

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 274/10
5099666

BETWEEN DR EMILIA MENDES
Applicant

AND THE VICE-CHANCELLOR OF
THE UNIVERSITY OF
AUCKLAND
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Dr John Robertson, counsel for Applicant
Ms Shan Wilson, counsel for Respondent

Investigation Meeting: 3, 17, 18, 19, 20, 21, 24 and 25 May 2010

Submissions received: 31 May, 4 and 5 June 2010

Determination: 11 June 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Dr Emilia Mendes is an Associate-Professor of Computer Science at the University of Auckland. Her employer is the Vice-Chancellor of the University, Professor Stuart McCutcheon.

[2] As employer of all academic staff the Vice-Chancellor has negotiated a collective agreement with unions authorised to act on behalf of those University employees who become their members. Dr Mendes was at material times a member of the Tertiary Education Union (TEU), one of the union parties to the Academic Staff Collective Agreement.

[3] The Authority has investigated a number of separate problems that arose for Dr Mendes at different times over several years in the employment relationship while

she was working in the Computer Science Department of the University's Faculty of Science, where she continues to be employed.

[4] Counsel for Dr Mendes, Dr Robertson, in a memorandum dated 2 May 2010 listed 14 separate occasions of alleged unjustifiable action taken by Dr Mendes' employer against her. It is contended that each unjustifiable action affected her employment to her disadvantage and that therefore the employer's actions comprise a personal grievance under s 103(b) of the Employment Relations Act 2000. It is also claimed that the University breached her employment agreement in several ways and unlawfully deprived her of certain entitlements under her conditions of employment.

[5] It is further claimed that on specific occasions the University breached statutory duties of good faith and in relation to health and safety in employment, owed to Dr Mendes.

[6] The University rejects all of the allegations made in the claims and asks the Authority to determine that it did not act unlawfully in any way in terms of any of the claims brought against it.

[7] Mediation on several occasions and settlement conferencing with the parties by an Authority member was undertaken by Dr Mendes and the Vice-Chancellor, but they remained unable to resolve the employment relationship problem on their own terms.

[8] Remedies available under the Act where the Authority determines an employee has a personal grievance have been claimed. They are reimbursement for loss of income - s 123(1)(b), and compensation for humiliation, loss of dignity and injury to feelings - s 123(1)(c). In relation to one particular claim a recommendation by the Authority has been sought - s 123(1)(ca).

[9] A remedy in "quantum meruit" has also been claimed, seeking a substantial amount. The legal doctrine of "unjust enrichment" has been invoked in this part of the claims, and also provisions of the Contracts (Privity) Act 1982. Under that statute an order is sought for particular benefits of past and future contracts between the University and a third party, the Royal Society of New Zealand, to be given to Dr Mendes. Those contracts are for the supply by the University of research services financed by the Marsden Fund administered by the Royal Society. Compensation has been sought for loss to Dr Mendes of benefits under Marsden Fund contracts.

[10] The monetary amounts sought from the employer under these various heads of claim was set out at Table 4 of the statement of problem (as amended on 5 May 2010), coming to a grand total of \$427,053. This amount has since been reduced significantly in the written closing submissions for Dr Mendes (dated 28 May) to \$304,513. Included among the 16 tabled heads of monetary remedy claimed are lost income (\$13,502), compensation for humiliation, loss of dignity and injury to feelings (\$45,000), quantum meruit (\$96,111), and penalties (\$30,000). Legal costs (\$120,000) are also claimed.

[11] The claims in relation to “quantum meruit,” “unjust enrichment” and the Contracts (Privity) Act are dependent upon the Authority having jurisdiction to determine them under s 161(r) of the Employment Relations Act (actions arising from or related to an employment relationship) and/or s 162 (orders that may be made by the High Court or District Court under any enactment or rule of law relating to contracts). Section 162 refers expressly to the Contracts (Privity) Act 1982 as an enactment relating to contracts.

[12] The penalty claims are more straightforward, being dependent upon the Authority determining that Dr Mendes’s employer breached her employment agreement. Section 134 of the Act provides that every party to an employment agreement who breaches it is liable to a penalty under the Act. Penalties have been claimed for multiple breaches, at a maximum of \$10,000 per breach as provided by s 135(2) of the Act.

[13] The type of grievance the personal grievance claims are based on is defined at s 103(1)(b) as:

(1) ... any grievance that an employee may have against the employer’s employer ... because of a claim -

(b) That the employee’s employment, or 1 more conditions of the employee’s employment ... is or are ... affected to the employee’s disadvantage by some unjustifiable action by the employer;

[14] As to what “conditions of the employees employment” may include, the Authority has kept in mind the wide meaning given to that phrase by the courts, particularly the Supreme Court in *Elston v. State Services Commission (No.3)* [1979] 1 NZLR 218 at 235, where Barker J said that the expression “conditions of employment” in legislation:

... should be defined widely so as to include the totality of the provisions of employment, not just those conditions articulated in a contract, but those terms which are understood and applied by the parties in practice.

[15] Also, in *Universe Tankships Inc of Monrovia v. International Transport Workers' Federation* [1983] 1 AC 366 at 402, Lord Scarman in the English House of Lords said that “terms and conditions of employment” is a phrase that includes not only the rights but also the customary benefits and reasonable expectations provided by reason of the employment to an employee by their employer.

[16] In the course of the investigation meeting the Authority reminded the parties of a qualification at s 103(3) of the Act to the s 103(1)(b) definition of personal grievance, which is as follows:

(3) *In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation or disputed interpretation, application, or operation, of any provision of any employment agreement.*

[17] As to the meaning of “unjustifiable” in s 103(1)(b), s 103A of the Act provides:

... the question of whether ... an action was justifiable must be determined, on an objective basis, by considering whether the employee'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 dismissal or action occurred.

[18] Although the claims brought by Dr Mendes are in many respects diverse, as are the legal principles relied upon in support of them, express statutory powers of the Authority enable it to take a broad view of the employment relationship problem. The Authority is enjoined to do justice according to the real nature identified of any employment relationship problem. In this regard s 160(3) of the Act provides:

The Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.

[19] Also important to the approach that may be taken by the Authority is its role expressed at s 157 of the Act:

(1) *The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the*

substantial merits of the case, without regard to technicalities.

[20] There has been no dispute about many matters of core fact upon which the various claims are based and I now proceed to make a determination according to the “substantial merits” of Dr Mendes’s case in relation to each claim.

The claims

[21] They are considered under general headings below, which are the same or similar to those used and understood by the parties during the investigation;

1. Applications for promotion in 2005, 2006 and 2007
2. Workload relief
3. Initiation of disciplinary procedures in relation to staff travel policies
4. Investigation of bullying complaint.
5. Role of Deputy HOD Research
6. Reimbursement of expenses (Waiheke Island ferry ticket)

[22] The investigation of these claims in other circumstances might have proceeded as several separate investigations into each of them, because although the parties are the same the claims or most of them are separated by time and personnel involved, as well as by the very different nature of most of the claims.

[23] The Authority acknowledges the assistance and co-operation it received from Dr Mendes and the many witnesses from the University including the Vice-Chancellor, Professor McCuthcheon. I am grateful for the help given by counsel Dr Robertson and Ms Wilson and their assisting counsel Ms Gilchrist and Ms Burson. Through their organisation and management of the presentation of witnesses and in other areas, the meeting was able to be concluded in less than the fortnight originally planned.

[24] I am also grateful for the extensive written submissions given by Dr Robertson and Ms Wilson on behalf of Dr Mendes and the University of Auckland. Although they have been carefully considered by the Authority, detailed reference will not be

made to them because of the constraints of time in trying to make as concise as possible what must inevitably be a determination that is longer than most.

1. Applications for promotion in 2005, 2006 and 2007

[25] Dr Mendes became an Associate Professor at the University of Auckland in 2007. Applications in 2005 and 2006 by her for advancement to that level had been unsuccessful, although she still achieved significant promotion in each of those two years. In 2005 when she was Senior Lecturer at Level 5 (SL5) on the salary scale for that position and below a bar on it, she obtained promotion to Level 6 (SL6) immediately above the bar. She had applied for promotion to SL8 and also to Associate Professor. In 2006 she was promoted to Level 8 (SL8) after again applying for Associate Professor.

[26] Dr Mendes dissatisfaction with the outcome of the 2005 and 2006 promotion rounds led her to complain to her employer, invoke formal appeal procedures and raise a personal grievance under her employment agreement. Even in 2007 when her application for promotion of Associate Professor was finally successful, Dr Mendes considered she had grounds for complaint which she has put before the Authority for investigation as part of her wider claims brought to it.

[27] Dr Mendes confirmed to the Authority that she was not asking it to reconsider and determine on their merits any of her applications for promotion. She is however asking the Authority to review the process or procedure followed by the University in determining those applications. She asks the Authority to find that the University did not comply with its own policies, procedures and criteria in relation to promotion generally and that it did not act fairly and reasonably or in good faith but was obstructive, uncommunicative and misleading in its behaviour towards her.

[28] As was accepted for Dr Mendes in submissions, she had no contractual right to be promoted. Case law has held that non-promotion resulting from the exercise by an employer of its judgement is unlikely to amount to a personal grievance, because the employee suffers no disadvantage simply from a lack of progression upwards; *Victoria University of Wellington v Haddon* [1996] 1ERNZ 139.

[29] Dr Mendes had a right to the same opportunities as other University of Auckland employees to a fair consideration and determination of any application for promotion she made. If in regard to process or procedure she was not afforded that

equal opportunity, she may be considered to have been disadvantaged. Her complaints are directed to the fairness of the process.

Promotion in 2005

[30] The first complaint from Dr Mendes about her promotion applications arose following the 2005 promotion round. She objected to some of what had been written about her in a significant report prepared for reference by those considering her application. The report was prepared as part of the normal promotions procedure by the Head of Department (HOD) of Computer Science, Professor John Hosking at that time. Dr Mendes' complaint was about part of the report in which he purported to record views expressed by members of the Departmental Staffing Advisory Committee (DSAC) that had been routinely convened to discuss applications for promotion received within University departments such as Computer Science.

[31] Under the applicable promotions policy the HOD's report is required to include advice concerning the views of the DSAC, or advice that "summarises the considerations" of the DSAC.

[32] When she learned of the content of Professor Hosking's HOD report, Dr Mendes complained that the views purporting to be those of DSAC members had not been expressed at all by anyone but had been fabricated by Professor Hosking. Later she claimed in writing to the Dean of the Science Faculty, Professor Dick Bellamy, that Professor Hosking had "lied" about her in his report. She complained that even if the statements or comments had been made as reported, they were not accurate as an objective evaluation of her performance.

[33] Dr Mendes was disturbed and offended by the words and the imputation she took from them in the report, which referred to her as having "a track record of un-collegial behaviour in some respects of her teaching." She considered the promotion process in 2005 had been flawed by the deliberations that had led to those words appearing in Professor Hosking's HOD Report and by the inclusion of those words in the document. As a result she felt that an injustice had been done to her.

[34] There were various views among witnesses, some of them very senior academics, as to the prejudicial affect of a statement about an academic being "un-collegial." It is generally understood to mean that an academic is unwilling or

unhelpful in sharing professional responsibilities with colleagues. If untrue, such a statement could obviously be regarded as insulting, offensive and unjustly made.

[35] In preparing his HOD report Professor Hosking had been required to rank Dr Mendes in the three areas of teaching, research and service. The objected to words (underlined below by me) appear in relation to what he said about her teaching achievements overall, as follows:

Teaching

Emilia has developed into a very strong and capable teacher, highly committed to the research-teaching nexus. She has taught large classes at both undergraduate and graduate level, including one of the most popular graduate level classes (COMPSCI708). She has excellent teaching evaluations, particularly at graduate level. She is prepared to innovate in her teaching and has also published papers relating to those innovations. She has built a very strong cohort of project and thesis students and has included several student endorsements in her supporting material. She has contributed extensively to curriculum development, most notably at the graduate level. The two DSAC Advisors are strongly supportive of her teaching indicating performance levels of Distinction (Khoussainov) and Excellence (Grundy). The DSAC had a less positive view recommending a performance level of Satisfactory with indications of Merit for her teaching based on a track record of un-collegial behaviour in some respects of her teaching. In this respect I differ from the view of the DSAC and argue for a Merit level of teaching performance, based on the strong track record of teaching evaluations, the extensive curriculum development work, contributions by way of teaching publications, and the large cohort of research students she has supervised.

[36] In his overall assessment of Dr Mendes' teaching Professor Hosking said in his report:

Her teaching is of good overall quality highlighted by the large cohort of project and thesis students and the strong curriculum development and delivery at graduate level, leading to a Merit level of performance in my view.

[37] 'Merit' is the second of four rankings available, after 'satisfactory' and before 'excellence' and 'distinction.'

[38] In his summary of overall views Professor Hosking in his report noted that he had disagreed with the DSAC members over the level of performance for Dr Mendes' teaching. The DSAC had rated her as "Satisfactory with indications of Merit," whereas Professor Hosking noted that he had viewed the performance as being at the higher grade of "Merit level."

[39] Although Dr Mendes had applied from SL5 below the bar to be promoted to SL8, the recommendation of Professor Hosking in his report was promotion to SL7.

[40] Under the promotion process the HOD's Report is considered by a Faculty Staffing Committee (FSC), the one in this case for the Science Faculty being chaired by the Dean, Professor Bellamy. The FSC makes recommendations to the Dean as to whether any applicant should be promoted. In 2005 Dr Mendes had also made a separate application for promotion to Associate Professor. Applications to that level are considered by the University Academic Staffing Committee (UASC) which is chaired by the Vice-Chancellor, Professor McCutcheon. The UASC makes the final decision on the application after considering the Dean's advice and the conclusions of the FSC.

[41] Ultimately the FSC recommended, and the Dean concurred, that Dr Mendes should be promoted from SL5 below the bar to SL6, but not to SL8 as she had applied for. Dr Mendes lodged an appeal against that promotion decision, exercising a right provided for in the University's published Policy on academic promotion. The availability of that right is expressly limited to situations where there has been "a failure in procedure that is so substantial that it may have affected the decision." There is no right of appeal against the exercise of judgment by the employer declining promotion on the merits of an application.

[42] Dr Mendes' appeal was submitted to Professor McCutcheon together with relevant documents. They included the HOD's report containing the contentious words referring to a track record of un-collegial behaviour on the part of Dr Mendes. The various breaches of promotion procedure alleged by Dr Mendes in her appeal all related to those words. Dr Mendes considered that her career had been damaged by their use in the HOD's report, which she claimed had been the basis of the FSC's decision declining her promotion to SL8 as had been applied for by her.

[43] Professor McCutcheon used the discretion he had under the appeals procedure to appoint a subcommittee to investigate the issues raised by the appeal. It comprised two senior Professors, both from outside the Faculty of Science.

[44] Included among those interviewed by the subcommittee were Dr Mendes and Professor Hosking but not the members of the DSAC who had reportedly passed comment about Dr Mendes un-collegial behaviour.

[45] On 31 March 2006 the subcommittee presented its findings to Professor McCutcheon. They included a conclusion that the contentious and objected to words in the HOD's Report had not influenced the promotion process, because the FSC had rated Dr Mendes' teaching at 'Merit' level, as Professor Hosking had done. The sub-committee found that the rankings given to her were consistent with other successful applications where the promotion was from SL5 to SL6.

[46] The subcommittee did however conclude in its findings that there had been two process issues which may have had some influence on the outcome of Dr Mendes' application for promotion to SL8. One concerned the fact that she had made two applications (one to be promoted to SL8 and the other to Associate Professor) that had been considered separately. The second process issue related to supplementary material Dr Mendes had provided to Professor Hosking as HOD after submitting her application. That material had been considered for one of her promotion applications but not the other.

[47] To address the two process issues, the subcommittee recommended to Professor McCutcheon that the FSC should reconsider Dr Mendes' application for promotion to SL8. Accordingly, Professor McCutcheon asked Professor Bellamy to reconvene the FSC. This was done and Professor Bellamy duly reported that having reconsidered the application the FSC recommended that Dr Mendes did not meet the criteria for promotion beyond SL6. Dr Mendes was duly advised of that result and her promotion to SL6 was confirmed.

Promotion in 2006

[48] In 2006 after Dr Mendes had again applied for promotion to Associate Professor, she was advised by Professor Bellamy that she would be promoted to SL8 but not Associate Professor. She exercised her right to appeal against that outcome, as she had done in the previous year.

[49] Upon considering the appeal, Professor McCutcheon found it to be largely an attempt to revive and relitigate concerns she had raised in her appeal following the 2005 promotion round, being concerns about the reference in Professor Hosking's HOD report to her having a track record of un-collegial behaviour in some respects of her teaching.

[50] A further concern raised in Dr Mendes' latest appeal related to comments made in the relevant HOD report, this one being completed by Associate-Professor Robert Amor who had replaced Professor Hosking as HOD of Computer Science in 2006. Objection was taken by Dr Mendes to the following statement in his report:

Overall, I believe that Emilia has reached the levels required to reach Associate Professor if she was applying from SL8.

[51] The statement could be read in two ways. On one view Associate-Professor Amor was saying that the attainment of SL8 would be an indicator of merit for promotion, if and when SL8 was reached by Dr Mendes. On another view, the one taken by Dr Mendes, Professor Hosking was saying the attainment of SL8 was a pre-condition of promotion. If that is what Associate-Professor Amor believed then he was wrong, as promotion to that level is based on merit not on the attainment of a particular level above SL6.

[52] Dr Mendes deduced from his statement that Associate-Professor Amor would have supported her application "had I been an SL8."

[53] Professor McCutcheon received a report from Professor Bellamy explaining the process followed by the FSC which he had chaired when it considered Dr Mendes' 2006 promotion application. Professor McCutcheon concluded that it was unnecessary to appoint delegates to investigate on his behalf, an option he had taken with the 2005 appeal, and that he was in a position to determine the appeal himself from the reports and documents provided, as he was permitted to do in his discretion under the appeal procedure.

[54] Professor McCutcheon advised Dr Mendes that her appeal against the 2006 promotion outcome could not be used as a way of reopening the earlier disposed of appeal against her 2005 promotion application. He also advised in relation to Dr Mendes' concerns about the comments of Associate-Professor Amor in his HOD Report that the key issue was whether the staff member applying for promotion met the specified criteria for the level of Associate-Professor. He advised that the decision that had been reached by FSC was, in his view, appropriate. Accordingly, her appeal was declined and her promotion to SL8 confirmed.

[55] Dr Mendes then raised a further concern about the procedure followed by Professor McCutcheon, which he duly inquired into and decided to address by

reconsidering her appeal. He did so and advised his findings that while it appeared Associate-Professor Amor, as HOD, may have misunderstood the promotion process (in terms of whether it was necessary to be at SL8 in order to be promoted to Associate-Professor) he did not believe that this had disadvantaged Dr Mendes. This was his view because the HOD is not the decision maker in the process and because the FSC and UASC committees had known that the attainment of SL8 was not a pre-condition of applying for the promotion.

[56] Dr Mendes' promotion to SL8 was therefore confirmed by Professor McCutcheon.

[57] Dr Mendes elected to pursue her personal grievance claim earlier raised and lodged an application in the Authority to do so.

[58] With regard to the contentious words in the 2005 HOD's report, I find from the evidence of the author Professor Hosking that although "un-collegial" was probably not the word used during the discussion he had taken part in with members of the DSAC, that word to him best described the tenor of remarks or comments he had heard made during the discussion that took place. He had reported, more or less accurately, the words he had heard used. In this regard I agree with the finding of the Vice-Chancellor's sub-committee in its report of 31 March 2006, that Professor Hosking had not reported 'hearsay.'

[59] I find that Professor Hosking did not fabricate his report in this particular part and did not lie, as Dr Mendes accused him of doing. I accept his word about that and there was also no obvious motive for making that part of his report up. I also agree that to have invented the contents of his report would seem illogical when, almost in the same breath, Professor Hosking was seeking to elevate his estimation of Dr Mendes' teaching performance above the level considered by his colleagues on the DSAC.

[60] It seems that things that were said by members of the DSAC introduced a minor discordant note into the discussion about the appropriate rating for Dr Mendes' teaching, the subject of the discussion. What had been said was reasonably accurately reported by Dr Hosking. A major part of that discussion was Professor Hosking's disagreement that a ranking lower than Merit was warranted, and this was also accurately reported.

[61] I accept that the making of the objected to statement about Dr Mendes in the HOD's Report had a severe impact on her, but even if it the statement was unjustified I do not consider she was disadvantaged in her employment by it, as the appeal process was a fair and practical mechanism for reconsidering the promotion application without the distraction of prejudicial information. The appeal is only a review of the promotion decision making process up to the point where the Vice-Chancellor (or delegated sub-committee) becomes satisfied that a failure in procedure may have affected the decision on the promotion application. At that point the appeal is in effect a rehearing of the application for promotion.

[62] For this reason there was no unfairness ultimately to Dr Mendes arising from the fact that the Vice-Chancellor's sub-committee did not interview members of the DSAC to hear from them whether they had in any way discussed un-collegial behaviour on the part of Dr Mendes. Her application was heard afresh without, I am satisfied, that part of Professor Hosking's report influencing the decision makers.

[63] It was submitted that the reported discussion about un-collegial behaviour amounted to the participants making allegations of "wrongdoing" against Dr Mendes and that she should therefore have been given an opportunity at the time to respond to them. I disagree. The statements reported on by Professor Hosking were an evaluation of her performance and were not made in a disciplinary context at all. Dr Mendes in this part of her case has unreasonably advocated a high degree of control or censorship over the ideas and information that must be freely exchanged by members of a committee playing a part in the determination of a promotion application.

[64] Dr Mendes had the protection of an appeal provision against the possibility that she believed the process for considering her application had been flawed. She exercised her rights in this regard and I am satisfied, particularly from the evidence of Professor Bellamy, that the appeal process was fairly applied and that the FSC considered all relevant matters and disregarded anything irrelevant or unfairly prejudicial.

[65] Professor Bellamy's evidence, which I accept, was that the primary information considered in any application for promotion is the application itself. He said that the FSC makes up its own mind about the merits of it and is not swayed or influenced by comments from any of the participants in the process but that the FSC no doubt looks at that material in testing its own conclusions.

[66] Dr Mendes considers that there were flaws in the 2005 promotion round in which she made two applications (for promotion to SL8 and to Associate-Professor) and she considers that those flaws were permanent and irreparable. For this reason it seems she then sought to carry them forward into account in the 2006 promotion round by making them part of her appeal in that year. The University's view is that they had been addressed and disposed of in determining the appeal against the 2005 promotion round. I agree.

[67] Insofar as Dr Mendes has brought personal grievance claims in relation to each promotion round in 2005 and 2006 and her subsequent appeals, I consider that in applying the test of justification under s 103A of the Act the entire promotion process including the right of appeal and its exercise, should be looked at rather than focusing on what may have happened during initial stages of the process that resulted in an appeal being heard.

[68] The fair and reasonable employer, as referred to in s 103A of the Act, in my view would consider a compliant by an applicant for promotion that an early part of the process had been or may have been flawed and would then endeavour to see that any necessary correction was applied through the appeal process. Because that procedure existed and was exercised, the process overall was in my view a fair one, and it was fairly managed as a whole in the final outcome where the decision to promote to the level of SL6 was confirmed to Dr Mendes.

[69] I do not accept that the blemish to Dr Mendes of the reference to a track record of un-collegial behaviour stained her appeal against the 2005 promotion round.

[70] Professor Bellamy, who has had the wide experience through long service on various University promotion committees, including the FSC, gave evidence of the University's promotions process. I fully accept that evidence based as it was on Professor Bellamy's intimate knowledge acquired from involvement with literally hundreds of promotion applications. He said that the system set up by the University is designed to buffer or avoid the possibility that any single person might stall or impede the development of an academic's career. To this end, applications are considered first by the DSAC, then by the HOD of the relevant department, and then by the FSC, which is free to reach a different decision from that reached by the DSAC and/or the HOD. In the case of applications for senior appointments, including

Associate-Professor, the FSC provides advice to the UASC which then makes a final decision.

[71] Professor Bellamy told the Authority that routinely at every stage of this process the University's policies on equity and impartial decision-making are taken into account. Further, the FSC and UASC are made up of a representative group of academics, drawn from across the various faculties of the University. Therefore it is the applicant's peers on the FSC/USAC who have the primary duty of assessing and ranking a person's application, after consideration of the application and following any collegial debate. Professor Bellamy said that participants in this process consider the application as independent parties and are able also to consider the standard applied across the whole faculty, and ultimately the University, not just that which might apply within one particular department.

[72] Professor Bellamy rejected Dr Mendes' view of the HOD Report as being the "principal document in the promotion process." He said that the principal document is the academic's application for promotion. Professor Bellamy's evidence was that while the FSC receives the HOD Report, and other material, it makes its own decision based on the application itself.

[73] The Authority is satisfied that on the basis of the appeal that led the FSC to reconsider Dr Mendes' application in 2006, any flaw that had previously developed in the process was overcome, so that Dr Mendes was not disadvantaged or prejudiced by the comments about her track record of un-collegial behaviour.

[74] I find that the same occurred in 2006 when Professor McCutcheon reconsidered Dr Mendes' unsuccessful application for promotion to Associate-Professor. Insofar as there may have been some imperfection in the procedure through the appearance from his comments that Associate-Professor Amor had mistakenly believed that being at level SL8 was a condition of the application, this was overcome and corrected through the subsequent appeal process.

[75] I take the same view of the claims made that there were failures to comply with policies and breaches of good faith and other actionable errors. These have to be considered in the light of the promotions process overall including the existence of a right of appeal which in this case was fully exercised by Dr Mendes.

Referee Report of Professor Lowe

[76] During the investigation meeting an issue arose as to whether all references provided for Dr Mendes in her application for promotion to Associate-Professor in 2006 had been considered by the FSC. A Summary Form recording in brief the information relevant to Dr Mendes' application shows that reports were received from two referees, recorded being as "Card – REF 1" and "Hall – Southampton – REF 2."

[77] The University's Deputy Director, HR Advisory Services, Mr Andrew Phipps was questioned about the consideration that had been given by the FSC to a third referee's report, from Professor David Lowe. The Summary Form shows no indication of a report from him being part of the material put before the FSC.

[78] At first Mr Phipps said although three had been called for there had not been reports from three referees and that the University had received only two for Dr Mendes. He added that in any event he had never seen a situation where a third report had made a difference to the overall recommendation made by the FSC.

[79] Mr Phipps at first thought that Dr Mendes' designated referee, Professor Lowe, although requested to do so had for some reason not provided a report. Mr Phipps' evidence was that the University received only two referee's reports and therefore considered only two.

[80] Mr Phipps in his evidence said that if Professor Lowe's report had arrived before the FSC meeting it would have been considered by the Committee but that if for some reason the report had not been considered, that omission could have impacted in a number of ways on Dr Mendes in the outcome of her promotion application.

[81] Later during the investigation meeting, when shown an email from Professor Lowe indicating that his report had been sent to the University, Mr Phipps agreed in his evidence that the HR department must have received Professor Lowe's referee report. The date of that email also indicates that it was received before the FSC meeting at which referees' reports and all other information was to be considered. Mr Phipps agreed again that a third report might have tipped the balance towards a recommendation from the FSC to promote Dr Mendes to Associate-Professor instead of SL8, but he qualified his evidence as being speculation only and said it was equally true that the impact of a third referee report might have prevented the promotion to SL8.

[82] The report of Professor Lowe, as apparently attached to his email sent to the University HR department, was not produced to the Authority and there was no evidence from any witnesses as to what grades it contained in relation to Dr Mendes under the heads of assessment for research, teaching and service. It may be assumed they were favourable and probably very favourable to Dr Mendes.

[83] In final written submissions Dr Robertson argued that the failure to include the grades given by Professor Lowe, whatever they had been, disadvantaged Dr Mendes.

[84] The concern of Dr Mendes about this omission is fully understandable, as the referee reports are an important part of the University's published policy and procedure on promotion to the level of Associate-Professor.

[85] The policy document requires that the three external referees are to be of the highest calibre professionally and academically in their field internationally. The policy also requires with reference to the FSC that it "will consider the Referee Reports."

[86] The referee reports are to be supplied to the University in confidence and will not be released to the staff member applying for promotion. Before the Authority's investigation, Dr Mendes apparently would not have known that her referee's report had not been considered by the FSC.

[87] Where an application for promotion is to be forwarded to the UASC for consideration, under the policy the Dean, as Chair of the FSC, is expressly required to provide copies of the referees' reports. The UASC is required to consider the reports "of three external referees."

[88] In summary from the evidence before the Authority, it seems highly probable that a third referee's report was received by the University from Professor Lowe. What happened to it after that is unknown, but it seems likely that the FSC was not supplied with a copy of it and therefore did not give the third report consideration as required. The alternative, that the FSC did have the report but simply did not refer to it in the Summary Form, seems unlikely as the sub-committee's notes expressly refer to the other two referee reports.

[89] I do not consider that Dr Mendes' understandable concerns about these circumstances should now be made the subject of any determination by the Authority

in this current case. This is not a matter that was identified and articulated as an employment relationship problem for the purposes of the investigation that has been carried out. The particular problem, in all its aspects, was comprehensively defined in the statement of problem including its four amendments. This is a new matter that has only come to light in the course of the investigation. It is not referred to by Dr Mendes in her written brief of evidence and the first sign of its existence was the production of a copy of an email by Professor Lowe showing that he had attached his referee's report to the email and he sent it to the University before the date of the FSC meeting.

[90] The statement of problem in relation to the 2006 promotion round is focused on Dr Mendes' dissatisfaction with the treatment of her appeal against the 2006 promotion outcome. That appeal was expressed by her as being taken with regard to distinct actions or omissions of the employer in carrying out the 2006 promotion round in her case.

[91] Dr Mendes may if she wishes try to exercise any other remedies that are available to her, before asking the Authority to fully investigate this particular matter and determine it as an employment relationship problem.

[92] The University policy provides for a right of appeal against non-promotion, although it may only be exercised on the grounds of a failure in procedure "that is so substantial that it may have affected the decision." There is now some evidence of a failure in procedure and, given the importance attached to the referees' reports by the University's policy, it may be a reasonable conclusion that such a failure was so substantial that it may have affected the promotion decision. That is for others to decide, not the Authority.

[93] The policy expressly provides that an internal appeal is to be lodged within 90 days of the advice of the non-promotion decision. As that advice was given to Dr Mendes over three years ago, she is now well past the stated time limit for lodging an appeal.

[94] However, it may be that the University considers that the time limit should be applied with the same flexibility as the 90 day time limit for raising a personal grievance under s 114 of the Employment Relations Act. Under that provision the 90

day period is tied to the date on which the action alleged to amount to a grievance occurred “or came to the notice of the employee,” whichever is the later.

[95] For the above reasons, it is not appropriate for this new matter to become the subject of a determination through having it ride in on the coat-tails of the employment relationship problem or the complaints that were clearly put before the Authority and the employer from the outset of this investigation and that were later refined four times before the investigation meeting began. It is also important, and necessary under the Act that the parties should have an opportunity to resolve by mediation any employment relationship problem that has not yet been addressed by the appeal mechanism provided by the employer or by raising a personal grievance.

[96] The same must apply to other aspects of the 2006 promotion round that became the subject of evidence and that have also been addressed in Dr Robertson’s submissions. An investigation by the Authority is not a general audit or review of the actions of an employer or the administration by it of its policies and procedures. An investigation is commenced by the lodging of a statement of problem which identifies the particular concern of the employee so that both the Authority and the respondent party, the employer in this case, may become fully and fairly informed of the complaint.

[97] While in many cases Authority investigations may be allowed to roam to some degree beyond the statement of problem, that is not an approach that can be taken in this case where a range of diverse but well defined complaints have been identified before the investigation meeting as comprising the employment relationship problem.

[98] Other new matters that seemed to arise during the investigation meeting and that are not suitable for determination in this application, include the evidence of Associate-Professor Amor conceding that he had made a mistake by giving Dr Mendes a “distinction” grade for her research but then had not made a recommendation for promotion to Associate-Professor. Paragraph 55 of Dr Robertson’s submissions refers to this matter.

[99] Paragraph 60 of counsel’s submissions seems to be in the same category, arguing that a reference to “EX” could only have been short for “exceptional” rather than “excellence” as Mr Phipps believed. It is submitted that a rating of exceptional

corresponds to a grade of Distinction and that the use of a different set of grades disadvantaged Dr Mendes.

[100] There are further submissions made by Dr Robertson referring to issues or contended issues which were not raised before the evidence was given in the Authority's investigation meeting. It needs to be emphasised that an Authority investigation is not a review of unlimited scope into absolutely every aspect or facet of an employer's (or employee's) actions, in this case in relation to the way an application for promotion was considered and disposed of in a particular year, 2006. The investigation must remain reasonably focussed inside the parameters of the employment relationship problem as defined by an applicant.

Promotion in 2007

[101] Although forming part of the claims made by Dr Mendes in relation to promotion, her complaints in relation to the 2007 year round were not addressed in closing submissions made on her behalf, perhaps because she is no longer pursuing that part of the claims.

[102] In any event the complaints about 2007 were addressed in closing submissions for the University and I agree with those. I find that Dr Mendes was not disadvantaged in 2007, because she applied for promotion to Associate-Professor and was successful. That result ought to speak for itself about the fairness of the University's actions in that promotion round. At best some communications Dr Mendes' had with Professor Bellamy left room for a misunderstanding about what he was getting at. That is a common enough situation between people at any level, but one that is far away from misrepresentation, or from amounting to misleading or deceptive behaviour, as alleged.

Conclusion on promotion claims

[103] I find that Dr Mendes various claims about the 2005, 2006 and 2007 promotion rounds and her appeals in relation to those cannot be sustained. Accordingly, none of the various remedies she seeks is available. The University's actions were not unjustified in any respect, and neither was Dr Mendes disadvantaged at all in her employment or any condition of her employment.

2. Workload relief

[104] Dr Mendes' claim under this head is that the University denied her an entitlement to be given workload relief. Over a period of several years she estimates her loss to have been \$96,111.

[105] A particular grant of research funding applied for and granted to Dr Mendes led to her raising this issue as to the way in which she would be receive workload relief from the University. She had applied in 2006 for a Marsden Fund grant to enable her to carry out particular research work on "A Causal Model for Resource Estimation of Web Projects."

[106] In May 2006 she questioned her supervisor, the Computer Science HOD Associate-Professor Amor, whether she would be able to have a "buy-out" from the teaching component of her position as a way of obtaining sufficient workload relief to fulfil the Marsden Fund research contract requirements, if her application was granted.

[107] Associate-Professor Amor answered by advising that there was a particular threshold measured as 0.2FTE (Full Time Equivalent) which her grant would need to reach before any teaching buyout would be negotiated. Dr Mendes questioned the reason for having the 0.2 requirement.

[108] Associate-Professor Amor's answer was that the 0.2 threshold reflected the maximum 20% of time that an academic was allowed to put into work outside of their major duties before having to reach special agreement with the University. The Academic Staff Collective Agreement contains at Schedule 6 a policy on outside activities undertaken by staff. It includes as a guideline a commitment that up to 20% of a staff member's time over the course of a year may be spent in approved outside activities. No provision is made in the collective agreement for workload relief.

[109] Associate professor Amor added a further reason for the 0.2 workload relief threshold:

I believe that it also reflects an expectation that staff are doing research as part of their job, and up to a certain point research, such as Marsden projects, fits into the 40% of research time expected from academic staff.

[110] In response to this explanation Dr Mendes noted her concern that:

... for those who are unable to cut from 0.4 to 0.2 by the time their grant starts, their workload may increase up to 0.2.

[111] She questioned whether “the 0.4FTE of research one does can actually be reduced to 0.2FTE before the grant starts.”

[112] The Marsden Fund granted Dr Mendes’s application in October 2006.

[113] Associate-Professor Amor counselled Dr Mendes to achieve workload relief for the research project by rearranging her research programme, to free up time for the particular project approved by the Marsden Fund. In particular, Dr Mendes was advised by her HOD that she could reduce the number of papers she had been publishing, giving her more time for the project, and that she could also cut down on the time spent attending and presenting at conferences. In those ways she could, explained to her by Associate-Professor Amor, find up to 0.2FTE to transfer to her work on the Marsden Fund contract research.

[114] From the evidence I find that across the various departments of the University of Auckland, where academics are carrying out research work funded by grants from sources such as the Marsden Fund, there is no common or universal way of providing workload relief. The model that Dr Mendes was advised the Computer Science Department used had been implemented before Associate-Professor Amor became HOD.

[115] To a large extent Dr Mendes’ claim relies on the provisions of a contract for supply of services for the Royal Society of New Zealand that was entered into in March 2007 with the University of Auckland. Under the contract a grant for the services was made from the Marsden Fund.

[116] Leaving aside the issue of whether Dr Mendes can strictly enforce that contract, there is no real dispute that as a condition of her employment she is entitled to workload relief where research funding has been granted for research work by her. The real question in this case is the way that relief was given.

[117] Under the Marsden fund contract Associate-Professor Amor, as HOD, had agreed in writing to provide workload relief for Dr Mendes as the researcher whose work was receiving the funding. He confirmed that in relation to the particular research contract for which Dr Mendes had been granted funding, she:

... will be given sufficient workload relief to fulfil the research contract objectives and milestones.

[118] The declaration Associate-Professor Amor gave makes reference to the Principles on Full Cost Funding of University Research, as formulated in January 2003. Those Principles emanated from the office of the Minister of Research Science and Technology. It is clear, and there is no dispute, that they were intended to apply to universities, including the University of Auckland.

[119] In the Principles it is noted that the full funding of the research emphasises that the research is separate and different from research carried out as part of teaching students. The Principles provide:

- *Heads of Department will agree, in writing, to provide workload relief for research staff working on RS&T contracts.*

[120] Further, the Principles refer to a sign-off to be obtained from the researcher's Head of Department, the purpose of which is to provide:

Written confirmation that the researcher will be given sufficient workload relief to fulfil the research contract.

[121] The Principles in this part (Annex A, p.7) also provide:

The form and extent of the workload relief is an internal matter for the universities to decide.

[122] In considering this particular claim of Dr Mendes, regard must be had to the elements of an unjustified action-disadvantage personal grievance under s 103 of the Act.

[123] As a matter of causation, whatever disadvantage was suffered or experienced by Dr Mendes has to have flowed on from some unjustifiable action by her employer, the University of Auckland. In relation to disadvantage to her conditions of employment, Dr Mendes attributes a major breakdown in her health, requiring her to go on sick leave for some two months, to an alleged failure by the University to provide her with sufficient workload relief.

[124] I am unable to find a lack of justification in anything Associate-Professor Amor did as HOD in administering workload relief. I find that the model he put forward to Dr Mendes, based around a threshold or boundary of 0.2FTE, had been

created or designed by the Computer Science Department before he became Head of it and had usually been applied to staff such as Dr Mendes who had obtained research grants.

[125] To the extent the model was different from any of those used in other departments, some of that difference is explained by the nature of the research required in different fields of learning such as Engineering or Medical Health and Science, to name but two referred to by Associate-Professor Amor when giving evidence of the different models for workload relief.

[126] As laid down in the 2003 Principles of Full-Cost Funding, the form and extent of workload relief was intended to be an internal matter for each university to decide. There is discretion in this regard and I find that it was not unreasonable for the University of Auckland to permit different departments to have different models according to the different fields of science, medicine, technology etc. they provide learning and research in.

[127] Professor Jane Harding who is Deputy Vice-Chancellor (Research) of the University gave evidence that it was unrealistic to have a uniform method across all departments of calculating workload relief to be given. She regarded the test as being whether the researcher would have sufficient time to carry out the research work funded by a grant. Professor Harding noted that between making application for her grant and having it awarded Dr Mendes had about 10 months, which was sufficient time to decide how best to balance her existing workload so that she could meet the requirements of the grant. I accept that it was reasonable in the circumstances for the University to expect self-management and self-responsibility in this regard from employees who enjoyed considerable freedom in what they did with regard to undertaking any research work.

[128] Associate-Professor Amor I find exercised a discretion he had as HOD in the same way that it had been exercised by his predecessors, and not arbitrarily or unreasonably towards Dr Mendes in particular. When he expressly confirmed that Dr Mendes “will be given sufficient workload relief to fulfil the research contract objectives” it was reasonable for him to consider that that relief could be found by her rearranging the research programme she had during the time when she was to fulfil the grant. I do not consider that by referring to workload relief as something to be

given that meant a transfer of relief from the HOD to the researcher such as Dr Mendes.

[129] In the circumstances, I find it was reasonable, based on the previous application of the Computer Science model, for Associate-Professor Amor to expect Dr Mendes to find up to 0.2FTE through rearranging her schedule of research work to give her that time. There is no suggestion that she would breach any rules or policies or fail to achieve any standards required, by carrying out that rearrangement or adjustment to provide the time.

[130] Dr Mendes had considerable autonomy in her research work and I accept that it was within her control to adjust her programme by reassessing priorities and commitments as a way of trimming her work to fit the needs of the Marsden grant. Any stress she suffered was self imposed to the extent she did not respond to Associate-Professor Amor's mentoring on this subject.

[131] I find no lack of justification in the employer's actions and determine accordingly that Dr Mendes has no personal grievance in relation to workload relief.

[132] I decline to make recommendations under s 123(1)(ca) of the Act as sought. While the model used by the Computer Science Department is not the same as those used in other departments, lack of uniformity by itself provides no basis for recommending that there must be one particular model across all departments. The information that has been given to the Authority is largely about the Computer Science Department and quite insufficient to be a basis for attempting to recommend some universal model, if one was even considered desirable.

[133] In any event there were and are other ways open to Dr Mendes to seek change in this regard. Proposals may be made to the research committee of the Computer Science Department for consideration. That is the only recommendation I make, that Dr Mendes raise the issue with the committee.

[134] Given the determination above, there is no need to decide whether the Royal Society should be joined as a party to this investigation.

3. Initiation of disciplinary procedure in relation to staff travel policies

[135] In 2007 Dr Mendes made arrangements to travel to a work related conference being held in Spain that September. In advance she sought approval for the travel and payment for the cost of it.

[136] On the standard form for requesting approval for travel and leave Dr Mendes gave as her last day of work 31 August 2007 and the date of her return to work as 2 October 2007.

[137] After some delay through the form being misdirected it reached Associate-Professor Amor who considered the request and then sent an email to Dr Mendes advising that he could not give approval for the travel and leave. He explained:

There are two major concerns that I have with this.

- (1) *The short period of notice before you expect to depart. One week is not enough time for this to be properly considered, and I understand that tickets are already ordered which, as you well know, is not the expectation for our travel process.*
- (2) *The amount of time you are away during term time and the impact this will have on your class. I am unhappy that this impacts the first week of your classes for COMPSCI 230. What is the possibility of changing your proposed time away so that this is not the case?*

[138] Dr Mendes responded to the email straight away apologising for the delay in making her request and explaining why it had occurred. She also proposed a way of dealing with the impact of her absence on the first week of classes, by organising extra classes and making certain other arrangements.

[139] Associate-Professor Amor reconsidered and signed his approval for the requested travel/leave on 29 August 2007, but made the following note on the form:

Signed with severe reservations due to short time until trip, flights already paid, and poor cover for teaching.

[140] That same day Associate-Professor Amor sent another email to Dr Mendes advising that while he had signed the request for travel he remained concerned at the untenable position he had been put in, where the travel had been booked and paid for prior to approval being sought. He also said that he was still not happy that the lost week of teaching by Dr Mendes could, by squeezing four weeks of material into three weeks, be recovered without impact on the students. He went on:

To address the issues which are raised by your actions in regards to this matter I will be invoking the disciplinary procedures for academic staff, as attached to your standard employment contract. As per these procedures I wish to hold an initial meeting to address the performance concerns that I have. For this meeting you may be accompanied by a representative. I plan to hold this meeting in the week that you return, and suggest Friday 5 October at 9.00am in my office.

As per the disciplinary procedures I will be looking to do the following at this meeting:

- (a) Identify the perceived shortcomings and invite any explanations for them.*
- (b) Outline the standards of performance or behaviour that are required and explain the ways in which improvement is needed and the period for the Staff Member to attain the standards.*
- (c) In the absence of a satisfactory explanation by the Staff Member, give an oral or written warning to the Staff Member which should be noted on the Staff Member's official University file. The Staff Member shall be given a copy of the note.*

[141] After receiving the email on 29 August, Dr Mendes later that day sent an email to her colleagues in the Computer Science Department advising as follows:

Dear All,

Robert has decided I am to be formally disciplined because I booked an air ticket before obtaining travel approval (I had to decide on the spot to purchase the ticket or have an increased cost of \$500 if I waited), and because I will be away for the first week of my teaching (despite my assurance there would be on-line tutorial and extra classes for students).

....

If anyone has ever booked a ticket before obtaining travel approval I would be most grateful if you could please email me as this would be evidence helpful for the hearing. Anonymity is guaranteed.

[142] For the disciplinary meeting Dr Mendes secured assistance from an organiser of her union the TEU, Ms Jane Adams, who advised Associate-Professor Amor on 30 August that due to the planned meeting Dr Mendes felt she had no option but to postpone her trip so that the meeting could be held as soon as possible.

[143] Ms Adams was advised by Mr Greg MacDonald the University's HR Manager who had been consulted by Associate-Professor Amor, that there had been no intention on the HOD's part for Dr Mendes to have to cancel her trip.

[144] Mr MacDonald also advised Dr Mendes that there had been no intention to cause her to delay her planned trip or cause any disadvantage. He advised that Associate-Professor Amor wished to meet and discuss appropriate communications regarding travel arrangements. The HR department had advised Associate-Professor Amor that a meeting with a representative present was the best way to do this.

[145] In a further communication Mr MacDonald advised Dr Mendes that he supported the idea of an informal meeting as opposed to “disciplinary.” He said he would be happy to discuss this with Associate-Professor Amor in the hope it would eliminate the need for an initial disciplinary meeting in the circumstances.

[146] Dr Mendes was advised by Associate-Professor Amor that the meeting would proceed as originally notified. In reply Ms Adams advised that a personal grievance would be raised if any disciplinary action resulted from the meeting or if any record of it was put on Dr Mendes’ personal file.

[147] There were further communications about the nature of the meeting to be held, including a request for Associate-Professor Amor to explain why Dr Mendes performance had been regarded as unsatisfactory or why her behaviour amounted to misconduct.

[148] The meeting was held on 10 September 2007. In the course of it, after discussion about the policies or requirements applicable to seeking approval for leave of absence, Associate-Professor Amor advised Dr Mendes and Ms Adams that he did not see a warning as warranted in the circumstances, in view of their discussion that had taken place. He agreed that better clarity was required to be given by the Computer Science department of its expectations in relation to the travel process, especially with regard to the timeliness of requesting approval.

[149] No record was placed on Dr Mendes’ file to show that the disciplinary process under the collective agreement had been invoked, at least up to the point where a meeting had taken place.

[150] Dr Mendes view is that the invocation of the disciplinary procedures that are provided at Schedule 3 of the Academic Staff Collective Agreement (2006-2007) by Associate-Professor Amor was itself a disciplinary action and in the circumstances an abuse of process.

[151] Ms Adams view is that the use of the disciplinary procedure was a provocative step, as it was invoked against a senior academic who had a spotless record as an employee and had given seven years of service. Ms Adams regarded Associate-Professor Amor as having overreacted in the circumstances and that in practice, or customarily, the disciplinary procedures at Schedule 3 of the collective agreement were not used by the University in the situation the HOD had wished to address.

[152] As stated in the Schedule 3 disciplinary procedures, they apply where in the course of employment of a Staff Member there is concern about the standard of his or her performance or conduct. As the procedures also specify, at clause 4:

4. INITIAL MEETING

4.1 *Where the Head of Department considers that the Performance of a Staff Member is unsatisfactory or that the behaviour of a Staff Member amounts to Misconduct, the Head of Department will arrange a meeting with the Staff Member concerned to discuss in an informal and constructive manner the aspects of Performance or behaviour that are perceived to be unsatisfactory. The Staff Member may be accompanied by a representative. Support to achieve the standards required will be provided where applicable.*

4.2 *At that meeting the Head of Department will:*

- (a) *Identify the perceived shortcomings and invite any explanations for them.*
- (b) *Outline the standards of Performance or behaviour that are required and explain the ways in which improvement is needed and the period for the Staff Member to attain those standards.*
- (c) *In the absence of a satisfactory explanation by the Staff Member, give an oral or written warning to the Staff Member which should be noted on the Staff Member's official University file. The Staff Member shall be given a copy of the note.*

[153] I find that Associate-Professor Amor planned the meeting to meet the requirements of clause 4 of the procedures. The meeting therefore provided an opportunity for him to identify the perceived shortcomings to Dr Mendes and invite her explanations for them. There was no requirement for him to give full details and particulars as requested by Dr Mendes in advance of that meeting.

[154] I find that the submission made for Dr Mendes that the invocation of the procedures was a disciplinary action confuses the distinction between commencing a

disciplinary inquiry and applying discipline. The step taken in this case was the former. The latter step was not taken, an outcome that was clearly a possibility after invoking the disciplinary procedures detailed at Schedule 3 of the collective agreement.

[155] I reject the submission that there was any abuse of procedure in what was done. I am unable to find any lack of justification on the part of Associate-Professor Amor in invoking the procedures, a matter within his discretion in the circumstances. I also must find that there was no disadvantage to Dr Mendes. To the contrary, there was an advantage to her, in that an earlier fear or apprehension by her HOD that there had been some failure of performance or conduct was dispelled by the discussion at the meeting and as a result Dr Mendes' record remained untarnished. The process had allowed her to keep her record free of any black mark going against it.

[156] I find no evidence that Associate-Professor Amor acted maliciously or arbitrarily or from ulterior motives. I accept from the evidence that he held genuine concerns about the performance or behaviour of Dr Mendes and wished to take those up with her under the prescribed disciplinary procedures for academic staff. It is not the point that another HOD may have addressed those concerns in a different way without resort to disciplinary procedures. I find that Associate-Professor Amor acted in good faith, according to his best judgement as a HOD of what was required.

[157] Dr Mendes had no reasonable basis for believing that what she said in the email of 29 August sent to her colleagues was true, that Associate Professor Amor had decided to discipline her. No disciplinary action was imposed at any time.

[158] From the evidence I am able to reject as totally unfounded the submission that Associate-Professor Amor and Mr MacDonald collaborated to impose disciplinary procedures with the intention of threatening and bullying Dr Mendes. I reject the submission that the University had "seized" on the use of the disciplinary procedures as an opportunity to put Dr Mendes under "extreme pressure" and ruin her health by pushing her "beyond my limits."

[159] Extraordinary accusations such as these and others put in evidence (including the ones of lying made by Dr Mendes against Professor Hosking and bullying and using false pretences made against Mr Phipps) show a propensity of hers to

thoughtlessly and irresponsibly denounce in the strongest terms those whom Dr Mendes believes are her adversaries.

[160] There is another fundamental reason why this claim cannot succeed as a personal grievance. It is because of the qualification under s 103 (unjustifiable action by an employer does not include an action deriving solely from the application for disputed application of any provision of any employment agreement). There was, I find, clearly a dispute about whether clause 3 applied in the circumstances, or about whether Associate-Professor Amor should have applied the procedure in the situation he wished to address.

[161] I find that Dr Mendes does not have a personal grievance in relation to this matter and there is no remedy therefore required to be considered by the Authority.

4. Investigation of bullying complaint

[162] On 28 May 2009 Dr Mendes wrote a complaint against the HOD of the Computer Science Department, Associate-Professor Robert Amor, as follows:

Formal Complaint

5/28/2009

I am raising a formal complaint against Robert Amor, CS HoD.

Nature of the complaint

Bullying, unfair treatment and breach of the HoD policy.

Part 1

An issue was raised by the staff rep from a second year course regarding a mid-term test. As a result of talking with the staff rep, a correction plan was orchestrated by Robert. The plan had a number of serious flaws, and was clearly unworkable to any academic worth his/her salt. A great deal of time and effort was used to elucidate these flaws to Robert. My efforts to prevent an impending disaster were ignored in front of my peers, and I was ordered by way of rank, to implement the changes directed by Robert. Robert's Corrective Action Plan (CAP) failed at the first fence and for reasons already expressed to him in detail by myself over emails.

In this instance I was forced to comply with something that was clearly unworkable the moment it was announced, with the potential to waste considerable University resources in the coming months. During this process a great deal of my own time was similarly wasted, both in changing the exam to meet the new requirement, and then changing it again and again to work around the problems

created by Robert's new CAP. Time was also wasted presenting sound and valid arguments to alert Robert to immediate problems faced if such a plan was implemented.

All of this time, my arguments were ignored as if I were transparent, rather than a valued senior academic in this department. As a result, I feel I've been humiliated in front of my peers, with a profound sense of worthlessness in the job that I do. With the additional time requirements to focus on this issue, I have been placed under a great deal of unnecessary stress given that this is already a busy time of the year and my teaching is 30% above the expected load. In addition, I am still working 0.12FTEs more than my co-workers fulfilling Government granted work, still unassisted by workload relief. In one of the emails that form part of the discussion, I was accused of 'twisting' Robert's words for using a synonym, again in front of my peers. This sentence has a negative connotation to which I objected and asked for an apology. Nothing came.

Part 2

This year I applied for R & SL [Research and Study Leave] for 2010. I presented a compelling case to Clark (aided by Robert), to take the leave in the first semester. A great deal of planning went into this research leave, to build collaborative links with a federal University in Brazil, and a number of companies based in Sao Paulo and Rio de Janeiro. From my understanding, forging links with South America is considered important for this University.

However, the case was closed without HoD's support, on the basis I would be required to teach an UG [undergraduate] course in the first semester 2010. However, this was premature as neither Clark nor Robert took into account my teaching load for 2010 based on current projections, which clearly demonstrated I would be 50% above the Department's expected teaching load, so making the issue of teaching to UG students in Semester 1 a moot point, and negating the "one" objection made necessary for HoD approval for semester 1.

Regrettably Clark was abroad at this point in time. However, Robert took it upon himself to move the goalposts and to raise a further objection, un-related to the initial reason for denial of HOD support. Again, a counter-argument was given. Robert raised yet more objections, again moving the goalposts further, and again counter-arguments were given. Robert refused to act further when he ran out of pitch.

It should be noted that my leave for Semester one was not supported in the HoD report because of the additional objections raised by Robert, above and beyond Clark's original objection. However, Robert failed to recognise that by equal measure, the additional objections he raised as to why I would not obtain HoD support for Semester one were equally applicable to my application for R & SL in Semester two and likewise would apply to any staff wishing to apply for R & SL. As support was given for Semester two, this contradiction clearly demonstrates that the additional objections raised by Robert were unwarranted, and that support was denied for reasons other than managerial planning.

The essence of my complaint here is that I have not been treated fairly, and that Robert is in breach of the HoD policy by denying me support, where support should clearly have been given, since the original objection was moot. Further, a specific request to HR was made and granted, requesting that Robert not be the one providing the principal input for my application, given the sizeable portfolio of complaints of unfair treatment and bullying against him, now lodged with the ERA [Employment Relations Authority]; concerns indicating a track record of bias towards me. However, at no point during the latter stages of this discussion did Robert show any indications that he had discussed his “new” objections with Clark, in light of their incorrect assumption about my teaching load for 2010 and contrary to our agreement that Robert take a back seat to the discussions.

What can I say? Bias from Robert was forecast; bias was the result.

[163] The “issue” Dr Mendes referred to at the beginning of Part 1 of her complaint was a difference of opinion she had had with Associate-Professor Amor. They had disagreed over the maximum number of marks that should be assigned to any one multiple choice question answered by second year students taking a mid-term test. Associate-Professor Amor considered, and ultimately directed, that a single multiple-choice question should not carry more than 2-3% of total marks, whereas Dr Mendes had argued for a higher percentage.

[164] Part 2 of Dr Mendes’ complaint was about decisions Associate-Professor Amor had made in considering an application from Dr Mendes for Research and Study Leave to be taken at the beginning of 2010. As it had been submitted a year late in April 2009, Associate-Professor Amor considered it raised problems with planning for staff availability in his department.

[165] On about 29 May Dr Mendes’ written complaint was referred to Professor Lee, the Acting Dean of the Science Faculty, who advised Dr Mendes that he had requested the Vice-Chancellor, Professor McCutcheon, to appoint an independent academic staff member to investigate it.

[166] The Vice-Chancellor appointed Professor Annamarie Jagose, the HOD of the Department of Film and TV Studies at Auckland University.

[167] On behalf of the Vice-Chancellor, Mr Andrew Phipps the Deputy Director of HR Advisory and Shared Services provided a detailed brief to Professor Jagose of her role in conducting the investigation. The last step that he asked her to undertake was as follows:

- *Prepare a written report for the Vice-Chancellor which sets out the findings of your investigation, including:*
 - *Whether, having regard to the definition of bullying (Appendix A) given by the Employment Relations Authority Associate Professor Mendes' complaint of bullying against Associate-Professor Amor is substantiated.*
 - *Whether Associate-Professor Amor can be said to have treated Associate-Professor Mendes unfairly as she alleges in her formal complaint.*
 - *Whether there has been any breach of the HOD policy by Associate-Professor Amor.*

[168] Mr Phipps' brief to Professor Jagose concluded:

I confirm that Associate-Professor Mendes has raised other issues in relation to her employment which are currently before (or will soon be before) the Employment Relations Authority. These issues relate to concerns about the academic promotion process, and issues relating to research funding and workload relief. I do not require you to consider and report on these issues.

[169] Appended by Mr Phipps to his brief was a definition of bullying extracted from the determination of Authority Member Dr Dzintra King in *Evans v. GEN-i Ltd* unreported, Auckland Employment Relations Authority, AA333/05, 29 August 2005. That definition was:

Bullying may be seen as something that someone repeatedly does or says to gain power and dominance over another, including any action or implied action, such as threats, intended to cause fear and distress. The behaviour has to be repeated on more than one occasion and there must be evidence that those involved intended or felt fear.

[170] Professor Jagose attempted to arrange a meeting with Dr Mendes. She was advised that Dr Mendes wanted to defer the meeting until she had returned from an overseas trip. This led to Mr Phipps requesting that she make herself available for the meeting before she left. Dr Mendes expressed objection to this but was nevertheless instructed to comply with the request and meet Professor Jagose. Dr Mendes regarded herself as being forced to attend the meeting and complained further to Mr Phipps about this. Her complaint was directed to the Vice-Chancellor.

[171] A further complaint Dr Mendes made arose out of a reference Mr Phipps had inadvertently made in an email to her. He referred to her bullying complaint as being a complaint of alleged "bullying and harassment." Dr Mendes then sought to question

Professor Jagose as to the experience and training she had had, if any, in conducting and leading a harassment investigation.

[172] The Vice-Chancellor Professor McCutcheon sought to clarify with Dr Mendes the way her complaint was to be investigated. He confirmed that Professor Jagose was undertaking her investigation on the basis of Dr Mendes' original written complaint set out in her letter of 28 May 2009, where it was described as being one of "bullying, unfair treatment and breach of the HOD policy."

[173] Then Dr Mendes on 18 August 2009 made a formal complaint about Mr Phipps. She said that he had used his position to try and bully her and had used false pretences to try and force her to attend an investigation into harassment.

[174] On 25 August 2009 in a letter to Dr Mendes, the Vice-Chancellor confirmed once again that Professor Jagose was undertaking an investigation on the basis of Dr Mendes' original written complaint and was not, nor ever had been, investigating a complaint of harassment. In his letter Professor McCutcheon acknowledged that Mr Phipps had incorrectly used the term harassment. He acknowledged Mr Phipp's mistake was unfortunate and he apologised for any confusion resulting from it. He said it had had no impact on Professor Jagose's investigation.

[175] The Vice-Chancellor wrote again to Dr Mendes pointing out that three months had passed since she had made her complaint and that in his view it was unreasonable for the University to allow the complaint to remain unresolved. He pointed out that it was not Dr Mendes' role to prescribe how Professor Jagose would conduct her investigation as his delegate under a prescribed formal procedure. Professor McCutcheon reiterated an instruction that Dr Mendes was to meet with Professor Jagose to progress the investigation into her complaint.

[176] That meeting took place on 31 August 2009. In the course of it, in a formal statement presented to Professor Jagose, Dr Mendes expressed herself to be unclear as to whether the investigation was in respect of bullying and unfair treatment or harassment. She said that she had been ordered to the investigation by the Vice-Chancellor under threat of disciplinary action despite having raised a number of legitimate concerns that due process and the University's Impartial Decision Making Policy were not being followed. She accused Professor McCutcheon of having

applied “an instrument of force” to compel her attendance at the meeting with Professor Jagose.

[177] Professor Jagose completed her investigation and delivered a report on it to Professor McCutcheon on 16 September 2009. That report set out in considerable detail spread over some seven pages the process followed by Professor Jagose to investigate the complaints. She expressed her conclusion as follows:

Conclusion

On available evidence, I find that Associate-Professor Mendes’ allegations of bullying, unfair treatment or breach of HR policy on Academic Heads are unsubstantiated. I therefore find no evidence of misconduct as per the terms of the Academic Staff Collective Agreement 2008-9, Schedule 2: Discipline Procedures.

I would also like to note that, while an accessible formal complaint procedure is a necessary and valuable aspect of a complex institution like The University, I have reservations in this instance as to the appropriateness of its use. Associate-Professor Mendes’ casual language and undocumented claims are unsuitable for a formal complaint, suggesting the mechanism is being taken up as an extension of her regular communications with Associate-Professor Amor rather than something initiated when all other avenues of communication and mediation have failed.

[178] After reading and considering Professor Jagose’s report, Dr Mendes wrote to Professor McCutcheon expressing her considerable dissatisfaction with it. She accused Professor Jagose of breaching University policy and of failing to act responsibly in her role as investigator of the complaint. She also accused Professor Jagose of presenting a picture that was highly distorted, unjustifiably critical of her as an academic and in her day-to-day working relationship with her HOD, and of failing to address the very nature of the complaints she had raised against him. Professor McCutcheon acknowledged receipt of those comments.

[179] The complaint of bullying against Associate-Professor Amor and the investigation and determination of it by Dr Mendes’ employer took up a considerable amount of time between May and September 2009 and involved a number of people. The complaint and its investigation were the subject of many written communications between Dr Mendes and management personnel of the University, from the Vice-Chancellor down. This material was produced to the Authority as documentary evidence and, as well, all those directly involved, including Professor Jagose, gave written and oral evidence to the Authority.

[180] The complaints and criticisms made by Dr Mendes in relation to this episode in her employment are set out in the statement of problem (4th amended). There is a general complaint that the University failed to undertake a fair and reasonable investigation into Dr Mendes' formal complaint of 28 May, and the University is criticised for:

- Failing to follow its own policies;
- Failing at the outset to address the complaint in a timely manner;
- Subsequently addressing the complaint hastily and disadvantaging Dr Mendes as a result;
- Unreasonably threatening disciplinary action if Dr Mendes did not meet the timeframe for investigation set by the University;
- Through the Investigator, Professor Jagose, failing to gain a full understanding of Dr Mendes' complaint in the way she proceeded;
- Through Professor Jagose, failing to allow Dr Mendes to be heard on all information collated during the investigation.

[181] The particular policy referred to by Dr Mendes in her complaint is the University's Impartial Decision Making Policy, in particular the principles in the policy of:

- Openness of evidence and consideration;
- Application of transparent and fair criteria, standards and processes; and
- The rules of natural justice.

[182] It is contended in the statement of problem that the various matters of complaint and criticism constitute a breach of good faith, in that the University failed to be active and constructive in establishing and maintaining a productive employment relationship and failed to deal with Dr Mendes in a communicative and responsive manner.

[183] Further, it is claimed that the University's acts and/or omissions as detailed in the statement of problem were unjustified and resulted in Dr Mendes being disadvantaged in her employment through:

- Being professionally stigmatised; and
- Suffering significant stress.

[184] On this last matter first, the Authority has found no evidence of any professional stigmatisation suffered by Dr Mendes, and it is not something that can reasonably be inferred to have happened.

[185] In relation to the claimed disadvantage of stress suffered, it is accepted by the Authority that Dr Mendes viewed herself as having been bullied by Associate-Professor Amor and that this compelled her to present her detailed complaint of 28 May 2009. It is also accepted that Dr Mendes remains completely dissatisfied with the investigation into her complaint that was carried out by Professor Jagose and that consequently she cannot accept the outcome of that investigation.

[186] In the statement of problem the complaints by Dr Mendes are process related rather than being a complaint requiring the Authority to determine whether Associate-Professor Amor did bully Dr Mendes.

[187] Even if it not a matter the Authority has been asked to determine, I am in complete agreement with the conclusions reached by Professor Jagose that the conduct of Associate-Professor Amor was not bullying and did not amount to unfair treatment or constitute a breach of policy or misconduct.

[188] As well as the definition of bullying supplied to Professor Jagose, an observation about bullying made in another Authority case is equally applicable to the circumstances of this case. In *Menelda v Publicis Mojo Ltd*, unreported, AA 403/07, 19 December 2007, Authority Member Robin Arthur said;

Criticism or feed back from an employer is not bullying

[189] Neither is it bullying for an employee to be given lawful and reasonable instructions by his or her supervisor, although because of the way they are given or a particular vulnerability of the recipient they might become so.

[190] I find that the stress felt by Dr Mendes during the time of the bullying complaint and its investigation, and the stress she continues to feel even after that, arises from her belief that there was misconduct by Associate-Professor Amor and also from her belief that Professor Jagose wrongly found her complaint to be unsubstantiated. Those major causes of her stress do not establish a personal grievance in the absence of a finding that the employer acted without justification, whether through Associate-Professor Amore or Professor Jagose.

[191] Aspects of the process as complained about by Dr Mendes I accept exacerbated her stress, although I do not find that they were by themselves significant causes of it. I therefore examine the process complaints.

[192] To the extent that Dr Mendes' complaint of 28 May did not begin to be addressed until about four weeks later, rather than, say, two or three weeks later, there was a delay, but I do not consider it to have been so great that it is to be regarded as unduly excessive or that it prejudiced Dr Mendes in having the complaint otherwise properly investigated and determined.

[193] Insofar as Dr Mendes was directed to attend an interview with Professor Jagose and insofar as there was an implicit threat of disciplinary action being taken if she did not follow that direction, again the process was not ideal and there can always be room for improvement, but I do not consider this aspect on its own establishes a personal grievance, or amounts to such a lack of justification causing disadvantage in her employment to Dr Mendes that her claim should succeed.

[194] I find that in trying circumstances an investigation by the Vice-Chancellor's delegate, Professor Jagose, was conducted and did lead ultimately to a determination of Dr Mendes' complaint.

[195] I find no unfairness or lack of justice in the way that Professor Jagose conducted the investigation by interviewing Dr Mendes last. It does not follow at all that by doing so Professor Jagose put herself at some disadvantage by not gaining a full understanding of Dr Mendes' complaint from the beginning of her investigation. The substance of the complaint had been set out in detail in writing. It was for Professor Jagose to decide how she went about investigating the various factual matters that were raised in the complaint. In her view it was appropriate to hear from Dr Mendes last in the process, so that she had an opportunity to respond to what had

been said by earlier interviewees. In giving her evidence Dr Mendes accepted that she had been able to address everything she thought was relevant at her meeting with Professor Jagose on 31 August 2009.

[196] The items of information that Dr Mendes complains were not provided to her by Professor Jagose were obtained elsewhere, from Professor Thomborson, during the investigation and before she was due to meet Professor Jagose. Again, there was no disadvantage or prejudice in the outcome, whether another investigator might have provided that information directly or not. In my view, Professor Jagose had a valid concern to keep her investigation focused on the complaint and not let it become a means of “trafficking” in communications such as emails and possibly causing new complaints against new parties to be generated.

[197] For the above reasons, I conclude in relation to this particular claim that Dr Mendes does not have a personal grievance. The investigation of her bullying complaint did not lead the University to act unjustifiably or unlawfully towards her. No remedy is required.

5. Role of Deputy HOD (Research)

[198] In 2007 the position of deputy to Associate-Professor Amor, HOD of the Computer Science Department, became temporarily vacant for about three months. Formal applications to fill the vacancy were not being called for but Dr Mendes, who at the time was a Senior Lecturer, volunteered for the position.

[199] When Associate-Professor Amor declined to give her the position, Dr Mendes raised objections and suggested that she was being discriminated against because of gender.

[200] Associate-Professor Amor explained the reason for his decision was that he required the position to be taken up by an academic holding the position of Professor. He explained this was because he was himself still an Associate-Professor and considered it important to have someone of Professor level as his deputy to help support research decisions. Dr Mendes did not accept that explanation.

[201] It appears from the evidence that Associate Professor Amor acknowledged Dr Mendes had volunteered to become deputy as a way of building on her service to the Computer Science department and helping her case for promotion. He responded

constructively to this show of initiative and ambition by suggesting she consider another opportunity to provide service to the department. He suggested a role that was responsible for overseeing equal employment opportunity matters (EEO) within the department.

[202] Dr Mendes rejected the suggestion as she was by then legally challenging the University over its standard of compliance with EEO requirements and principles. She told the Authority she had turned down the position suggested by Associate-Professor Amor, as it was “a dead duck role.”

[203] It was accepted by Dr Robertson in his submissions that non-appointment to an extra position did not constitute disadvantage to Dr Mendes in her current employment, in the way that non-appointment might. The argument seems to be that the HOD was required to advertise the existence of a temporarily vacant position and invite applications for it from anyone who might be interested, although there was no requirement in the employment contract for that. It also appears that there was no right of appeal against non-appointment, an indication that it was a discretionary assignment by the HOD to the role.

[204] I reject the submission that the assignment of a Professor to the role was arbitrary and unjustified. It seems perfectly natural when cost was not a factor for the HOD to appoint the most senior person he could find who was prepared to take on the role, which apparently carried no increase in pay.

[205] The opportunity was also not one that was being made available to employees of “the same or substantially similar qualifications, experience or skills” as those had by Dr Mendes. It was being made available only to employees of measurably higher relevant qualifications (appointment to Professor), and the higher experience and skills that are most likely required to achieve that level of appointment. The definition of discrimination at s 105(1)(a) of the Act therefore is not satisfied in this respect.

[206] I find that Associate-Professor Amor declined to appoint Dr Mendes as his deputy because in assessing his needs for a deputy he made and applied a distinction between staff at the level of seniority of Professor and staff below that level. Dr Mendes was in the latter class and was not a victim of discrimination because of gender or for any other unlawful reason. His rejection of Dr Mendes was not

depreciative of Dr Mendes as a woman but was the result of a distinction applied between an academic of Senior Lecturer level and a Professor. The distinction Associate-Professor Amor drew was not by reason of any prohibited ground, I find.

[207] I find that the making of such a distinction was a matter of judgement and that the selection for the temporary position was within the discretion of Associate-Professor Amor as the manager or supervisor of academic staff employed in the Computer Science department.

[208] Dr Mendes chose to place negative connotations on this selection rather than seeing it as an exercise by a HOD in setting a particular standard for the Computer Science department, intended to reflect the general standards Associate-Professor Amor wanted.

[209] No doubt an appointment to the Deputy HOD position would have reflected well on Dr Mendes, providing some prestige and increasing her renown, but in no sense was she disadvantaged in or in relation to any condition of her employment by not being appointed. She simply did not obtain any advantages that the three month temporary appointment might have brought to her.

[210] I have found that there was no unlawful discrimination in the way Associate-Professor Amor selected his Deputy and I must also find that there was no unjustifiable action in any other respect in the way he exercised discretion within the scope of his position.

[211] The Authority determines that Dr Mendes does not have a personal grievance in relation to this particular claim.

6. Reimbursement (Waiheke Island ferry ticket)

[212] Dr Mendes resides on Waiheke Island and usually commutes to the Auckland CBD by ferry. On a normal working day she is expected to attend the University campus in Auckland City where she has an office and carries out her work including teaching. She is not reimbursed for travelling to and from her workplace.

[213] In the course of carrying out research funded by Vote RS & T Grants (from the Marsden Fund and FoRST), Dr Mendes travelled to different software/Web

companies in the Auckland region and elsewhere in New Zealand, to obtain data needed for this work. Travel expenses were budgeted for in her research grants.

[214] She sought from the University reimbursement of the travelling expenses for going to and from the software/Web businesses using means of transport including rental car, taxi, plane, train, bus and ferry.

[215] There is no dispute that reimbursable costs include return transport from Dr Mendes normal place of work at the University campus to premises she wished to visit in gathering data for her research.

[216] Dr Mendes' complaint is that having previously been reimbursed for at least one 40-trip Waiheke Island ferry ticket, two single trip tickets and a car ferry ticket, in December 2008 she was told she could not claim those costs against her externally funded research grant.

[217] In her statement of problem and her evidence in support of this particular claim Dr Mendes drew attention to a provision in the Academic Staff Collective Agreement at clause 18. Under that provision where an employee undertakes a "field trip or expedition" the employer is required to either provide suitable transport or reimburse the employee for such costs on an actual and reasonable basis. Also under clause 18, where field work is undertaken as part of a research programme, that programme is to meet transport and other costs.

[218] Dr Mendes considered that there was a precedent for reimbursing her the costs of travelling on the Waiheke Island ferry on those days where she visited a private company or business in the course of her research work. She had been told by the Faculty of Science Financial Adviser, Mr Amrit Prasad, that travel costs for the purpose of field work could be claimed without exceptions. She had also been advised by Professor Grundy, Principal Investigator in the FoRST grant that a ferry ticket was reimbursable if her travel was entirely or principally for her funded research responsibilities. Professor Grundy was then the HOD of the Electrical and Computer Engineering Department, not Computer Science.

[219] She took the matter up with the Deputy Dean of the Faculty of Science, professor Alan Lee, who advised:

... travel specifically to and from meetings held at a premise other than the University, are able to be reimbursed, on the proviso that where you are reasonably expected to be at work for that day (or part of that day) travel to and from the University would be considered a personal cost.

[220] Dr Mendes took issue with the Deputy Dean's advice and argued that there could be no reasonable expectation for a staff member engaged in outside funded research to be physically at the University campus for any day during which the funding grant was being serviced or when field work was being carried out. She said that it was not reasonable to expect her to be working at the University during this time and it was not a condition of the grants received that she had to go to the University before continuing on to any businesses she wanted to visit.

[221] She took her concerns about this issue to the Pro-Vice-Chancellor EEO, Trudie McNaughton, the EEO Manager, Prue Toft, and the Deputy Vice-Chancellor Research, Professor Harding, claiming that she was being discriminated against and suggesting that the funding from her external grants was being mismanaged.

[222] Dr Mendes was not satisfied with the advice given to her by Ms Toft and Ms McNaughton, or Professor Harding which was that the denial of reimbursement of legitimate travel expenses was a matter relating to conditions of employment and that Professor Harding was neither the employer nor the line manager of Dr Mendes.

[223] To help prove that she had been discriminated against, in January 2009 Dr Mendes bought a return Waiheke Island ferry ticket to use for field work visiting a Web company and hired a car to get there. She asked for these items to be reimbursed from her research grant and submitted a claim, with receipts attached, for approval by the HOD.

[224] Dr Mendes' evidence is that the reimbursement was approved without issue by the Acting HOD, Professor Thomborson.

[225] Dr Mendes has decided to pay for travel expenses out of her own pocket until this particular issue has been resolved by the Authority. She has expended a total of \$1,660 in 40-ride ferry tickets. The cost of a 40-ride ferry ticket is about \$440, a considerable amount to pay in advance of travel for research work purposes which might occur only sporadically over any period of time.

[226] The documentary evidence shows that in about October 2008 Dr Mendes applied for reimbursement of the cost of a 40-ride ferry ride ticket to Waiheke Island. Ms Heather Armstrong, the Computer Science Department Administrator, advised Dr Mendes that the department did not reimburse for daily travel expenses to and from home and work. She gave her view to Associate-Professor Amor that meetings Dr Mendes attended with companies in Auckland could be the subject of reimbursement for travel costs from the University to the meeting, but not from Dr Mendes' home on Waiheke Island and back.

[227] As well as there being an issue about the place at which reimbursable travel began and ended, there was clearly a second issue about whether the expenses could be claimed in advance of any travel required in the course of undertaking research work.

[228] In reimbursement prior to travel Dr Mendes had previously received payment for a 40-ride ferry ticket. I accept from the documentary and other evidence it is likely that the claim was approved by Mr Amit Prasad, a finance officer, without his knowing the claim was in relation to a multi-trip ticket or that the trips had not been taken on the ticket at that point.

[229] It is clear that Mr Prasad understood that the travel was research related and had advised that if the visits to companies were required for research purposes then mileage could be claimed. He also advised that a log had to be kept to support any claim for mileage, and if travelling by taxi or public transport receipts would be required. Clearly Mr Prasad had a different understanding of the basis on which Dr Mendes was making her claim.

[230] Associate-Professor Amor advised Dr Mendes that he would not approve her claim for reimbursement of a 40-trip ferry ticket. Professor Lee later advised Dr Mendes that he was in agreement with Associate-Professor Amor's rejection of the claim.

[231] The view of Associate-Professor Amor is that it is not appropriate for a bulk claim for a 40-ride ferry ticket to be made, without supporting evidence to show that each trip was research-related. His view is that if a request for reimbursement of a particular ferry trip taken as part of research travel is made it can, if accompanied by appropriate supporting documentation, be approved. Associate-Professor Amor does

not consider that the Computer Science Department can simply approve the payment of a multi-trip ferry ticket for Dr Mendes when it is not tied or related to any particular research visits, as to do so essentially would amount to paying expenses of travelling to and from work which are not a research project cost.

[232] Insofar as this particular complaint by Dr Mendes is capable of founding a personal grievance under s 103(1)(b) of the Act, I find that her employer's action was not unjustified. The University did not act to deny absolutely her reimbursement for travel costs incurred in association with particular research visits to companies, but it acted reasonably by expecting that any claim for reimbursement would be made after the cost had been incurred, so that there would be supporting evidence for the claim and receipts would be available for audit purposes. Such requirements are entirely consistent with those of many, if not most, employers.

[233] So far as disadvantage is a requirement or component of a grievance claim under s 103(1)(b), I find that Dr Mendes has suffered no appreciable disadvantage in any condition of her employment through the way the University of Auckland administers her claims for reimbursement of travel costs. She may expect to be reimbursed travel costs paid once she has made a claim meeting the general conditions outlined by Associate-Professor Amor.

[234] Mr MacDonald in his evidence confirmed the view of Associate-Professor Amor that the University cannot reimburse employees claiming for travel to and from home, when that travel is not tied to research or when employees are asking for the cost of a multi-trip ticket to be reimbursed in advance of any travel. He said in that situation the employer would have to get proof that later the ticket was actually used for a research related trip, an approach it would have difficulty justifying to its external auditors.

[235] Mr MacDonald in his evidence explained that as a matter of published policy found in the "Tax Treatment of Reimbursement of Travel Costs to Employees" it is specified that home to work travel can only be reimbursed tax free to the extent that the costs exceed the regular costs of the employee getting to work.

[236] Mr MacDonald's evidence also indicated the existence of the dispute about the operation or application of the collective agreement. In his view clause 18 in relation to reimbursement for field trips or field work is not applicable to research staff who

simply attend meetings at offices that are mostly in and around Auckland city, rather than in the “field.” Whatever the correct view is of clause 18, there is clearly a dispute about it. The remedy of personal grievance has been excluded by statute (s 103(3) of the Act) as an appropriate vehicle for resolving such a dispute.

[237] Insofar as Dr Mendes has relied on clause 18 of the collective agreement, I find that if contrary to my finding her employer had acted unjustifiably towards her, that action was derived solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of a provision of an employment agreement. Such action is not therefore within the scope of s 103(1)(b) as being able to provide a foundation for a disadvantage personal grievance.

[238] No claim exists in relation to this particular matter and no remedy is therefore required.

Determination

[239] For the above reasons the Authority determines that none of the several claims brought for investigation by Dr Mendes has been established. Therefore no remedies are needed to be given and no orders or directions are made for compliance by Professor McCutcheon as Vice-Chancellor of the University of Auckland.

Costs

[240] Costs are reserved.