explanation about the lack of functionality between Macs and PCs. Mr Robinson's view was that this explanation was implausible. Mr Robinson also confirmed that the documentation had been prepared by Ms Russell on her computer.

[21] The issue regarding the list is an example of one of Ms Russell's approaches to complaints being raised: denial. Ms Russell said the 2005 schedule discussed was not her work because she had not been employed in 2005. However, the reason it was dated 2005 was simply that Ms Russell had not changed the date to 2006. The document in question was a list of 2006 Public Law students. Ms Russell said that she was suspicious as to the authenticity of the schedule tables after the first disciplinary meeting as it was unlikely that she would have made so many errors as she was the most experienced exam typist. She was also suspicious that the draft

exam papers presented at meetings were not her work and may have been tampered with as they “*contained other errors inconsistent with my word processing discipline*”.

[22] Another approach was to say the mistakes were minor and inconsequential.

[23] Not having heard from Mr McLennan, Ms Cathersides wrote to Ms Russell asking for a written response to the concerns that had been raised on 23 June. A written response from Mr MacLennan was provided on 28 July. Mr MacLennan said he believed “*disciplinary action has been essentially the result of a personal conflict between the parties*” referring to Ms Marama and Ms Russell. Mr MacLennan simply denied the allegations against Ms Russell and suggested that she report to someone else, that meetings between her and Ms Marama be attended by a third party, that she approach another employee when she required clarification and that Ms Marama desist from verbal attacks. Mr MacLennan suggested there was “*an atmosphere of persuasive angry management at the Faculty*” and “*a culture of controlled aggression is adopted to achieve outcomes.*”

[24] Ms Marama said that throughout the performance management period Mr McLennan advised Ms Russell not to attend meetings at which Ms Marama gave exam preparation instructions. Ms Marama did provide email instructions. It was not sensible for Ms Russell to withdraw from meetings which provided instruction in an area she was having difficulty with.

### **1 August 2006 Meeting**

[25] The parties met to give Ms Russell a further opportunity to explain her response to performance issues, which related to file management, use of tabs, indenting and failure to use spell check. It was agreed there would always be somebody present in future when any meetings between Ms Marama and Ms Russell were held.

### **8 August – First Written Warning**

[26] The University issued a letter of warning stating that while Ms Russell’s copy typing skills were “*satisfactory*” she did “*not have the necessary skills to undertake the more complex tasks which were part of the job description.*”

[27] The letter also stated that the University would continue to help Ms Russell to improve to the required standards, firstly by evaluating her work processing ability

and then by providing any necessary training needed to enable her to perform the exam paper preparation in August and September before a further evaluation of her performance on 12 September. If there was not improvement to the required level a further warning would be issued. Ms Cathersides noted that the University took seriously Mr MacLennan's claim of a culture of controlled aggression and asked for evidence to support those claims so they could be appropriately investigated or be withdrawn. None was forthcoming.

[28] On 21 August Ms Russell's work processing skills were assessed by an external consultant who found that while Ms Russell had good typing skills suited to routine matters she lacked proficiency in more complex formatting skills, particularly numbering and indentation. The assessor noted that an almost one on one approach would be necessary and that simply repeating training courses would not achieve the desired outcome. Ms Marama said it was not possible to address this in any meaningful way given Ms Russell's refusal to accept that there was any problem with her work. Mr McLennan maintained the assessment was a "*set up*" and did not accept that it was an impartial assessment of Ms Russell's skill level.

[29] In September and October the exam papers for the second semester were prepared. On 4 October Ms Cathersides wrote to Ms Russell regarding a further review of her performance, notifying her that the review period had been extended to November 2006, when the preparation of exam papers would be completed.

### **Second Formal Performance Management Stage – 5 December 2006**

[30] On 5 December the University asked for a meeting with Ms Russell following the completion of the semester two exams. This was postponed and rescheduled by Ms Russell.

### **9 February 2006 Meeting**

[31] On 9 February 2007 the parties finally met. Ms Cathersides outlined the ongoing concerns with Ms Russell's performance, which again included numerous errors associated with the semester two exam papers. There were also performance concerns over formatting and tabulation work which replicated the performance issues arising from exam preparation. A follow up meeting was proposed for 20 February to hear the applicant's response. This was again postponed by Ms Russell.

[32] On 22 February 2007 Ms Cathersides wrote to Ms Russell saying that if it was determined that she had not met the requisite performances standards then she would be issued with a final written warning; if her performance did not improve over a further agreed period her employment would be terminated.

[33] Ms Cathersides was concerned that it appeared that there would not be a meeting to address the concerns raised at the 9 February meeting until March. She suggested mediation with the Labour Department.

[34] Mr McLennan replied on 1 March. He alleged that the University's actions were "*a reckless, systematic attempt to humiliate, hurt and destroy the professional reputation of Ms Russell*" but agreed to attend mediation.

[35] On 2 April 2007 mediation took place. Matters were not resolved.

[36] On 18 May 2007 Ms Cathersides wrote to Ms Russell advising that the performance issues raised at the February meeting, including her performance in preparing semester two 2006 exam papers would be taken off the table. It had been some months since the University had initially tabled the exam documents and other general work and the University had still not been able to address them with Ms Russell.

[37] Ms Cathersides said she thought it would be unfair to hold these over until the June 2007 review. The assessment on 25 June would be to deal with an assessment of her performance solely in relation to the completion of the first semester 2007 exam papers. She said this was done in good faith and in an attempt to move forward after the mediation.

[38] Mr McLennan replied with an unfortunate letter saying that that there was "*no further point in attempting to provide rational reasons or explanations pertaining to fabricated allegations of poor work performance*". Ms Cathersides responded by saying that Ms Russell now had the opportunity to show she could perform by carrying out the exam paper work competently.

[39] Ms Cathersides suggested Ms Russell contact Ms Calvelo with any queries regarding exam preparation and asked that Ms Russell consider using the Employee Assistance Programme.

### **Third Formal Performance Management Stage – June 2007**

[40] On 13 June Ms Katherine Rive, the Human Resources Adviser for the University, emailed Ms Russell on behalf of Ms Cathersides proposing that the performance review meeting following the completion of semester one exam paper preparation be held on 2 July 2007. On 21 June Ms Cathersides emailed a follow up because no response had been received regarding a proposed meeting. On 25 June Ms Russell emailed Ms Cathersides confirming her attendance at the 2 July meeting. She then took sick leave from 29 June 2007 to 9 July 2007.

[41] On 9 July 2007 Ms Marama emailed Ms Russell asking for a meeting with her to discuss her absence emphasising that it was important that the University be made aware of stressors for the applicant. Ms Russell provided an undated medical certificate stating only that she was unfit to attend work.

[42] On 12 July 2007 Ms Rive emailed Ms Russell setting out the University's obligation to provide a safe working environment and its understanding that performance related discussions could be stressful for staff. She also gave again the contact details for the Employee Assistance Programme and told Ms Russell that she would have the opportunity to provide further information about her stress related absence at the meeting relating to her performance so that the University could investigate her concerns and take appropriate action.

[43] On 13 July 2007 Mr MacLennan responded to Ms Rive's email stating that the University's suggesting that her stress was related to the performance management process was "*simplistic and uninformed*"; that the EAP offer was "*an unwelcomed distraction*" and that the University would have the opportunity to respond to Ms Russell's health concerns "*at an appropriate time.*" This was not a helpful response.

[44] On 18 July 2007 Ms Cathersides wrote to Ms Russell asking to meet on 25 July to address her letter of 18 May. While Mr MacLennan did not consider that the meeting was required the University advised "*If you fail to meet with us we may have no option but to proceed to form a view in the absence of your input. I am reluctant to proceed without you having the opportunity for input because of the seriousness of the potential outcome. It could be a final written warning.*"

[45] On 23 July Mr MacLennan replied that Ms Russell could not meet because she was unwell and asking that further documentation be provided. He said Ms Russell would not be attending further meetings “*pending a clearance on Ms Russell’s health*” and if the University wished to “*proceed with further and final disciplinary action so be it.*”

[46] Ms Cathersides explained that since the University had had no opportunity to understand the nature of Ms Russell’s illness it could not resolve any workplace issues that might be impacting on her health. She asked Ms Russell to provide written comments on the errors in the semester one 2007 exam material by Monday 30 July.

[47] On 25 July Mr MacLennan emailed saying that Ms Russell was not well enough to attend the meeting pending further medical assessment and that she was on stress leave “*induced by her work environment and conditions*”.

[48] On 26 July Ms Cathersides again set out the University’s health and safety obligations. She reiterated that it was not possible for the University to deal with her health issues and support her because of refusal to provide the requisite information. Ms Cathersides also asked for details of the personal grievance.

[49] Mr MacLennan refused to provide medical details and wrote that the suggestion that Ms Russell might wish to have EAP assistance “*was an insensitive, inflammatory uninformed reaction to a serious medical condition that was specifically generated by her employment environment...*” He also asserted that claims of poor work performance had been “*intentionally fabricated.*”

[50] On 3 August Mr MacLennan emailed Ms Cathersides saying Ms Russell did not have sufficient information. This was despite his request for additional information on 27 July which was provided the same day.

[51] On 6 August Ms Cathersides responded to Mr MacLennan saying that the University had provided clear examples of work which was regarded as below the required standard and that Ms Russell had been provided with copies of the exam papers she had produced which had required correcting. She had also received a spreadsheet which detailed the ongoing and repetitive corrections required for jobs for which she was responsible.

[52] Ms Cathersides noted that Ms Russell had prepared exam papers three times and continued to make basic errors. She proposed a meeting for 8 August so that Ms Russell could respond before the University made a decision.

[53] On 31 August Ms Cathersides met with Mr MacLennan after he had been unavailable to meet earlier in August. Ms Russell did not attend. Mr MacLennan did but he had not discussed the material with Ms Russell.

[54] On 7 September 2007 Mr MacLennan emailed a response to the allegations of poor performance. He said he was “*not satisfied the allegations have been established to a credible level which warrants further final formal disciplinary actions.*” He referred to Ms Russell’s illness which he said was “*stress and clinical depression*” which had been induced both by unreasonable work demands and a “*deceitfully constructed*” disciplinary process.

#### **10 September 2007 - Final Written Warning.**

[55] Ms Cathersides issued Ms Russell with a final written warning and she advised that a follow up meeting regarding the second semester exam paper preparation would be held on 2 November 2007.

[56] On 19 September Mr MacLennan emailed Ms Cathersides stating that the allegations against Ms Russell were inconsequential and trivial and that there was no issue with performance. Ms Cathersides replied on 24 September 2007 saying that offers of support had been made in good faith and were still open.

[57] Ms Russell was absent from work for four days from 25 September 2007. On 3 October Ms Marama asked Ms Russell for reasons for her absence and asked whether her absence was for work related reasons. On 5 October 2007 Mr MacLennan emailed Ms Cathersides saying that Ms Russell’s absence was due to “*protracted work stress related illness*” and that her condition and treatment were confidential to Ms Russell and her doctor.

[58] On 8 October Ms Cathersides told Mr MacLennan that it was important for the University to understand Ms Russell’s illness and its causes so it could at least minimise work related stress. She asked for information about the stressors that were being experienced “*above and beyond those that could be expected in a performance management situation.*”

## **Exam Paper Release**

[59] Ms Cathersides learned that Ms Russell had submitted an examination paper to the examination office without having had the final checks made.

[60] On 9 October Ms Cathersides wrote to Ms Russell regarding the matter and asked to meet with her on 11 October to address it on an informal basis so as to understand what had happened.

[61] On 10 October Mr MacLennan emailed Ms Cathersides regarding the release of the exam paper and declining to attend the meeting to address the issue.

[62] On 15 October Mr MacLennan emailed Ms Cathersides outlining Ms Russell's views with regard to the masters' exam paper issue.

## **11 October 2007 Meeting**

[63] Ms Cathersides and Ms Marama met with Mr MacLennan but the release issue was not discussed. Mr MacLennan went through examination papers in detail. He had also copied final exam papers held in the library to demonstrate that not all papers deemed "Masters" were up to standard. He asked for a response to these claims which Ms Cathersides said would be provided once they had had the opportunity to review the papers. At this meeting Mr MacLennan also maintained that the exam preparation schedule was constructed after the process and not contemporaneously and was therefore faulty.

[64] On 16 October Ms Cathersides emailed regarding the release issue stating that the main concern was that Ms Russell had not followed the identified checking process before despatching the paper

[65] On 1 November 2007 Mr MacLennan emailed Ms Cathersides saying Ms Russell was not responsible for the error regarding the release of the exam paper and that this was a further demonstration of an attempt to orchestrate a disciplinary issue that did not exist, damage Ms Russell's reputation and provide the University with the opportunity to fabricate allegations of poor performance, which amounted to abject harassment and discrimination.

#### **Fourth Formal Performance Management Stage – 9 November 2008**

[66] On 7 November Mr MacLennan emailed Ms Cathersides saying that Ms Russell would not attend the 9 November meeting.

[67] However, Mr MacLennan met with Ms Cathersides to discuss Ms Russell's performance in preparing the semester two 2007 exam papers. Mr MacLennan was provided with the erroneous work Ms Russell was responsible for to assist him in preparing a response.

[68] On 25 November Ms Cathersides wrote to Ms Russell saying that she was concerned that she had not attended the 9 November meeting given the potentially serious outcome. Ms Cathersides explained that the delay in communication following that meeting had been due to the University's need to investigate two issues raised by Mr MacLennan at the meeting: whether the same standards applied to other staff preparing exam papers and whether she had been given complete instructions by examiners. Ms Cathersides accepted that some of the things categorised as "errors" would not usually be categorised as such.

[69] Ms Cathersides said the University had serious doubts about Ms Russell remaining employed as Office Administrator and requested a meeting to explore three options before determining whether dismissal was appropriate:

- (a) further training;
- (b) re-deployment (which would need to be a role which did not require complex word processing skills);
- (c) the creation of a suitable alternative position within the Faculty of Law.

[70] The first proposal seemed not to be viable because Ms Russell did not accept that a problem that needed rectifying.

[71] The last proposal had been investigated but there appeared to be insufficient work to justify a new position being created, Ms Cathersides asked Ms Russell to provide details of the staff who Ms Russell said had provided her with positive references so that she could explore this option with them. Ms Russell did not do so. Ms Cathersides asked Ms Russell to meet on 7 December to discuss the options.

[72] On 6 December Ms Russell took sick leave. Mr MacLennan cancelled the meeting planned for 7 December and would not agree to a rescheduled meeting. Ms Russell returned to work on 10 December. Ms Cathersides then rescheduled the meeting until 17 December and gave Ms Russell the option of providing her views in writing as well as meeting and indicated she would then would make a decision and communicate this at a meeting on 20 December.

[73] On 17 December to January Ms Russell again took sick leave and advised that she would not be returning to work until the New Year.

[74] On 18 December Ms Cathersides sent by courier to Ms Russell's home address a letter requesting her attendance at a meeting on 10 January. Ms Russell subsequently said she had not received this letter. The meeting was rescheduled to 1 February 2008 and then 8 February 2008.

[75] On 31 January 2008 Ms Cathersides wrote to Ms Russell saying she was concerned about the delays in meeting and that she had been invited to meet to discuss options. The University would make a decision on 8 February if she did not attend or provide a response on the basis of the information it had at the time.

### **8 February 2008 Meeting**

[76] On 8 February Ms Cathersides met with Mr MacLennan. She tried to discuss the options for redeployment but he did not wish to do so and maintained that the University had determined the outcome. Ms Cathersides emphasised that the decision to be made would be serious and she genuinely wanted Ms Russell's input. Mr MacLennan asked that the decision be made quickly. Ms Cathersides agreed that it would be made by the end of the following week.

### **11 February 2008 Dismissal**

[77] The University's confirmed Ms Russell's dismissal by letter dated 11 February 2008. On 29 April 2008 Ms Russell raised a personal grievance. In September they attended mediation but no resolution was reached.

### **The Law**

[78] In *Trotter v. Telecom Corp of NZ* [1993] 2 ERNZ 659 the principles for dismissal for poor performance were set out. The issues before the Authority centre on the

application of s.103A and overall whether the respondent's termination of the applicant's employment was what a fair and reasonable employer would have done in the circumstances.

[79] The questions for the Authority's consideration are:

- (a) Did the employer in fact become dissatisfied with the employee's performance?
- (b) Did the employer inform the employee of the dissatisfaction and set out the expected standards?
- (c) Were the criticisms and future requirements objective and readily comprehensible by the employee?
- (d) Was reasonable time allowed for the attainment of the required standards?
- (e) Did the employer turn its mind fairly to the question of whether the employee had achieved what was expected including:
  - (i) Using an objective assessment of measurable targets;
  - (ii) Giving the employee an opportunity to answer the conclusions arising from the performance management process;
  - (iii) Listening to the employee's explanation with an open mind;
  - (iv) Exhausting all possible remedial steps such as training, counselling and redeployment;
  - (v) Considering the explanation and all favourable aspects of the employee's service record and any fault on the part of the employer in terms of poor training, management and promotion.
- (f) Did the employer have mixed motives for raising performance issues with the employee?
- (g) Should the Authority determine that the applicant's dismissal was unjustified, what other remedies were available;

(h) Was there contributory conduct?

**Did the employer in fact become dissatisfied with the employee's performance?**

[80] Although it was disputed by the applicant, it was a core and key requirement of Ms Russell's role that she prepare exam papers accurately and according to the correct format.

[81] Difficulties with Ms Russell's performance became apparent almost immediately. When an informal management process failed to resolve the necessary improvement the University commenced a formal performance management process. Other staff had to finalise the papers she was supposed to be responsible for. Later in the process she deliberately circumvented the exam paper preparation process by refusing to submit draft exam papers for checking as required.

[82] I accept the respondent's evidence that during the four exam preparation periods Ms Russell continued to make the same errors on numerous occasions, including failing to comply with formatting requirements pursuant to the exam guidelines, pagination requirements, line spacing and page breaks. Furthermore, new errors would appear in various versions of the draft exam paper after earlier corrections had been made. This continued to occur throughout the four exam preparation periods.

[83] The University did become dissatisfied with Ms Russell's performance.

**Did the employer inform the employee of the dissatisfaction and set out the expected standard?**

[84] The concerns were initially raised informally and then a performance management process commenced.

[85] Although the University addressed these concerns with Ms Russell it was met with denial that there was any issue. Ms Russell's seemed to be of the view that as long as the exam papers she prepared came out correctly in the end, it did not matter

what she did when preparing them. The problem was that when correcting exam papers as directed by the co-ordinator, she frequently made new mistakes which required further correction. She refused to see there was any problem with her work and did not acknowledge the employer's right to determine how exam papers were to be prepared.

[86] There was an increasing concern that her performance was not improving, the same mistakes continued to occur throughout her employment and improvement was not forthcoming. The timeliness of the submission of the papers was not an issue for the respondent. It was concerned with the number of iterations that Ms Russell did for each exam paper and the number of formatting errors and the nature of those errors including repeated errors. The fundamental problem was that her performance was unacceptable and no improvement was showing over a two year period.

[87] The expected standard was set out but Ms Russell refused to accept it.

**Were the criticisms and future requirements objective and readily comprehensible by the employee?**

[88] These were clearly set out and worked through with Ms Russell or her representative as she failed to attend a number of the meetings. She refused to acknowledge that there was any difficulty with her performance. She attended only three meetings and then had Mr McLennan attend.

**WAS SUFFICIENT TIME ALLOWED FOR THE ATTAINMENT OF THE REQUIRED STANDARD?**

[89] The performance management process ran from June 2006 until February 2008. Performance was assessed over four exam preparation periods. She was provided with training and offered additional training, and she was also encouraged to seek assistance from the office manager. However her representative advised on 28 July that any further offers to attend training would be considered harassment.

**Did the employer turn its mind fairly to the question whether the employee had achieved what was expected?**

[90] This entails a consideration of the following criteria.

- (a) *Using an objective assessment of measurable targets.*

The University did objectively assess her performance. The correct formatting of papers is objective and measurable.

(b) *Give her an opportunity to answer the conclusions arising from the performance management process.*

There were a number of meetings to discuss this, she was represented at those meetings and had the opportunity to respond in writing.

(c) *Did the employer listen to the explanation with an open mind.*

It is clear that the respondent listened to all the explanations, followed up on issues raised by her and some of the explanations given were accepted by the University.

(d) *Did the University consider the explanation and all favourable aspects of her service record and any fault on the part of the employer in terms of poor training management or process*

The University went to great lengths to help her improve her performance. It considered all the relevant factors including her performance in the role overall before deciding to terminate her.

(e) *Did the University exhaust all possible remedial steps*

She was offered training during the performance management process, but was insistent that she had the necessary skills. Although she initially did undertake some training she refused further offers of training. The assessment report clearly suggested she was below standard in key areas.

Once the University had reached the conclusion that it could no longer employ her in the position she held it turned its mind to the possibility of altering her role to remove the requirements of preparing exam papers. This was unworkable. The University then looked at finding an alternative to dismissal but was severely hampered by her representative's refusal to consider redeployment.

### **Allegations of mixed motives, disparity of treatment and bias**

Ms Russell and her representative felt that Ms Marama singled her out, took issue with her work unfairly in comparison with other staff and that Ms Marama had a personal vendetta against her. I accept the respondent's submission that these allegations are not supported by the evidence. I also accept the submission that Ms Cathersides did take the issues as raised by the applicant in relation to Ms Marama seriously. She investigated the complaint regarding the meeting with Ms Marama and

it was agreed that a third person would be present when Ms Marama needed to meet with Ms Russell. Ms Russell was asked to provide more details about other specific problems she wanted address, but no further information was forthcoming.

The issue of lack of performance was never addressed by Ms Russell who consistently denied there was a problem, insisted that the concerns were trivial, that errors were not her's or had been incorrectly recorded.

[91] In his closing submissions Mr Woodhouse says that while Ms Russell accepted that there were formatting errors in her work she did not accept in most instances that she was responsible for them. She accepted that some errors in the initial drafts were deliberately left by her towards the end of the preparation process to facilitate productivity. The alleged errors, repeated errors or new errors or what were misleading referred to as formatting anomalies inevitably arose from the work in progress nature of the exam preparation process, not from incompetence on her part.

[92] Ms Russell believed she was being victimised by Ms Marama. I find that this was not so. Ms Marama was simply endeavouring to point out and help rectify Ms Russell's errors. Ms Russell took exception to this.

[93] Ms Russell said she was more productive than other employees who made similar mistakes in the preparation of exam papers, but they were not subjected to the performance management process. However, no evidence was put forward to support this allegation. While other employees did make mistakes these were not of the same nature or as continual and repetitive as those made by the applicant. Furthermore other employees' performance improved during the exam paper preparation process, whereas Ms Russell's did not.

[94] There was no inconsistency of treatment nor was the employer motivated by anything other than a desire to assess and rectify poor performance.

[95] The fact that Ms Marama played a part in the disciplinary and evaluation process does not render the decision reached invalid. I do not accept that there is any basis for the allegations of bias. Complaints about poor quality work did not initially emanate from Ms Marama.

## **Health Issues**

[96] The assertion that the University disregarded the health issues is not accurate. She gave the University very little information, given that her medical certificate simply stated that she was unfit for work. She declined to provide more information as requested. Although use of the EAP scheme was offered, this was declined. The University took all practicable and reasonable steps to ensure that the workplace was healthy and safe.

[97] Ms Russell says that she had made it clear to the University that her ill health was related to the personal grievance with which Ms Marama was personally involved and the unreasonably protracted unfair disciplinary process which Ms Marama largely orchestrated. I accept that this is Ms Russell's view, and that it is sincerely held.

[98] Mr MacLennan refused to accept that Ms Russell had not provided adequate documentation to enable the University to deal with the matters that were raised. He said that this position was untenable because he in his letter to Ms Cathersides of 25 July 2007 made it clear that the work related stress was caused mainly by the disciplinary process.

[99] In answers to questions from me during the hearing, Mr MacLennan did not accept that a medical certificate as well as a lay opinion was required. Furthermore if the stress was caused by the disciplinary process then there was little that the University could do about that. Employers cannot be expected to stop disciplinary processes taking place simply because employees find those processes stressful.

### **Alternatives to Dismissal**

[100] Ms Russell agreed with the University that retraining was impractical because she did not agree that her typing skills were deficient. Ms Russell says that the remaining two proposals were not genuinely put to her.

[101] On the issue of re-assignment, Ms Russell says that the University's view that there was insufficient work to justify a new position being created was not supported by the evidence and displayed Ms Catherside's refusal or failure to undertake an open minded, thorough investigation into a matter which, if she had investigated, would have caused Ms Cathersides to accept the viability of this option and to question her rigidly held view about Ms Russell's confidence. I do not accept the validity of this view.

[3] Mr Woodhouse says that Ms Marama and Ms Cathersides appeared to have no reservations about exploring the possibility of re-deployment elsewhere in the University, notwithstanding their claim that Ms Russell could not perform straightforward word processing tasks. That was not the position taken by Ms Marama and Ms Cathersides. It was that she could not perform some complicated formatting tasks.

[4] Alternatives were considered by the University. Ms Russell did not meet to discuss these and Mr McLennan refused to engage with the University on these matters.

### **Decision**

[5] Ms Russell was justifiably dismissed. She has no personal grievance.

### **Costs**

[6] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King  
Member of the Employment Relations Authority