

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 60
5282312

BETWEEN DR CATHERINE JANE
MILLICHAMP
Applicant

A N D VICE-CHANCELLOR
UNIVERSITY OF OTAGO
Respondent

Member of Authority: Helen Doyle

Representatives: Peter Cranney, Counsel for Applicant
Barry Dorking, Counsel for Respondent

Investigation Meeting: 8 and 9 December 2010 in Dunedin

Submissions Received: 24 December 2010 and 28 January 2011 from Applicant
27 January 2011 from Respondent

Date of Determination: 5 April 2012

DETERMINATION OF THE AUTHORITY

Acknowledgement to the parties

[1] I would like to acknowledge the parties' patience given the regrettable delay in the issue of this determination. This was one of a number of files that was unable to be retrieved from the Authority's building in Kilmore Street until several months after the 22 February 2011 earthquake. This matter was already somewhat delayed by the time it was lodged with the Authority and following the statement of problem being lodged with the Authority the parties attempted to work through the issues and achieve a resolution before an investigation was undertaken in December 2010. It is my great regret that I have added to that delay.

Employment relationship problem

[2] Dr Catherine Millichamp (Dr Millichamp) was appointed as a lecturer in the Department of Psychological Medicine at the University of Otago from 2 February 1998.

[3] Her appointment was for an initial four year period with continued employment subject to the confirmation of appointment procedures set out at the time of appointment in the booklet – Information for Applicants for Academic Posts and Conditions of Appointment. These procedures are amended from time to time. The confirmation procedure that applied for staff appointed before 1 December 2005 at the material time is document 1 in the respondent's bundle of documents.

[4] Dr Millichamp was a member of the Association of University Staff (the union), now the Tertiary Education Union and her work was covered by a collective agreement between the Union and the University. The confirmation procedure was incorporated at the material time into the collective agreement along with other policies, statutes and regulations and was binding on Dr Millichamp.

[5] The Staffing Advisory Committee (the SAC) is a University body that assesses the progress of academic staff. It held meetings and deferred consideration of Dr Millichamp's confirmation of appointment on 4 September 2001, 3 September 2002 and 7 September 2004.

[6] By the end of 2006 Dr Millichamp was required to complete a number of goals for confirmation. These included a research objective of four papers published or accepted in final form in international refereed journals. By August 2006 the only outstanding goal was the publication or acceptance in final form of one of the four required papers. This goal was not accomplished within the required timeframe.

[7] The Head of the Department for Psychological Medicine had left her position in April 2004 and Dr John Adams, the Dean of the Dunedin School of Medicine took over as acting Head of the Department in addition to his Dean's role until a new Head of Department could be appointed. In the role of acting Head of Department Dr Adams assumed responsibility for completing Dr Millichamp's final 16 month confirmation report in 2004. It was at this time that Dr Adams recommended a two year extension for Dr Millichamp to complete the requirements and expressed a view to her that this would be her last extension.

[8] Dr Adams was again involved in completing the final confirmation report which both he and Dr Millichamp signed on 21 December 2006. The confirmation period expired on 31 January 2007. He reluctantly recommended a twelve month deferral to enable the final fourth paper to be completed. The SAC was then involved as part of the process.

[9] On 19 February 2007 Dr Millichamp was advised in a letter from Dan Wilson, Manager, Human Resource Division, that as at 30 January 2007 the SAC decided not to confirm her appointment as lecturer in the Department of Psychological Medicine in the Dunedin School of Medicine.

[10] The letter contained two proposed options. The first was that Dr Millichamp be transferred to a permanent position (0.8) fulltime equivalent as a Professional Practice Fellow within the Department of Psychological Medicine in the Dunedin School of Medicine from 19 March 2007 with current conditions of employment continuing. The second was that the confirmation path policy relating to non confirmation was invoked and Dr Millichamp's confirmation path is therefore terminated. In that case Dr Millichamp was offered a one year fixed term appointment as a lecturer from 19 March 2007. The letter advised that if a formal acceptance of one of the two offers was not received by 18 March 2007 then Dr Millichamp's employment would be terminated. Her attention was drawn in the letter to the right of appeal against the SAC decision.

[11] Dr Millichamp appealed the decision of the SAC but says that the process that followed was not in accordance with natural justice and the statutory obligations of good faith set out in section 4(1A) of the Employment Relations Act 2000. Mr Cranney on behalf of Dr Millichamp clarified at the investigation meeting and in final submissions that Dr Millichamp does not seek to be reinstated to a confirmation path. The remedies he now seeks are different to those set out in the original statement of problem because it was accepted that the Authority could not substitute its view for that of the SAC, the Review Committee or the Vice-Chancellor.

[12] There was a concern raised by the Authority at its investigation meeting as to whether if Dr Millichamp was successful there was an effective remedy for her because even at the time of the investigation meeting a considerable period had elapsed since the making of the decision. Mr Cranney, in final submissions, said that if Dr Millichamp was successful in obtaining a declaration that the process undertaken

by the University was not in accordance with natural justice and good faith obligations that the matter should be adjourned to allow the parties to have discussions and to arrange for the matter to be reconsidered in accordance with natural justice and the good faith obligations.

[13] The respondent accepts that the Authority does have jurisdiction to require the University to reconsider the decision in accordance with natural justice and the good faith obligations. The respondent says though that regardless of the process Dr Millichamp had not met the minimum requirement for confirmation by at the latest December 2006 and in those circumstances there is no effective remedy for her. In any event it does not accept that there was the unfairness as stated by Dr Millichamp.

Issues

[14] The issues that the Authority is required to determine are as follows:

- What was the confirmation procedure and appeal process?
- Was the process in accordance with the principles of fairness and natural justice and the statutory good faith obligations?
- If the process was not in accordance with natural justice and good faith obligations, then what remedies are available to Dr Millichamp.

What was the confirmation procedure and appeal process?

[15] The confirmation procedure for staff appointed before 1 December 2005 provides for the Deputy Vice-Chancellor (Academic and International) on behalf of the Vice-Chancellor to review all confirmation progress reports of which there are a number throughout a five year period.

[16] At the time of Dr Millichamp's appointment the confirmation period was four and not five years although as confirmation was deferred on several occasions that has less bearing than it may otherwise have had. The confirmation progress and final reports assess whether objectives have been met. The objectives are set in consultation with the person seeking confirmation and the Head of Department and usually fall under three generic categories, teaching, service and research.

[17] The focus in this case is on the research objectives because there was no issue about Dr Millichamp's achievement in the areas of service and teaching. It was recognised in the reports that Dr Millichamp was a gifted teacher.

[18] There was an initial delay after appointment before satisfactory objectives for Dr Millichamp were set. The research objective for confirmation for 1998-2001 was three papers accepted for publication in final form.

[19] The final confirmation report in 2001 provided to the SAC noted that no papers had been published since Dr Millichamp took up her appointment. The SAC agreed to defer consideration of confirmation of the appointment for one year to 31 January 2003. During that period the minimum standard for research for Dr Millichamp increased to four papers published or accepted in final form in international refereed journals. This was more clearly set out in the 60 month final report in 2004 but given there was only one paper published by the time of preparation of the 60 month report in 2004 it is not really material to the matters I am required to determine. The issue of reasonableness of the requirement for four papers will, if necessary, be considered at a later time in this determination. Various factors are taken into account in setting objectives including whether an employee is part or full time. Dr Millichamp commenced in her position as a 0.5 FTE and later the role became a 0.8 FTE. In 2002 she was a full time employee but for the purpose of teaching only and not research.

[20] It was clear from the report provided to the SAC in 2001 that Dr Millichamp had difficulty for a variety of reasons establishing her research programme. The reasons were set out as a heavy teaching and administrative load, lack of adequate guidance and support with respect to research, departmental difficulties and project related difficulties. It was set out in the report that the staff in the Department had had to deal with the aftermath of the arrest and publicity about the former Head of Department, Dr Colin Bouwer. Dr Bouwer was subsequently convicted of murder and imprisoned. The report provided that Dr Millichamp was particularly adversely affected because Dr Bouwer had taken on the role as mentor for her research and it is clear in reading the report that this duly impacted on both morale and staff turnover. The final confirmation report in 2001 from Dr Pearce provided that Dr Millichamp had maintained a high level of performance throughout a period of great personal stress and through the events surrounding the former Head of Department. Dr Pearce

set out in her report that Dr Millichamp is intent on establishing her research programme and she has every confidence that she will do so.

[21] On 3 September 2002 the SAC again resolved to defer consideration of confirmation of Dr Millichamp's appointment by a further two years to 31 January 2005. The Vice-Chancellor Dr Graeme Fogelburg wrote to Dr Millichamp on 12 September 2002 advising her of the extension and, amongst other matters acknowledged, that she had had to deal with extraordinary circumstances over the past few years. He also wrote that he understood the issues impacting on her capacity to set up and sustain a research programme are reaching resolution and the two year deferral has been granted to allow time to meet the research requirements of the confirmation objectives and standards.

[22] In 2004 Dr Millichamp met with Dr Adams to complete a 60 month confirmation progress report. At that time Dr Millichamp had just had one article accepted for publication but had not met her research objectives of four papers. A research objective was set at that time in the report to have at least four papers published or accepted in final form in international refereed journals.

[23] In the report Dr Adams made some comments with the knowledge that Dr Millichamp had not met the objectives set for her particularly in research despite what he described as a generous extension of time. He acknowledged the staffing difficulties increased *the pull* for Dr Millichamp to take on teaching roles to the detriment of the time needed to complete research. He acknowledged the impact of issues in Dr Millichamp's personal life that continued over the previous two years although expressed that they were not a sufficient reason alone for under performance. He set out that although some assistance had been offered by way of support to meet deadlines Dr Millichamp did not believe that support had been offered in tangible ways. He set out that alternatives had been put before Dr Millichamp for her future but that she is determined that she wants an academic career and that research interests her. Dr Adams discussed the possibility of a three month study leave from her teaching duties in the Department to produce the required papers and have them published by the end of a further extension of confirmation time.

[24] At a meeting on 7 September 2004 the SAC made a decision to defer confirmation. The decision was conveyed to Dr Millichamp in a letter dated 13 September 2004 by the Manager Employee Relations Lynne Osborne. In that

letter Dr Millichamp was advised that her appointment would be extended for a further two years to 31 January 2007. The letter advised that this was the final extension the SAC would approve and should the objectives and standards not be met in the final report then she would be offered a Teaching Fellowship and if she did not want to accept that then she would be offered a temporary fixed-term appointment for one year which would be available from the end of the deferred confirmation appointment. Dr Millichamp was advised that six months from the expiry of the extension the SAC would again consider her case for confirmation of appointment. Dr Millichamp did have three month's study leave during this period.

[25] Eight months before the end of the initial five year period the procedure is that the Director of Human Resources requests the Head of Department to submit a report on the appropriate form, through the Dean (where applicable) and the Pro-Vice Chancellor, whose comments are also required, on the performance and progress of the staff member concerned.

[26] The report may either recommend that it be:

- A final report the performance objectives and standards have been met;
or
- A final report the performance objectives and standards have not been met and non confirmation is warranted at the expiry of the initial five year period; or
- An interim report with a final report to be provided in a further 12 months (at 66 months).

This action will be taken to allow the staff member a final opportunity to rectify unsatisfactory performance.

[27] At the time of completing the final report in December 2006, this was extended from the usual reporting date in August 2006, Dr Millichamp had published three joint refereed journal articles but had not met the objective of four. Dr Adams stated the following with respect to suggesting a deferral of confirmation for 12 months:

The University has now invested a significant amount in her career and development. It seems very likely that she will produce further

material that will be very topical in the next year. The delay in presenting her paper for publication was not entirely under her control.

I therefore find a recommendation very difficult to make. My assessment is that we are so far down a path of support at this point that stopping and turning back would waste time and resources. I therefore reluctantly suggest that there be a further 12 month extension.

[28] As required by the confirmation procedure for staff appointed before 1 December 2005 the report was also provided to the Pro-Vice Chancellor, D M Robertson (the PVC), who in a document attached to the report stated that there had been a review of the documentation for the final confirmation report and a discussion of the issues with Dr Adams. The PVC set out support for the provisional recommendation of the Dean that there be a further extension to allow the publication confirmation objective to be met and said that the extension should be until December 2007 and at that time there must be evidence of publication.

[29] The process provides that the staff member under review must be shown the report and where confirmation is not recommended or a deferral has been recommended given the opportunity to provide such additional comments as the staff member considers appropriate to allow the SAC to make a considered judgment. Dr Millichamp duly signed the December 2006 report and in the part allowed for comments referred the reader of the report to an addendum in her curriculum vitae that briefly set out her plans for the future and some of the historical difficulties that she had faced in achieving her objectives. She was doing this though in circumstances where a deferral had been recommended.

[30] The recommendation for deferral falls then to be considered by SAC. The SAC may decide to either:

- Approve confirmation; or
- Defer consideration of confirmation for a period of 12 months; or
- Decline to confirm the appointment, in which case the staff member will be informed that their employment will be terminated, with notice.

[31] Where the SAC overrides a recommendation of the PVC as happened in Dr Millichamp's situation the SAC is to provide a preliminary view and an

opportunity for the PVC to discuss the matter at the next meeting of the Committee, should they wish, before the Head of Department or staff member is notified. This did not occur in this case.

[32] Mr Dorking in his submissions by way of explanation for the breach of the procedure referred to the size of the Health Sciences Division resulting in functions which would be carried out by the Divisional PVC being carried out by the Dean. He referred to minutes of the SAC dated 6 March 2007 and a discussion about the decision between the SAC Chair and Deputy Vice-Chancellor Professor Jones and the Dean before Dr Millichamp was advised of the decision. I accept a discussion of that nature took place but that does not comply with the required procedure. I am not persuaded by Mr Dorking that any of the above matters provide a good reason not to follow the procedure. This was not a situation where the PVC simply signed that the report had been noted and made a brief comment. The PVC attached a separate document to Dr Millichamp's final report supporting the provisional recommendation of the Dean with whom the PVC had discussed the issues in detail. There was specific reference by the PVC to Professor Poulton, a highly regarded senior researcher who was involved in the work undertaken by Dr Millichamp in relation to the fourth unpublished paper. The PVC was satisfied that with further work in the next few months, there would be one manuscript (invited) in press, and another submitted during 2007. In breach of the procedure there was no preliminary view provided to the PVC by the SAC and no opportunity for comment if desired at the next SAC meeting.

[33] The decision of the SAC will normally be made known to the staff member no later than three months before the expiry of the initial term of five years or, in the case of the staff member for whom consideration of confirmation of appointment has been deferred for 12 months, three months before the end of the deferral period. Where confirmation is declined the staff member will be entitled to receive a written statement of the reasons for non confirmation.

[34] Dr Millichamp was advised by letter dated 19 February 2007 from Dan Wilson, Manager Human Resources, that she had not achieved the objective to publish at least four international refereed journal articles and was advised that her confirmation path appointment would cease on 19 March 2007. As a result of that the

two options that had been referred to Dr Millichamp in 2004 would apply (paragraph 24). Dr Millichamp's attention was drawn to her right of appeal against the decision.

[35] The policy provides that a staff member whose appointment has not been confirmed has a right to appeal. Any such appeal must be lodged with the Director of Human Resources no later than one month after the date of written advice from the Director of Human Resources that the appointment will not be confirmed. On receiving an appeal a Committee will be set up to review the decision. The review committee will contain such members as the Vice-Chancellor considers appropriate. The applicant will have the right to obtain any assistance needed, but this shall be at the appellant's own cost. The review committee may recommend to the Vice-Chancellor:

- That the SAC's decision be confirmed; or
- That the staff member be given a further period to achieve the performance requirements expected for confirmation; or
- That the staff member be confirmed.

[36] On 9 March 2007 Dr Millichamp wrote to Mr Wilson and advised that she wished to lodge an appeal and it was likely she would want to appear in person before the Review Committee and submit written material.

[37] On 20 March 2007 Mr Wilson wrote to Dr Millichamp and asked for reasons and grounds for the appeal and advised that she was able to submit additional written material as supporting evidence. The request to appear in person before the committee was declined because Mr Wilson said in his letter that the committee process does not allow for individual staff to appear before it. He did invite Dr Millichamp to make an appointment with Professor Gareth Jones, the Vice-Chancellor (Academic and International) to discuss this and the appeal. Mr Wilson confirmed that whilst the appeal was being considered Dr Millichamp would remain in her current position as lecturer.

[38] On 3 April 2007 Dr Millichamp met with Professor Jones and Mr Wilson. Dr Millichamp attended the meeting with a Union representative, Shaun Scott. At that stage Dr Millichamp said she was not aware that Professor Jones was a member and indeed Chair of the SAC. Professor Jones said in his evidence that Mr Scott

would certainly have known this and I have no reason not to accept that evidence. It does seem a bit unusual that no-one asked what Professor Jones' role was and why he was involved. It was discussed at the meeting that the appeal would be presented to the next SAC rather than following the normal appeal process with the appeal to the Review Committee.

[39] The meeting was followed up with a letter from Mr Wilson on 12 April 2007. Mr Wilson wrote to Dr Millichamp and advised that her appeal would be presented to the next SAC meeting on 1 May 2007. In preparation for that meeting Dr Millichamp was asked for a response about a number of matters and it was requested that her information be provided by 26 April 2007. The letter further advised that because Dr Millichamp had stated she believed her research career was *taking off specifically as a result of collaborative work with Professor Ritchie Poulton and Dr Chris Gale* that they be approached for further information as well as the Associate Professor Oliver Davidson who was the Head of Department at that time. Mr Wilson stated in his letter that that information would be requested in writing but time restraints mean it may be necessary to conduct interviews.

[40] As Mr Wilson indicated in his letter of 12 April 2007 he asked for further information about Dr Millichamp's research and the nature of the collaboration from Dr Gale and Professor Poulton. Dr Gale provided an email on 13 April 2007 to Mr Wilson outlining amongst other matters that he had invited Dr Millichamp to join a project in writing a chapter on generalised anxiety disorder for clinical evidence and that the other author had withdrawn leaving only Dr Gale and Dr Millichamp as authors. Dr Gale told Mr Wilson that Dr Millichamp had the expertise in child issues in anxiety disorders that was outside of his experience and that he had found Dr Millichamp to be fast working and well organised. Mr Wilson was advised that it was an aim to have a revision of the chapter to the editors by the end of May. Professor Poulton also provided an email setting out an outline of research projects that Dr Millichamp was currently contributing to or collaborating with him on.

[41] By letter dated 24 April 2007 Dr Millichamp enclosed information for the consideration of the Staffing Advisory Committee setting out her grounds of appeal and providing a considerable amount of supporting material.

[42] The minutes of the SAC dated 1 May 2007 record that the SAC: *deferred making a decision until HR provides further advice. Once the advice is obtained, the*

Committee will hold a special meeting to consider the appeal. Supplementary notes relating to the committee deliberations were provided for the first time after the Authority investigation meeting. There was a further meeting of the SAC on 25 May 2007.

[43] On 15 June 2007 Dr Millichamp was advised in a further letter from Mr Wilson that the SAC had held a special meeting to consider the appeal on 25 May 2007. Mr Wilson advised in his letter that in addition to the appeal submission the committee had invited Dr John Adams and Associate Professor Oliver Davidson to attend and provide further information on Dr Millichamp's research activities. Mr Wilson advised that having responded to the questions from the committee both gentlemen had left the meeting before any deliberations on the decision were undertaken. Mr Wilson set out the two purposes of the Confirmation of Appointment policy in his letter and advised in his letter that having considered the information the SAC decided it could not be confident that if Dr Millichamp was appointed to a 10 year position it would be successful in terms of the University's ongoing performance expectations. Dr Millichamp was advised that the committee therefore stood by its original decision not to confirm the position.

[44] Mr Wilson advised in his letter that the appeal and supporting documentation would then be sent along with a report from the SAC to the Vice-Chancellor for his decision and the appeal decision would be reviewed by a Review Committee the membership of which would be as the Vice-Chancellor deems appropriate.

[45] On 24 September 2007 Mr Wilson advised Dr Millichamp by email of the members of the Review Panel; Professor Terry Crooks from the College of Education, Humanities and Professor Harlene Hayne from Psychology Sciences.

[46] On 1 October 2007 Dr Millichamp emailed Mr Wilson and asked to be advised of the procedure for the review and the further opportunities she may have to present her case. On 2 October 2007 Mr Wilson forwarded to Dr Millichamp by way of attachment to an email terms of reference for the Confirmation Review Committee and in the email advised that individuals do not appear before the Committee.

[47] By email dated 3 October Dr Millichamp wrote to Mr Wilson and asked whether she would be allowed to provide further information to the review committee relevant to her confirmation that had arisen since 24 April 2007, the date which she

provided information to the Staffing Advisory Committee. Dr Millichamp set out in her email that she had two invited papers completed and had submitted a third paper completed awaiting publication and release by Professor Poulton with a fourth paper (invited) in progress to be completed the following month and a fifth paper in progress and wanted the review committee to have that information.

[48] Mr Wilson by email dated 24 October 2007 advised that he had discussed Dr Millichamp's request to provide information to the review committee with the Chair of the SAC, Professor Jones. Mr Wilson said in his email that the review committee's role is to *review the decision by the Staffing Advisory Committee not to confirm an appointment*. He set out in his email that the review is therefore based on the information available to the committee at the time the decision was made and that it would be inappropriate to allow further information to be included beyond the timing of the decision regardless of whether it might support the decision of the SAC or the appellant's case.

[49] Before this email was sent the review committee had already made their decision and provided it under cover of letter dated 5 October 2007 to the Vice-Chancellor, Professor David Skegg. Mr Wilson was unaware that that had occurred.

[50] Dr Millichamp was then advised by letter dated 4 December 2007, received some days later but in all likelihood following a verbal discussion with Kevin Seales Director of Human Resources, that the Review Committee members had recommended the decision of SAC be upheld and that the Vice-Chancellor had accepted that recommendation.

[51] Dr Millichamp was then advised she must either become a Professional Practice Fellow or remain as a lecturer until 19 March 2008 at which point her employment with the University would terminate. The Union then requested further information and proposed mediation with the status quo maintained until mediation had taken place.

[52] On 12 March 2008 the Union agreed to Dr Millichamp transferring to a teaching position without prejudice to her right to challenge the decision not to grant confirmation.

[53] A personal grievance was then raised on 23 May 2008 seeking as a remedy reinstatement on to the lecturer's position. A statement of problem was lodged with

the Authority on 1 October 2009. The matter was then set down for an investigation meeting in August 2010 but was adjourned until December 2010.

Was the process fair and in accordance with the principles of natural justice and statutory good faith obligations?

[54] Section 4(1A) (b) and (c) of the Employment Relations Act 2000 provides the duty of good faith:

- (b) *requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
- (c) *without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse affect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –*
 - (i) *access to information, relevant to the continuation of the employees' employment, about the decision; and*
 - (ii) *an opportunity to comment on the information to their employer before the decision is made.*

[55] The outcome of the appeal not to confirm Dr Millichamp's appointment as lecturer in the Department of Psychological Medicine left her with two options. The first was to accept a Professional Practice Fellow and the second was a fixed term agreement for one year ending in termination of employment being in effect extended notice. On a without prejudice basis Dr Millichamp accepted a Professional Practice Fellow at the same salary level. In Dr Millichamp's oral evidence she said that the opportunities for progression were not the same in a role as a Practice Fellow and that she could not supervise PhD students, develop course material and apply for research grants, study and conference leave. Although research was not precluded by the appointment it would need to be done outside of the core responsibilities of the position and Dr Millichamp would not be able to apply for research grants or for leave in order to be able to conduct research.

[56] I find that Dr Millichamp was in a position of her employer proposing to make a decision that would be likely to have an adverse effect on the continuation of her employment. The University was therefore obliged in good faith to provide her with access to information relevant to the continuation of her employment and an opportunity to comment on that information before a decision was made.

[57] The process of appeal against non-confirmation needs to be analysed in terms of whether the good faith obligations and natural justice were complied with. It is important when doing so to recognise that the members of the SAC and Review Committee are entitled to deliberate about the decision to be made. Members of the committee will inevitably have an opinion either way about whether to defer or not. They are entitled to voice their opinions in arriving at a decision as part of the process.

[58] The SAC decision on 30 January 2007 not to confirm Dr Millichamp did not follow from a process that complied with natural justice and the statutory obligations of good faith. It was a decision that had an adverse effect on continuation of employment and Dr Millichamp was not provided with the information and an opportunity to comment on it before it was made.

[59] A decision was then made that the SAC review its own earlier decision as part of the appeal process. Whilst an unusual process, Mr Seales could not recall any other case where the SAC reviewed its own material, it was a sensible attempt by the University to deal with any unfairness as a result of the first decision by the SAC.

[60] The first meeting of the SAC at which the appeal against the decision not to confirm was dealt with was on 1 May 2007. Professor Jones was Chair of the SAC and at that time there were five committee members who are senior academic representatives from each division and the Secretary of SAC John Bartlett, Mr Wilson and an equity participant.

[61] There was an agreement reached by the committee members on 1 May 2007 to defer making a decision on the appeal and seek legal advice. It was agreed to hold a special meeting to consider the matter. As already mentioned it was only after the Authority investigation meeting that some supplementary notes relating to that decision to defer making a decision were provided. A reading of those deliberations show an open mind by some of the SAC members at that point in time to defer confirmation for a year. At that time they had for the first time Dr Millichamp's appeal material in front of them. One of the committee members expressed that after seeing the material he was now more sympathetic and considered that Dr Millichamp had explained the reasons for poor productivity quite well. There was concern from some committee members about Dr Millichamp's future productivity, such concern extending beyond the requirement to simply satisfy the research objectives.

Dr Millichamp had provided some information as part of the material supplied in support of her appeal about current and future research productivity on her part.

[62] Toward the start of the meeting on 1 May 2007 Mr Wilson in his role as Human Resource advisor properly set out the issue for the committee to decide on was the appeal and specifically noted that employment options sit outside of the SAC. The minutes provide that Professor Jones advised the SAC that Dr Millichamp wanted to present to the Committee but that he was reluctant to create a precedent. Mr Cranney is critical of this because he says the SAC did not discuss this or resolve it. There did not appear to be a decision by the Committee about that matter but I accept the minutes are not a verbatim record of the proceedings. Mr Cranney submits that Dr Millichamp had a right to be heard in person by both the SAC and Review Committee and Mr Dorking said that any requirements of good faith and natural justice were met by allowing Dr Millichamp to comment on the information relevant to the continuation of her employment and an appearance in person was not required.

[63] Is there then a right to be heard in person? There is nothing in the confirmation procedure itself to support that the SAC process does not allow for individual staff to attend in person or that this would not be permitted for fear of creating a precedent. Mr Cranney submits that the part of the procedure set out below provides a right to be heard.

...where confirmation is not recommended or a deferral is being recommended, given the opportunity to provide such additional comment as the staff member considers appropriate to allow Staffing Advisory Committee to make a considered judgement.

[64] Dr Millichamp was given an opportunity to provide additional comment to the SAC in written form that she considered appropriate at that time. She was advised by Professor Jones to focus more on current research projects rather than the historical difficulties in her submissions but that aside was able to prepare the appeal submission without restriction and included information about current and future research projects. Dr Millichamp's material was well presented and clearly had a favourable impact on some of the Committee members on 1 May 2007. I find that had the decision been made by the SAC on 1 or 25 May 2007 on the basis of the material provided by Dr Millichamp and other information that Dr Millichamp knew about then a right to be heard in person was not required by way of natural justice or good faith.

[65] A decision was not made on 1 May 2007 and the SAC reconvened a special meeting on 25 May 2007 at which it heard from Dr Adams and the late Associate Professor Davidson. Mr Dorking correctly refers to the possibility of further information about research and the nature of collaborative work being sought from Professor Poulton and Dr Gale and the Head of Department, Associate Professor Davidson being foreshadowed at the meeting that took place on 3 April 2007 with Professor Jones, Mr Wilson, Dr Millichamp and Mr Scott. The agreements reached at that meeting were then recorded in a letter dated 12 April 2007 that provided if time was short then that information may be gathered from the above-named by way of interview. There was no suggestion though in that letter that Dr Adams may be amongst those interviewed. Mr Dorking's submission on that point in paragraph 3.42 is incorrect. It was never agreed with Dr Millichamp or later put in writing that Dr Adams would provide a report to the SAC. Professor Jones in his evidence said that Dr Adams was invited because he had recommended an extension.

[66] As already set out the process in obtaining information from Dr Gale and Professor Poulton was by written record and not in person. As part of that process Mr Wilson advised Dr Gale and Professor Poulton quite properly that Dr Millichamp may see anything they wrote. There was less focus in the evidence on whether Dr Millichamp saw the written material supplied by Dr Gale and Professor Poulton. That is because the focus was on what was said by Dr Adams and Associate Professor Davidson to the SAC. For completeness though good faith obligations would require the emails from Dr Gale and Professor Poulton to have been shown to Dr Millichamp and for her to have had a further opportunity to comment on their contents if she wished as part of the appeal process.

[67] Mr Dorking's submission is that both Dr Adams and Associate Professor Davidson painted, when orally presenting to the SAC, the best picture possible where Dr Millichamp had failed by a substantial margin to meet her research requirements to the SAC. Dr Adams in evidence could not really recall his attendance at the SAC and/or what he said and the minutes were not made available until after the investigation meeting.

[68] What the minutes in fact record is that Dr Adams told the SAC amongst other matters that he fully supported the decision not to confirm and that there continues to be an issue of performance and that confirming would question the integrity of the

process. The minutes record Dr Adams stating that [Dr Millichamp's] productivity was not going to improve and doubts if research will differ. Finally he says that he accepts the original decision but can work with Dr Millichamp if the appeal is accepted. It would be unlikely I find that Dr Millichamp, although aware that Dr Adams had reluctantly recommended a deferral of confirmation for one year, would have anticipated Dr Adams making comments of this nature.

[69] I accept Mr Cranney's submission that the comment made by Associate Professor Davidson as recorded in the minutes *that Chris Gale had to work pretty hard with her but she got there* was on its face inconsistent with what Dr Gale had stated in his email of 13 April 2007 in which he referred to Dr Millichamp as *fast working and well organised*. There were other comments made by Associate Professor Davidson about the quality of Dr Millichamp's papers and about her writing ability.

[70] The SAC allowed Dr Adams and Associate Professor Davidson to attend before it in person but not Dr Millichamp. Its minutes are not a verbatim record of what was said by the two men to the SAC. In circumstances where a verbatim record of what was said was not available to be provided to Dr Millichamp for her response before the SAC reached a decision then fairness required the SAC to also permit Dr Millichamp to attend in person, hear and respond to the new information provided orally to the SAC by Dr Adams and Associate Professor Davidson. Had Dr Millichamp had such an opportunity then it may well have made a difference to the outcome in her case about a deferral of confirmation.

[71] Dr Millichamp in accordance with natural justice and good faith requirements should have had an opportunity to respond to those comments including those in relation to performance both on published papers and ongoing future performance in research.

[72] I find that the process undertaken by the Staffing Advisory Committee did not comply with natural justice and the obligations of good faith for the reasons set out above.

[73] I turn then to the Review Committee whose role it was to review the decision of the SAC. The terms of reference provided that the Review Committee would receive the following documentation:

- The confirmation policy,
- Dr Millichamp's confirmation progress reports,
- Copies of the SAC minutes,
- Copies of letters to Dr Millichamp on behalf of the SAC relating to her confirmation progress and outcome,
- Dr Millichamp's letter of appeal dated 24 April 2007,
- Any other documentation that they may deem relevant. These requests would be directed to the Deputy Vice-Chancellor (Academic and International). The role of the Review Committee was to review the decision of the SAC. Dr Millichamp had asked for information about publications since 24 April 2007 to be put before the Committee.

[74] The terms of reference also provided that the Committee will review only the documentation provided directly or requested through the Deputy Vice-Chancellor.

[75] Dr Millichamp wanted to provide further information to the Review Committee and Mr Wilson discussed that request with Professor Jones in his role as Chair of the SAC. Mr Wilson advised Dr Millichamp that her request to submit further information was declined because the review was based on information available to the Committee at the time the decision was made and it would be inappropriate to allow further information beyond the timing of the decision regardless of who that information may support.

[76] I can understand why Mr Wilson discussed the request from Dr Millichamp to provide the information with the Chair of the SAC. Properly though in my view he should have advised the members of the Review Committee who could then have considered whether or not they may have wished to request the material from Dr Millichamp through the Deputy Vice-Chancellor. I imagine they would have because one of the factors behind their recommendation that the SAC decision of 30 January 2007 be upheld was that Dr Millichamp had not yet established evidence of a platform of research *that makes us confident of her future research productivity*. The statement in the letter of 5 October 2007 to the Vice-Chancellor was that *from*

this forward-looking perspective, the decision of the SAC seems sound. Mr Cranney puts the importance of this material well in his submission when he says any assessment using a forward looking perspective necessarily required consideration of the very materials Dr Millichamp had not been allowed to provide.

[77] The Review Committee asked for written information from Dr Adams and Associate Professor Davidson as to what they had said to the SAC. This was duly provided through Mr Wilson and no doubt the Deputy Vice-Chancellor. Even allowing for a more cautious response when one is given in writing there was considerable difference in the letters provided to the Review Committee and the record in the minutes. Dr Adams said nothing in his letter sent to the Review Committee along the lines of supporting the original decision not to confirm or that confirming would question the integrity of the process. In fact the letter was supportive of Dr Millichamp. It is likely from consideration of the letters more was said by Dr Adams and Associate Professor Davidson than the minutes reflect. The lack of fairness already identified in not giving Dr Millichamp a right of reply to the new oral information given at SAC level was not identified by the Review Committee and Dr Millichamp was again not shown the letters for comment.

[78] Mr Cranney was very critical of the Review Committee analysis and conclusions including on Dr Millichamp's four paper requirement and the measure of extensions that he says properly ran from September 2004 to the end of 2007 not nine years from 1998 to 2007. The issue though is whether there was an opportunity for comment on these matters. I shall address that when I consider the next stage of the process.

[79] I find that there was a breach of natural justice and good faith at the Review Committee stage of the appeal process because new information was provided to the Committee that Dr Millichamp had not seen and without her having an opportunity to comment on and the Review Committee was not told that Dr Millichamp wanted to provide further information on her current research.

[80] Dr Millichamp was told by Mr Wilson that individuals do not appear before the Review Committee and did not pursue that thereafter. I am not satisfied that there is a breach in this specific case because Dr Millichamp did not have a right to be heard in person.

[81] Finally Mr Cranney submits that the Vice-Chancellor could have given Dr Millichamp a copy of the Review Committee's finding and given her an opportunity to comment on them before deciding whether to accept the recommendations. Mr Dorking submits that there was no obligation on the Vice-Chancellor to provide Dr Millichamp with the Review Committee's recommendation before deciding to follow it. In any event he submitted the only decision made by the Vice-Chancellor was whether or not to reverse the decision of the SAC or to let it stand. Mr Dorking submits that if it can be said that non confirmation is a dismissal, although he did not necessarily accept that, then the decision is made by the SAC and not by the Vice-Chancellor.

[82] I have found that the breaches of good faith and natural justice occurred at the SAC stage of the process when Dr Millichamp did not get an opportunity to respond to new information presented to the SAC and then these initial difficulties were compounded again at the Review Committee level. The final stage of the process was that the Vice-Chancellor accepted the recommendation of the Review Committee.

[83] I accept Mr Dorking's submission that the decision on Dr Millichamp's employment was made at first instance by the SAC when Dr Millichamp had been given notice of her dismissal. Later however in a letter dated 20 March 2007 from Mr Wilson Dr Millichamp was advised that while the appeal was being considered she would remain in her current position as lecturer.

[84] The Vice-Chancellor in deciding whether or not to accept the Review Committee's recommendation was therefore making a decision that was going to have an adverse effect on the continuation of Dr Millichamp's employment. Under section (4)(1A)(c) of the Employment Relations Act 2000 the Review Committee's recommendation was information relevant to the continuation of her employment and Dr Millichamp was entitled to an opportunity to comment on it before the Vice-Chancellor made a decision to accept or otherwise the recommendation. The failure to provide this information and an opportunity to comment on it to Dr Millichamp was a breach of the good faith obligations.

If the process was not in accordance with natural justice and good faith obligations, then what remedies are available to Dr Millichamp?

[85] Dr Millichamp was entitled to have the decision made in a manner that complied with natural justice and good faith requirements in section 4(1A)(c) of Employment Relations Act 2000. I have identified breaches of good faith and natural justice in this determination.

[86] Given the delays in this matter I think Mr Cranney's suggestion of how to deal with remedies is a sensible one. I give the parties time to have discussions as to the best way to deal with this situation where there have been breaches of good faith and natural justice.

[87] I reserve leave for either party to return to the Authority if necessary.

Costs

[88] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority