

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Wellington 54
5319266

BETWEEN TIMOTHY ROCHFORD
Applicant

A N D VICE-CHANCELLOR,
UNIVERSITY OF OTAGO
Respondent

Member of Authority: G J Wood

Representatives: Peter Cranney for Applicant
Barry Dorking for Respondent

Investigation Meeting: 20, 21 September 2011 at Wellington

Submissions Received: 20 December 2011

Further information
received: 11 April 2012

Date of Determination: 24 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Timothy Rochford, was an academic employed by the respondent (Otago University) at its Medical School in Wellington. He worked there between March 2004 and November 2010 under the confirmation path for lecturers. Mr Rochford's employment was terminated as the University considered that he had not meet the requirements for permanent employment under the confirmation path, even although he had been given a year's extension to meet those requirements. This recommendation from the Staffing Advisory Committee was upheld on appeal through to the Vice-Chancellor. In a previous determination I concluded that Mr Rochford could be dismissed under the confirmation path process, even although

it was a probation period of an extremely long length. That determination is subject to challenge.

[2] This determination assesses Mr Rochford's claims that he had met the requirements of the confirmation path process, or alternatively, that he had done so before his dismissal took effect, and/or that he was not given a right of appeal as required. Mr Rochford also claims that there were breaches the University's duties of good faith to him, and of natural justice, because:

- he had no opportunity to respond to the *blind* review commissioned independently by the Staffing Advisory Committee;
- that the Staffing Advisory Committee did not receive his written responses made to their and his Head of Department's comments;
- that information supplied at the Staffing Advisory Council meeting was never put to Mr Rochford for comment;
- that the Vice-Chancellor did not conduct a proper appeal; and
- that alternatives to dismissal should have been considered and were not.

[3] The University disputes all of the above claims.

Factual discussion

[4] Mr Rochford was originally employed by the University at its Wellington Medical School to lecture medical students on health-related matters. He worked under a number of fixed term agreements until he commenced on the confirmation path with effect from March 2004. Under the confirmation path policy a person not confirmed is subject to dismissal. The policy sets a fixed term of five years as the length of the path, which may be extended for one year. This occurred in Mr Rochford's case because, most importantly, he had not published the agreed number of articles required to establish an acceptable research profile.

[5] Thus the Staffing Advisory Committee resolved the following in July 2009:

The Committee was encouraged to see that Mr Rochford has made good progress in recent times. It was noted that there is some uncertainty about which publications are recognised as contributing to his confirmation.

Subject to confirmation from the Department that Mr Rochford has one paper to complete, it was agreed that Mr Rochford's confirmation period was extended to 6 July 2010. To be confirmed he needs to submit at least one quality assured manuscript for publication

[6] It was confirmed with the Department that Mr Rochford had been expected to complete five quality assured publications during the confirmation period and at that point had only completed four. In a letter dated 18 August this was clarified in the following way:

This means that in order to be confirmed you must submit at least one quality assured manuscript for publication. Should you submit a paper before the end of the confirmation period, then a final report may be submitted to the Staffing Advisory Committee at that time for consideration.

[7] I note that Mr Rochford had previously been informed in writing that before he could be confirmed he had to have:

...attained an output of quality-assured research publications that:

- a. are consistent with the TEC definition of "research"¹;*
- b. would gain a minimum assessment of "research active" in the PBRF appraisal;*
- c. cumulatively demonstrate a platform of research activity (or developing research activity) and output that is based on a sound/justifiable methodology, and makes a contribution to research within the discipline and/or to apply knowledge (have published or accepted in final form a minimum of the equivalent of 5 quality assured publications during the confirmation period)...*

[8] The PBRF Guidelines, which Mr Rochford had access to, include the following:

*A **quality-assured research output** is defined as any research output that, prior to its publication (public dissemination, presentation, performance, or expression), has successfully completed a formal quality-assurance process.*

Successful completion of a formal quality-assurance process means the output must have been subject to formal, independent scrutiny by those with the necessary expertise and/or skills to assess its quality (including, where relevant, its rigour, logic, clarity, originality, intellectual significance, impact, applications, artistic merit, etc).

...

¹ See the University of Otago PBRF Handbook. P14...

Formal quality-assurance processes vary between different disciplinary areas. They include, but are not limited to:

- *Peer-review or refereeing processes undertaken by journals and book publishers*
- *Other review processes employed by editors, editorial committees or publishers ...*
- *Review processes employed by users of commissioned or funded research.*

*Quality-assurance processes are different from review processes as used in the PE component. A research output may have been reviewed in the public arena **after** its publication or public dissemination. Such reviews do **not** meet the definition of a quality-assured research output ...*

A non-quality-assured research output is one that:

- i. Has not been subject to a quality-assured process;*

OR

- ii. Is currently in the process of being quality-assured;*

OR

- iii. Has been unsuccessful in completing a formal quality-assurance process (i.e. it has been peer-reviewed and rejected, possibly two or more times).*

[9] In evidence Mr Rochford accepted that the PBRF guidelines provided the normal meaning of a quality-assured article.

[10] As a result of all this information I conclude that Mr Rochford was or should have been aware that to meet the requirements for his confirmation the article he had to present was a manuscript for publication that had already been quality-assured. As Mr Dorking graphically suggested, for someone asked to prepare for assessment a baked iced cake, it was axiomatic that the cake be baked before it was iced and that one would not present an un-iced cake simply because one was confused as to whether it should be iced before or after it was cooked. Thus I conclude that Mr Rochford was aware that by the deadline set that he had to provide a manuscript that had been peer-reviewed, even although in a technical sense the wording given to him could be seen as ambiguous. Similarly, to be quality-assured, by the standard definition such quality assurance process must result in a positive recommendation for the article in respect of publication. It was also clear that attainment of this objective would be appraised by the Head of Department, the Dean and the Pro-Vice-Chancellor.

[11] Mr Rochford was also advised of assistance that could be obtained from his Dean and Head of Department. Mr Rochford, being a Māori academic with high level involvement in the governance of Ngai Tahu and a particular interest in Māori health, was also offered assistance from the Director of the Office of Māori Development,.

[12] I accept that during the year in question Mr Rochford had to deal with a heavy teaching workload and personal and work-related issues. However, given the level of research required for one article, this was clearly a reasonable target in the context of academia and permanent appointment to a position therein. Unfortunately, despite some assistance from colleagues, including the provision of a mentor, Mr Rochford did not provide his Head of Department with a peer-reviewed article by the deadline of 6 July 2010. Rather, he provided, on 12 May, a draft of a viewpoint article on health disparities between Māori and non-Māori and the role of genetics, for submission to the New Zealand Medical Journal. This gave little time for the Medical Journal or any other organisation to have the article quality-assured.

[13] Mr Rochford's Head of Department provided comments on the draft the next day. The written feedback and handwriting on the article focused on a number of the ten points raised and made two general suggestions. It also contained the notation *Subm – NZMJ*. I accept the Head of Department's evidence that this was a note as to where Mr Rochford intended to submit the article, not his agreement that it should be submitted and that it was publishable. Furthermore, I accept his evidence that his focus was on getting Mr Rochford to submit material required for his confirmation, and that he would have a better chance of confirmation if he had a manuscript for submission to a journal, even if it had not been quality-assured, than if there was no article at all. In fact it was not until 28 June that Mr Rochford submitted his article to the Medical Journal.

[14] Over the same time period the Head of Department was completing his part of the final confirmation path report for Mr Rochford. That document is dated 29 June. In relation to research he noted that Mr Rochford's performance had continued to be variable. The summary he provided to the Committee stated:

In summary, Tim has largely achieved the requirements of his confirmation objectives in relation to teaching (other than attendance at an HEDC course) and for service work to iwi and community organisations. His service in these areas is commended.

However, Tim's research confirmation requirements have largely not been achieved over the six years of the confirmation period. Tim has published four out of the five journal articles required and another has been submitted for publication....

There are therefore specific failures to achieve confirmation objectives in relation to obtaining research funding and progress towards a PhD. There is little evidence that Tim has been able to develop a clear personal research theme or track record in the area of Māori health research. The confirmation aim of developing Māori health, Māori environmental health and Kaupapa Māori as a designated research area within the Department has not been achieved. Given that this has not occurred over a 6 year period, this seems unlikely to change in the future. This is problematic given that the Māori health lecturer role is key strategic position within the Department and is vital to the maintenance and further development of the Māori health research programme within the department.

Finally, there are continuing tensions between the time commitments to his iwi based service and his research activities and contribution to the Department. There is no evidence that these have been or are likely to be resolved in the foreseeable future.

[15] The Head of Department also made significant comments on the article, on two closely written typed pages in small font, which is largely critical of it. The statement summary concluded as follows:

This article will not be acceptable for publication in its current form, and is likely to require substantial additional work following review of comments if it is to be published.

[16] The Head of Department recommended that confirmation be declined. Mr Rochford had the opportunity to respond in writing, which he did. He stated that the Head of Department's advice was sometimes contrary to the critique sent to the Committee. In his five page response he also defends the content of the proposed article and notes in particular his additional teaching responsibilities, including curriculum development. He also set out his belief that the University fails to understand the importance of Māori staff working in the community, despite its partnership with Te Runanga o Ngai Tahu, where Mr Rochford had been elected to serve on the national body.

[17] I conclude that in order to assist Mr Rochford in his efforts to gain confirmation the University arranged for a blind reviewer to quality-assure the article, before the Staffing Advisory Committee met. The blind reviewer was an academic geneticist in the employ of the University of Otago. The only information the reviewer had was that it was written by a lecturer at the University on an extended

confirmation period, and that the article was not submitted in time for referees' reports to be received. The lecturer was asked if the article would fit his definition of quality-assured in the sense of being of a standard of work expected from a lecturer who has been six years in the post and being likely to result in publication in a peer-review journal in its current form, or with some minor amendments and improvements.

[18] That lecturer responded on 9 July commenting that the standard of the article was not of a level acceptable to him and would be rejected outright in its current form for any publication that he reviewed articles for. His last statement was:

I am less qualified to comment on the more socio-political oriented journals. However, for such journals, major improvements would be required.

[19] After the second final confirmation report being provided on 9 July, Mr Rochford was provided with the blind review and was given four days to respond, two of those days being the weekend. Unfortunately, being away for the weekend, Mr Rochford was unable to provide a response before the Staffing Advisory Committee met on 20 July 2010.

[20] The meeting was attended by Committee Members, plus the Director of the Office of Māori Development. The Director is not a member of the Committee. At the meeting the Director was asked to provide his comments about Mr Rochford's suitability for confirmation. He told of a conversation that he had had with him regarding his commitment to the University compared to his involvement in Ngai Tahu, which was said to be well paid and taking up more than 50% of his time. He informed the Committee that he had told Mr Rochford that he was fortunate to have been granted a year's extension, and that he had no issue with it not confirming him into an academic post. He then made some negative comments about Mr Rochford, including that Mr Rochford's claims of mitigating factors did not have merit. He endorsed the Dean and Head of Department's views on non-confirmation. Later he intervened during the Committee's deliberations to state that in his opinion the article was not of an acceptable standard, *even in Māori health terms*.

[21] As well as discussing the ambiguity of admitting a quality-assured manuscript, the Committee also discussed whether or not an appeal might be successful. As is clear from the notes, the Committee's focus was solely on the question of whether the

article was quality-assured. Given that it was not, the decision was made not to confirm Mr Rochford's employment. This was on the basis that the blind reviewer had not categorised it as quality-assured.

[22] On 26 July Mr Rochford's Head of Department informed him that his appointment as a lecturer had not been confirmed. This was followed up by a letter dated 5 August setting out the Staffing Advisory Committee minute which held:

The Committee did not consider that the manuscript submitted for publication is quality-assured, on the basis of a peer-review by the Head of the Department and the blind review by a senior academic staff member.

[23] For this reason, the Committee agreed that Mr Rochford's appointment was not confirmed. Mr Rochford was then told that this meant that his employment "*is terminated with three month's notice from the date of this letter. Therefore your employment will end on 4 November 2010.*

[24] Mr Rochford was told of his right to appeal and then invited to a meeting on 9 August to clarify the situation.

[25] Mr Rochford engaged a lawyer to assist him, and was given an extra month within which to appeal to the University.

[26] On 22 September Mr Rochford's representative informed the University that his article was being sent out for peer-review by another journal. Mr Rochford then filed in the Authority for a personal grievance for unjustified dismissal.

[27] On 7 October Mr Rochford provided a five page paper, closely typed in small font, in response to the blind review.

[28] On 11 October Mr Rochford informed the University that his article had been reviewed and accepted for publication in another journal. The documentation filed by Mr Rochford, however, demonstrated that the journal editor took a very positive view of the article, but she went no further than stating *the revised article is now in a suitable format for me to send out for peer-review. I expect it will take four weeks to have the article reviewed. When I receive the peer-review reports I will forward them on to you for your consideration.* That shows clearly that the article received by the editor had not yet been peer-reviewed or quality-assured. Consistent with the

university's view, I do not accept that an editor is in a position to quality-assure such a manuscript to the satisfaction of the University.

[29] Also on 11 October, Mr Rochford's representative set out the grounds for appeal in writing, having been denied ability to present personally to the Review Committee, whose role was to recommend an outcome to the Vice-Chancellor. All matters raised at the commencement of this investigation for determination were raised in that submission.

[30] The Review Committee recommended that the Staffing Advisory Committee's decision be confirmed because the paper was not submitted in time for referee reports to be received to determine whether the paper met the requirements of being quality-assured. The Committee concluded by stating:

In the absence of independent evidence the paper is quality-assured, Mr Rochford has not met the research objective related to publications. Nor has he met several of the other research objectives. Accordingly, we recommend that the Staffing Advisory Committee's decision of 20 July 2010 be confirmed.

[31] The University then gave Mr Rochford the opportunity to make submissions as to why the Vice-Chancellor should not follow the recommendation of the Review Committee. Again this was to be done in writing and no opportunity was given for a face to face meeting.

[32] The letter from the University's lawyers also stated:

Our client has considered whether or not it can offer Mr Rochford an alternative position and it has been unable to identify anything suitable. A Professional Practice Fellow position does not appear to be suitable because our client requires someone who is able to take responsibility to supervising, designing, and facilitating courses without supervision rather than simply providing support and facilitation in these areas to a Lecturer which is the requirement of a PPF job description. Similar considerations would apply to Mr Rochford being appointed as a Teaching Fellow, but one presumes Mr Rochford would be unwilling to accept the significant reduction in security, income, and status that would be involved in any event. In addition the Department requires someone with appropriate research skills and commitment to further knowledge in Mr Rochford's field and to contribute to the Department's BBRF assessment.

[33] Mr Rochford is then given an opportunity to make submissions on that matter as well. Submissions were then made to the Vice-Chancellor on Mr Rochford's

behalf. Similar issues were raised, but also noting that a decision to dismiss was different to a decision not to confirm an academic.

[34] On 29 November the University wrote to Mr Rochford stating that it considered that the University had conducted a fair process and had then come to a fair decision to dismiss him. The letter notes:

This termination can be called a “dismissal” only in a very technical sense. It is the agreed consequence of non-confirmation. If there is a “decision to dismiss” involved in this process it is a decision made by both parties several years earlier when the terms of employment were originally agreed.

[35] The conclusion on substance was that:

...it is inarguable that the principal requirement for confirmation, to have submitted one quality-assured article for publication by 6 July 2010, was not met. That requirement had still not been met at the time of the Review Committee report some four months later. Accordingly the Vice-Chancellor has decided to confirm the Staffing Advisory Committee’s decision.

[36] Mr Rochford’s employment was terminated the next day. Despite mediation and other attempts to resolve it, the employment relationship problem remains unresolved.

Determination

[37] It is simply not arguable that the decision to terminate Mr Rochford’s employment was a dismissal only in a technical sense. Instead it was a standard dismissal at the end of a probation period because the University deemed Mr Rochford’s performance not to be of a sufficient standard. Mr Rochford was thus in effect dismissed for unsatisfactory performance in the course of his confirmation period, being an extended probation period akin to an apprenticeship.

[38] As indicated in my previous determination, cases such as *Nelson Air Ltd v New Zealand Airline Pilots Association* [1994] 2 ERNZ 665 envisage safeguards to employees in such circumstances. There may be less stringent procedural requirements in the case of an employee during a probation period, but this does not release an employer from its obligation to act fairly. In such cases, particularly where the probation period lasts for a very long time, considerable care and sensitivity is required of an employer.

[39] At p.669 the Court in *Nelson Air* held:

The employer for its part may not simply be a critical observer, but must be ready to point out shortcomings, to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment.

[40] The Act also requires that parties are to deal with each other in good faith. They are therefore required to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative. Furthermore, where an employer proposes to make a decision that will or is likely to have an adverse effect on the continuation of employment of an employee, it must provide to that employee access to information relevant to the continuation of the employer's employment about the decision, and an opportunity to comment on the information to their employer before the decision is made. The judgment of the Full Court in *Vice-Chancellor Massey University v Wrigley & Kelly* [2011] NZEPC 37 is instructive in this regard. I conclude that there is no difference to the obligations on an employer whether it is in a selection for redundancy setting as in *Massey*, or an approval for confirmation setting as in this case.

[41] These obligations do not require face to face meetings. It is possible, particularly within an academic environment, for matters to be dealt with on the papers, as it were, as the University has sought to do so throughout in this case. However, that applies to both parties. Here, the Director of the Office of Māori Development was not a member of the Staffing Advisory Committee, but was invited to provide information about Mr Rochford. When seen in this light, it is clear that Mr Rochford should have had an opportunity to comment at least on any negative information or opinions provided by the Director. In this case the comments made by the Director were extremely damaging, and whether or not they played a part in the Committee's decision is not relevant. It was potentially damning information in the eyes of the Committee and Mr Rochford ought to have had an opportunity to respond to it. Nothing in the appeal process, including the Vice-Chancellor's assessment, remedies these matters as neither they nor Mr Rochford were made aware of the Director of the Office of Māori Development's comments.

[42] Similarly, in terms of the blind review, Mr Rochford did not have a reasonable opportunity to respond to this assessment, being given less than two working days to respond to a strongly argued four page review. These concerns involve a different proposition than requiring an employer to provide copies of all evaluative material, such as here the Staffing Advisory Committee's in-committee discussions about whether Mr Rochford's employment confirmation would be granted. That is not required in order for the process to be fair. Otherwise there could be a never-ending series of discussions and meetings required.

[43] In terms of the substance of the decision not to grant confirmation leading to Mr Rochford's dismissal, I conclude that there were grounds not to grant him confirmation and that this was properly upheld through the appeal processes. Mr Rochford was given a straightforward target to meet. He did not meet it. It was not an overly onerous target (nor was it argued to be so) and no amount of procedural issues can overcome the fact that he did not meet that target. As a result it was a justified decision in substance not to confirm his appointment as a lecturer.

[44] However, the University then had to go on and determine, as a fair and reasonable employer, whether Mr Rochford's employment would be terminated. I conclude that it did properly consider this issue. It gave Mr Rochford a reasonable opportunity to not only challenge the decision to not confirm him, but to make submissions on alternative employment opportunities. It also looked into the issue of alternative employment opportunities and was not able to find him any. Neither did Mr Rochford suggest any alternatives. In these circumstances the University did act as a fair and reasonable employer would have.

[45] Overall I conclude that while non-confirmation was a justifiable decision for the University to reach, as was dismissal, it failed to treat Mr Rochford fairly in the way it went through the process. Mr Rochford's evidence was clear that he has suffered a great deal of injury to feelings and loss of mana as a result of his dismissal. However he is only entitled to compensation for the way that the University allowed the Director of Māori Development to seek to influence the decision against him without Mr Rochford being able to make any input, and for the lack of a reasonable opportunity to respond to the blind review. When he found out about the former point for the first time during the course of the investigation meeting he was extremely

upset. He was entitled to be hurt about the way he was treated and these revelations exacerbated his belief that he had been treated unfairly.

[46] In all the circumstances of this case I consider an appropriate award of compensation as \$4,500.

[47] I therefore order the respondent, the Vice-Chancellor of the University of Otago to pay to the applicant, Mr Timothy Rochford, the sum of \$4,500 compensation.

Costs

[48] Costs are reserved.

G J Wood
Member of the Employment Relations Authority