

Attention is drawn to the order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 247
5416219

BETWEEN KERRY FRANCES KIRKLAND
Applicant

AND THE VICE CHANCELLOR OF
THE UNIVERSITY OF OTAGO
Respondent

Member of Authority: David Appleton

Representatives: Len Andersen, Counsel for Applicant
Barry Dorking, Counsel for Respondent

Investigation Meeting: 5 and 6 November 2013

Submissions received: 6 November 2013 from Applicant
6 and 14 November 2013 from Respondent

Determination: 3 December 2013

DETERMINATION OF THE AUTHORITY

- A. The applicant was unjustifiably dismissed and suffered an unjustifiable disadvantage in her employment.**
- B. The applicant is awarded remedies subject to a 25% reduction for contribution.**
- C. Costs are reserved.**

Prohibition from publication order

[1] The Authority had before it a report, called the Sim Report, which summarised the findings of an investigation carried out by an independent lawyer into allegations against the respondent's Director of Marketing and Communications, Ms Nicholls, and her management of the Marketing and Communications Division of the

university. No evidence in relation to the contents of the Sim Report which pertain to individuals other than Dr Kirkland and Ms MacKenzie-White, who gave evidence to the Authority, is to be published, and such evidence is to be kept confidential.

Employment relationship problem

[2] Dr Kirkland raises a personal grievance that she was unjustifiably dismissed and that she was subjected to an unjustified disadvantage in her employment by way of bullying by her direct line manager, Ms Nicholls, and by the failure of her employer, the respondent, to investigate her allegations of bullying and to put in place a safe working environment.

[3] The respondent denies that Dr Kirkland was unjustifiably dismissed. It denies that Ms Nicholls bullied her and it also denies that it failed to investigate her allegations. The respondent says that it dismissed Dr Kirkland by reason of medical incapacity when she said she was unable to return to an environment that she said was unsafe but which the respondent says it was unable to change.

Brief account of the events leading to dismissal

[4] Dr Kirkland started working as the full time Head of Marketing Services within the university's Marketing and Communications Division in late November 2011, reporting directly to the Director of Marketing and Communications, Ms Nicholls. Prior to taking up that position, Dr Kirkland had been employed by the university for approximately 10 years in various roles and Ms Nicholls had held the post of Director for approximately four years.

[5] Upon commencing her Head of Marketing Services role, Dr Kirkland was told by Ms Nicholls that she had inherited a *difficult team who were hard to manage*. Dr Kirkland says that she then found the atmosphere in the Marketing Services Department to be oppressive and *staff members were distraught about the situation with Ms Nicholls and how they had been treated by her*.

Alleged rudeness to Ms Hook

[6] The first significant incident in the breakdown of the relationship between Dr Kirkland and Ms Nicholls occurred in February 2012 when an external contractor (Ms Hook), undertook some research on behalf of the university. This research was

presented by Ms Hook to a meeting at the Business School on 28 February 2012 and, according to Dr Kirkland, she questioned Ms Hook about sample size to verify the research and how accurate it was to predict and determine insights upon which to base a marketing campaign. According to Dr Kirkland, Ms Nicholls later told Dr Kirkland that she had behaved very badly at that meeting and that she should not have asked questions. According to Dr Kirkland, Ms Nicholls either could or would not explain what she had done wrong other than to say that Dr Kirkland had a bad attitude and had been very rude to Ms Hook.

[7] According to Ms Nicholls' evidence to the Authority, Dr Kirkland had interjected partway through Ms Hook's presentation to the Business School and had been rude and hostile in her tone. She said that Ms Hook had been in tears and had told her that she had never been treated with such rudeness by a colleague before. Ms Nicholls said that she spoke to Dr Kirkland straight after the meeting, denies that she told Dr Kirkland that she should not have asked questions, but told her that her interjection had not been appropriate and that it had been seen as rude and hostile by her and Ms Hook. Ms Nicholls said that she made it quite clear to Dr Kirkland what it was about her behaviour at the meeting that had been seen as rude, but that Dr Kirkland had had no idea that she had been rude. Ms Nicholls says that, having brought the matter to the attention of Dr Kirkland on the day it occurred, she saw that as being the end of the matter.

[8] In her evidence to the Authority, Dr Kirkland said that Ms Nicholls proceeded to raise her alleged rudeness to Ms Hook thereafter, doing so regularly at their semi-weekly one to one meetings, for a total of four to six times. Ms Nicholls said that she discussed the research itself with Dr Kirkland in one to one meetings, but did not recall mentioning her rudeness more than one occasion at the end of the Business School presentation.

[9] On 8 June 2012, Dr Kirkland wrote to Mr Seales, the Human Resources Director for the university, stating that she had been the subject of *a number of unsubstantiated verbal allegations* from Ms Nicholls in relation to her alleged rude behaviour towards Ms Hook. Dr Kirkland stated in the email that Ms Nicholls refused to put the allegations in writing and would not clarify exactly what was wrong with her behaviour. She stated that Ms Nicholls had raised her apparently rude behaviour on a number of occasions and had said that Dr Kirkland had a personal

issue with Ms Hook. In the email, Dr Kirkland went on to say that she had been advised that Ms Nicholls *repeated admonitions to me may constitute a pattern of bullying and harassment*. Dr Kirkland stated that she had asked Ms Nicholls on 6 June to put her allegations in writing and to send them to HR but that Ms Nicholls had refused to do so. Dr Kirkland said that this was not a formal complaint but that she wished to put the matter in a formal record in case the behaviour continued.

Raising of complaint by the TEU

[10] On 9 August 2012, the organiser of the Tertiary Education Union (TEU) wrote to Mr Seales *to formally raise ... serious concerns we have regarding the work environment of our members in the Division of Marketing and Communications*. In the letter of complaint, the TEU referred specifically to Ms Nicholls, citing her management style as *micro-managing, misguided and conflict creating*. It was as a result of this raising of concerns by the TEU that an investigation was initiated resulting in a written report created in December 2012 by an independent lawyer, Mr Sim.

Alleged rudeness to Mr Moore and Ms Postlewaight

[11] In August 2012, a social media advisory group (SMAG) was formed, the purpose of which was to consider ways of utilising social media for the benefit of the university. Ms Nicholls had asked all managers to put staff forward to be on the SMAG and Ms Nicholls had agreed that Mr Moore, the Head of the Auckland Centre and the Wellington city office, together with his Auckland administrator, Ms Postlewaight, should be members of the group. When Dr Kirkland found out about this, she sent an email to Ms Nicholls saying that the addition of Ms Postlewaight to the group had not been discussed or agreed with the other managers and that Mr Moore had neither the marketing nor web knowledge that qualified him to form part of the group. She also raised a concern that having Mr Moore on the group *would cause multiple and confusing lines of instruction for Kate Kidson* (a member of Dr Kirkland's team).

[12] It was Dr Kirkland's evidence that Ms Postlewaight had already set up a Summer School Facebook page at the request of Mr Moore and the Director of the Summer School, Dr Webster, but that, in Dr Kirkland's opinion, the Facebook page has been set up in a less than ideal way, had dubious content and did not follow the

university's branding guidelines. Dr Kirkland's evidence was that she felt significantly undermined by this and that she should have been an integral part of the process before it had been executed. Ms Nicholls decided that Mr Moore and Ms Postlewaight should attend the first meeting of the group and gave evidence that Ms Postlewaight went on to make a valuable contribution to the SMAG and remains part of that group.

[13] Ms Nicholls' evidence was that it was her choice who attended the SMAG meeting but that, at that meeting, Dr Kirkland had questioned why Ms Postlewaight and Mr Moore were taking part and specifically questioned Ms Postlewaight's competence to be included in the group. Ms Nicholls' evidence was that this had been very inappropriate and rude to a younger member of staff. She said that Mr Moore and she both apologised subsequently to Ms Postlewaight as a result of what Dr Kirkland had said.

[14] Ms Nicholls said that, at the end of the meeting she asked Dr Kirkland, Mr Moore and another manager (Mr de Beer) to discuss this rudeness and she asked Dr Kirkland what she thought she was doing and why she had been rude to Ms Postlewaight. She says that Dr Kirkland did not believe that she had been rude or that her behaviour had been inappropriate. It was for this reason, she says, that she later called an emergency management meeting on 20 August 2012 to discuss the way that they were operating as a management team. A human resources manager, Ms Dixon, was asked to attend that meeting.

[15] Dr Kirkland's evidence is that she was ordered to attend the management meeting on a day when she was involved with Channel 4 filming at the university and so did not wish to leave that filming. Ms Nicholls however directed Dr Kirkland to attend the meeting and told Dr Kirkland that her deputy, Ms Kidson, could be in charge of it during her absence.

[16] Dr Kirkland says that at the emergency management meeting it was stated that *someone had been rude at the SMAG meeting*. The minutes of the management meeting record that, *at that meeting, a staff member was made to feel not welcome*. Dr Kirkland says that, when she was later asked to approve the minutes of that meeting, she objected and Ms Nicholls then stated that Dr Kirkland had been rude to Ms Postlewaight without detailing exactly what she had done or said, despite her

requesting clarification. The minutes also record that Mr Moore had asked that it be noted that both he and Ms Postlewaight had been made to feel not welcome.

Alleged rudeness to Dr Webster

[17] A few days after the management meeting, on 29 August 2012, the head of the Summer School, Dr Webster, met with two members of the marketing services team, Mr Peter Scott and Ms Kate Kidson, to discuss the advertising for the 2013 Summer School. Dr Webster invited Dr Kirkland into the meeting when Dr Kirkland came into the room unexpectedly. During the meeting, there was a discussion about the way the advertising should proceed and Dr Kirkland says that she disagreed with some of Dr Webster's ideas. Around a month later (on 24 September 2012), Dr Webster wrote an email to Ms Nicholls saying that she had been:

... less than happy with Kerry Kirkland. I did expect some kind of support for content (clearly beyond Kate and Peter's roles) but on the one occasion when this could have been provided, instead Kerry was rude and dismissive. I was appalled at her unprofessional manner towards me (and to Kate) and dismayed at the lack of service. I am happy to be given constructive criticism but its hardly reasonable to condemn unsupported efforts, and then to offer no solution.

[18] It is Ms Nicholls' evidence that, after returning to work from annual leave on 17 September 2012, she had been told by her deputy, the head of the School's Liaison, Mr Wilson, that Dr Webster had complained to him about Dr Kirkland being rude. She then met with Dr Webster on 19 September who told her that Dr Kirkland had been rude about a new advertising concept, referring to it as *crap*. She said that Dr Webster had told her that Dr Kirkland had said that she had a hundred other more important things to work on and did not have time for her Summer School issue. She said she then went on to explain everything that was wrong with the Summer School advertisement without given any recommendation on how to fix the issue. Ms Nicholls said that Dr Webster told her that this was the rudest encounter she had ever had in her time at the university. Ms Nicholls asked Dr Webster to put her complaint in writing and the email she received was that complaint.

[19] Ms Nicholls said that she spoke to Mr Seales on how to handle this, which was the third time she had had to talk to Dr Kirkland about rudeness and her behaviour, and he recommended a meeting to discuss it with an impartial person there, namely a member of the HR team, Ms Pankhurst.

[20] It is Dr Kirkland's evidence that, on 28 September, she was called into a meeting with Ms Nicholls and, to her surprise, found that Ms Pankhurst was also present. She was shown a copy of the email from Dr Webster and asked to read and comment on it immediately. She said that she had felt ambushed and uncomfortable at the meeting but had denied the allegations completely.

[21] Ms Nicholls said that, at that meeting, Dr Kirkland had said that she felt she had been ambushed but she had no idea why Dr Webster was complaining, that she felt the meetings had been positive and she had provided Dr Webster with a lot of advice on the Summer School marketing. The meeting on 28 September did not last long however, because Dr Kirkland did not want to continue it without a support person present.

[22] Dr Kirkland later obtained statements from Ms Kidson and Mr Scott, both of whom essentially denied that Dr Kirkland had been rude to Dr Webster.

Mr Kirkland's letter raising a personal grievance on behalf of Dr Kirkland

[23] As a result of this meeting, Dr Kirkland's brother, Mr Kirkland, a barrister and partner of Carter Kirkland Morrison, wrote a letter to the Vice Chancellor of the university stating that he was raising a personal grievance complaining about the behaviour of Ms Nicholls and Dr Webster and stating that there had been an unsafe working environment in the Marketing Service Department and a breach of procedure in relation to the handling of the complaint by Dr Webster.

[24] Mr Kirkland made a number of allegations in his letter, which included the following passage:

Our client has informally been warned by previous and existing staff members that Nicholls has a modus operandi whereby she manufactures allegations and thereby creates an environment of fear.

[25] The letter also raised concerns about other complaints that had been made by Ms Nicholls to Dr Kirkland in relation to Ms Hook, Ms Postlewaight and Mr Moore. In the letter Mr Kirkland stated that Ms Nicholls's actions were:

... libellous, defamatory, bullying and harassing. The working environment is unsafe. Our client is extremely stressed and distressed.

[26] On 29 November 2012, Mr Seales replied to Mr Kirkland's personal grievance letter stating that managers are encouraged to raise concerns about their staff directly with the staff member to try to resolve them. The university had used an informal approach with Dr Kirkland when she had been invited to the meeting on 28 September 2012. Mr Seales said that, although it would have been preferable for Dr Kirkland to have been advised that Ms Pankhurst was going to be present at the meeting, it was not necessary. To have gone further and suggested that Dr Kirkland might like a support person present would have elevated what was a preliminary inquiry into a formal investigation with a possible negative outcome for Dr Kirkland. Mr Seales went on to say that he had spoken to Dr Webster, Mr Moore and Ms Hook and could verify that all of them felt that Dr Kirkland had spoken to them rudely and that they had raised this with Ms Nicholls. Mr Seales ended his letter by asking whether Mr Kirkland wished the university to proceed by carrying out a formal process. It is Mr Seales' evidence that Mr Kirkland did not respond to that question.

Recording of meetings

[27] On 18 December 2012, Ms Nicholls wrote to Dr Kirkland saying that she had been informed that Dr Kirkland had recorded her conversation at a meeting on 6 December 2012 with an outside agency and that she wished to discuss this with her. Dr Kirkland responded to that email the following day saying that she had recorded the talk *in order to share Zephyr's ideas and insights with my team members, not present, about our advertising campaign*. In her evidence to the Authority, Dr Kirkland said that she had not recorded Ms Nicholls at that meeting, but confirmed that she had started to record conversations with Ms Nicholls around August 2012, several months before. Ms Nicholls says that the meeting with Zephyr was highly confidential and should not have been recorded without express permission.

[28] Dr Kirkland refused to attend a meeting at short notice to discuss the recording issue, saying that she wished her lawyer, Mr Kirkland, to be present. Ms Nicholls responded, suggesting that they meet in the New Year. Mr Kirkland wrote to Ms Nicholls' PA saying that they would not be able to meet in January 2013 as he was going to be having surgery, that he would be filing a claim against the university with the Employment Relations Authority in the New Year and that he would like to arrange mediation in February/March 2013. Ms Nicholls responded saying that she

was not prepared to wait that long, that the meeting would be organised in January and that if he was not available, then Dr Kirkland could get another lawyer to attend.

[29] More correspondence ensued from Mr Kirkland, both by email directly to Ms Nicholls and by letter to Mr Seales.

[30] On 21 January 2013, Ms Nicholls wrote to Dr Kirkland telling her not to record any more meetings without the express permission of the attendees. Dr Kirkland replied stating that she was legally entitled to record conversations and that she had no trust and confidence in Ms Nicholls *as you continue to misrepresent our discussions to third parties*. Ms Nicholls responded asking Dr Kirkland to reconsider her stance, saying that she would ask Mr Patrick (the Chief Operating Officer) whether Dr Kirkland's conduct was reasonable if she continued to insist on recording operational meetings. She also asked Dr Kirkland if she would provide examples of instances where she misrepresented discussions to third parties. She says that she had no response to this question.

Correspondence with counsel

[31] Mr Seales wrote formally to Mr Kirkland on 22 January 2013 stating that no formal process had been instigated by the university in relation to any complaint against Dr Kirkland, and that Ms Nicholls was not only entitled to raise the matter of the complaint with Dr Kirkland but she was obliged to do so. He also stated that, if Dr Kirkland wished to insist on a formal disciplinary procedure being followed, they were prepared to accommodate that although, in his opinion, that would be escalating the matter unreasonably and unnecessarily. He then stated that a meeting would take place with Mr Patrick on 14 February 2013. Finally, Mr Seales said that there was nothing to mediate as, in his view, none of the facts referred to in Mr Kirkland's letter of 24 October 2012 could reasonably have supported the allegations that Ms Nicholls' actions were libellous, defamatory, bullying and harassing and that the working environment was unsafe or that Dr Kirkland had any grounds for pursuing a grievance.

Meeting with Mr Patrick

[32] Dr Kirkland met with Mr Patrick along with Mr Andersen, her counsel, on 15 February 2013 and, at that meeting, Mr Patrick told Dr Kirkland that *no further action* was to be taken against her. During the Authority's investigation meeting, Mr Patrick

confirmed that, by this, he meant disciplinary action. He also said that Dr Kirkland could request an investigation in writing and that, if she did, the university would treat it in a formal manner. Mr Patrick said that Mr Andersen advised Dr Kirkland to *let it go* as the outcome Mr Patrick had given her was the best she could achieve. Mr Patrick said that Dr Kirkland was reluctant to do this but finally agreed. This was not contradicted by Dr Kirkland in her evidence.

Further correspondence

[33] On 21 February 2013, Mr Seales wrote to Dr Kirkland in respect of her recording of meetings with Ms Nicholls, stating that Dr Kirkland's insistence on recording all meetings was not workable as it stifled internal communication, interfered with the operation of the department and was unreasonable. He warned her that her refusal to comply with an instruction not to record meetings could be seen as serious misconduct and he expressed concern at the statement she allegedly made that she had no trust or confidence in Ms Nicholls. He expressed a wish to meet with her on 26 February to discuss the matters raised in his letter.

[34] On 22 February, Ms Nicholls wrote to Dr Kirkland to say that the next one-to-one meeting to discuss operational matters that was scheduled to take place between them would be postponed until the issue of recording of their conversations was resolved.

[35] On 22 February, Dr Kirkland was signed off sick, her medical certificate stating that she should be able to return to work on 22 March 2013. It is Dr Kirkland's evidence that she went off sick with stress. She never returned to work from this point on.

[36] On 25 February, Mr Andersen wrote to Mr Seales stating that he was instructed to file a personal grievance with the Employment Relations Authority and saying that, if Mr Seales would confirm that Mr Patrick instructed Dr Kirkland not to record meetings, then those meetings would not be recorded.

[37] Mr Dorking, counsel for the university, responded to this letter stating that, unless Dr Kirkland was referring to the issues raised by Mr Kirkland in his letter of 24 October, the university had not been notified of any allegations of bullying and harassment. He said that the allegation that Dr Kirkland had been bullied by her manager had already been investigated and that the allegation had been rejected. He

concluded his letter by asking Mr Andersen to clarify whether Dr Kirkland had resigned (because of comments made by Mr Andersen in his previous letter), and whether the allegations of bullying to which he referred went beyond those referred to in Mr Kirkland's letter of 24 October.

[38] Mr Andersen responded substantially on 19 March stating that Dr Kirkland had not resigned although she was prepared to do so if satisfactory arrangements could be made for her departure. He also stated that the complaint:

... is of continuing conduct that is causing her stress and upset and making it impossible for her to continue unless remedial steps are taken by the University. The allegations of bullying and harassment were first raised in an email to Kevin Seales sent on 8 June 2012. This complaint was put in writing and is referred to in Kirkland Morrisons' letter of 24 October 2012.

Notwithstanding the email of 8 June 2012 the claims that Dr Kirkland is rude have continued to be made by Ms Nicholls. The effect of this has to undermine Dr Kirkland in her position and to make the workplace intolerable. It has required Dr Kirkland to take the rather extreme measure of taping conversations with Ms Nicholls because Ms Nicholls was not prepared to put in writing the allegations that she makes to Dr Kirkland when they were alone.

[39] A response from Mr Dorking followed on 20 March questioning the statement that allegations of Dr Kirkland being rude had continued to be made by Ms Nicholls but stating that the university was prepared to investigate the claims that Ms Nicholls had bullied Dr Kirkland if Dr Kirkland provided details of the allegations supposedly made by Ms Nicholls when they were alone, including the time, place and nature of the allegations. Mr Dorking's letter concluded as follows:

7. *Dr Kirkland says it is "impossible for her to continue unless remedial steps are taken by the University". The University has already investigated Dr Kirkland's allegations against Ms Nicholls and found them to be unfounded, in which circumstance there are no "remedial steps" the University can take.*
8. *In other words the situation is unlikely to change from that which Dr Kirkland currently describes as being "intolerable". If she decides to reconsider that conclusion, then once Dr Kirkland feels well enough to return to work, the University will require a medical certificate confirming she has recovered sufficiently to enable her to work in the existing environment without damage to her health. The University will pay the cost of obtaining that certificate.*

[40] The letter concluded with Mr Dorking saying that Dr Kirkland would have utilised all her paid sick leave by the end of the week.

[41] Mr Andersen responded by letter stating that *as it is the environment that is causing the damage to her health, Dr Kirkland cannot return to work because she is unable to satisfy the university's requirement for a return to work meaning that she is effectively suspended without pay*. He then asked whether the university was prepared to go to mediation to try to resolve the issue.

[42] Mr Dorking responded stating that, having reached a conclusion that Dr Kirkland's original complaints were unfounded, and in the absence of subsequent examples of supposed bullying and harassment, it followed that the university did not consider Dr Kirkland's assessment of the working environment to be intolerable to be reasonable. Having concluded that, there were no changes that could reasonably be made to remove, isolate or mitigate what Dr Kirkland saw as the cause of her health issues. The university was obliged to ensure she was not allowed to work if it would damage her health and that required confirmation from a doctor that this would not be the outcome of her return. Mr Dorking said that the university was prepared to attend mediation.

[43] A further medical certificate was obtained dated 8 April 2013 which stated that Dr Kirkland had been examined by a doctor and *given that there have been no changes in the circumstances of her work environment it would be detrimental to her health to return to work at the current point in time*.

Termination of Dr Kirkland's employment

[44] On 1 May 2013, Mr Dorking wrote to Mr Andersen a long letter reciting what had occurred to that date, recording that mediation had not resulted in any agreement to change the circumstances of Dr Kirkland's working environment and stating that it appeared that Dr Kirkland was not medically fit to return to work and, accordingly, that the university proposed to terminate her employment on the grounds of medical incapacity. He invited Mr Andersen to comment on whether or not Dr Kirkland accepted that was an appropriate course of action.

[45] Mr Andersen responded on 13 May 2013. He stated that there was no issue of medical incapacity as Dr Kirkland was able to perform the tasks and there was no medical reason why she could not do so immediately if the university provided a

proper working environment. He stated that the university had not protected her from unjustified allegations being made by either investigating the allegations or requiring Ms Nicholls to provide details of exactly what the behaviour was that she described as *rude* and/or *unprofessional* so that Dr Kirkland could understand exactly what complaints were made against her.

[46] Mr Andersen also said that the fact of the complaints and the refusal to investigate whether they were well founded or not created stress for Dr Kirkland as she could not protect herself by modifying her behaviour. He stated that the complaint was that Mr Seales had not been prepared to investigate whether Dr Kirkland was in fact *rude* and/or *unprofessional* and whether there was any substance in the complaints, but limited his inquiry to whether she was claimed to have been rude by the named people.

[47] Mr Dorking responded on 16 May 2013 on behalf of the university stating that the university had investigated Dr Kirkland's concerns about the working environment and concluded that she had no reasonable cause for complaint. He stated that the university had done all it could, that Dr Kirkland believed that the complaints were unjustified and solicited or manufactured by Ms Nicholls but Dr Kirkland had no evidence to support her belief. He stated that it was clear in the correspondence from Mr Kirkland that he and his client were aware of the detail of the complaints but that, even if that had not been the case, providing the detail was not strictly necessary unless the university proposed to conduct a formal investigation. He stated that, at the meeting with Mr Patrick, the matter of the complaints had been discussed and Dr Kirkland had been reminded of the standard of behaviour required of someone in her position and then *that was the end of the matter as far as the University was concerned*.

[48] Mr Dorking stated in his letter that the university had no grounds for making the changes to the environment which Dr Kirkland said she required and that *the workplace hazards which Dr Kirkland finds "intolerable" are a usual part of working as part of a team*. The letter ended by Mr Dorking saying that the university had investigated the matters Dr Kirkland had identified as causing her condition and had concluded that changes she considered necessary to make the workplace tolerable for her were neither reasonable nor practicable. The university had considered whether there were any alternative positions available to which Dr Kirkland could be

redeployed but had been unable to identify anything suitable. Therefore, the university decided that Dr Kirkland's employment would terminate on a no fault basis on the grounds of medical incapacity. The effective date of termination would be three months from the date of the letter.

[49] Dr Kirkland was then signed off sick by way of a certificate issued *awaiting the outcome of the legal process*. This certificate also stated that Dr Kirkland was not medically incapacitated for work, that she was fit and healthy to do any work, but that *nobody should work in a hostile bullying environment – and I fully support her decision to not work in any such environment*.

[50] On 24 September 2013, Mr Andersen wrote to notify the university of a personal grievance challenging Dr Kirkland's dismissal on 16 August 2013.

The issues

[51] The issues the Authority must consider are as follows:

- (a) Whether Dr Kirkland suffered an unjustified disadvantage in her employment by way of bullying;
- (b) Whether Dr Kirkland suffered an unjustified disadvantage in her employment by way of a failure of the respondent to investigate properly her allegations of bullying;
- (c) Whether Dr Kirkland was unjustifiably suspended without pay; and
- (d) Whether the respondent unjustifiably dismissed Dr Kirkland.

[52] The starting point in determining this and the other questions set out above is the requirement upon the Authority to apply the test set out in s.103A of the Employment Relations Act 2000 (the Act). This provides as follows;

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

- (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- (5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*
- (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[53] Also of relevance are the provisions of good faith set out in s. 4 of the Act. In particular the following:

4 Parties to employment relationship to deal with each other in good faith

- (1) *The parties to an employment relationship specified in subsection (2)—*
 - (a) *must deal with each other in good faith; and*
 - (b) *without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
 - (i) *to mislead or deceive each other; or*
 - (ii) *that is likely to mislead or deceive each other.*
- (1A) *The duty of good faith in subsection (1)—*
 - (a) *is wider in scope than the implied mutual obligations of trust and confidence; and*
 - (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 effect 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.*

Did Dr Kirkland suffer an unjustified disadvantage in her employment by way of bullying?

[54] There was a rejection expressed by Mr Seales in one of his letters to Mr Kirkland, repeated by Mr Dorking in a subsequent letter, of the assertion that a valid personal grievance had been raised by Mr Kirkland in his letter of 24 October 2012.

This argument had been apparently abandoned by the respondent by the time of the Authority's investigation meeting. However, for the record, I do not accept that the personal grievance was raised out of time in respect of allegations of rudeness against Dr Kirkland in relation to the SMAG meeting and to Dr Webster. It was raised out of time in relation to the alleged rudeness to Ms Hook, and the email to Mr Seales dated 8 June 2012 did not raise a personal grievance with respect to the alleged repeated admonitions, but that was not the focus of the letter. Furthermore, I do not accept that the letter of 24 October 2012 lacked the required specificity for it to be a valid grievance.

[55] There are a number of allegations raised by Dr Kirkland during and after her employment which could give rise to a finding of bullying and, hence, of unjustified disadvantage. These are as follows:

- a. Ms Nicholls and Dr Webster colluded to fabricate a complaint against Dr Kirkland;
- b. Being invited to attend a meeting on 28 September 2012 to discuss Dr Webster's complaint without representation;
- c. Ms Nicholls falsely accused Dr Kirkland of being rude to Ms Hook;
- d. Ms Nicholls falsely accused Dr Kirkland of being rude to Ms Postlewaight and Mr Moore;
- e. Ms Nicholls refused to provide details of the alleged rudeness;

[56] I shall examine each of these in turn. Other allegations contained in Dr Kirkland's witness statement, prepared for the Authority's investigation, were not raised with the university at the time as a cause of concern, and Dr Kirkland said that they were referred to as background, and so I will not investigate those separately.

Fabrication of Dr Webster's complaint

[57] The content of the letter of 24 October 2012 clearly created some confusion in the mind of the university (or more specifically Mr Seales) as he understood it to be saying solely that Ms Nicholls and Dr Webster had colluded to fabricate a complaint that was untrue; namely that Dr Kirkland had been rude to Dr Webster. This was certainly one of Dr Kirkland's complaints, and continues to be her belief, as she called

one of her ex colleagues, Ms Kidson, to give evidence to the Authority to support this argument. Certainly, if this assertion of fabrication were true, I would have to find that Dr Kirkland had suffered a significant disadvantage in her employment, which would have been unjustified.

[58] However, I do not believe that the complaint was fabricated. One of Dr Kirkland's arguments to support this assertion was that the complaint had been raised a month after the meeting giving rise to it. However, I accept Ms Nicholls' evidence that she was told by her deputy that Dr Webster had raised it during Ms Nicholls' annual leave, so that it had been first raised less than a month after the meeting between Dr Webster and Dr Kirkland. I also find it highly unlikely that a senior member of the university (Dr Webster) would chose to invent, and record in writing, a complaint against another senior manager (Dr Kirkland) without any apparent very strong motivation. I was told of no possible motivation at all.

[59] I also accept the respondent's argument that, having received a written complaint from a senior manager about a member of her staff, Ms Nicholls was obliged to investigate it. In light of this, I do not accept that the raising by Ms Nicholls with Dr Kirkland of Dr Webster's complaint constituted bullying; nor was it an unjustified disadvantage.

The meeting of 28 September 2012

[60] Ms Nicholls told the Authority that she had sought advice from Mr Seales, who had recommended that an HR manager be present at the meeting as an impartial person, given the tensions that already existed between Dr Kirkland and Ms Nicholls. Mr Seales said that she was there to protect both parties. Mr Seales accepted in evidence that, in hindsight, it would have been better to have forewarned Dr Kirkland about the purpose of the meeting with Ms Nicholls and the HR manager. He said, however, that he did not wish to make the process formal, and that this meeting had fallen outside of the university's normal disciplinary process. Dr Kirkland said that it was *a big deal* having an HR person present in a meeting, and had felt ambushed.

[61] Being called into the meeting was the catalyst for Mr Kirkland writing the grievance letter on behalf of Dr Kirkland. I accept that Dr Kirkland had been disadvantaged by being called into this meeting without warning, as it caused her stress and caused her to feel that she was being bullied by Ms Nicholls.

[62] However, when I consider the s.103A test of justification, I am not satisfied that this was an action which no fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The university was trying to keep the matter informal and was trying to provide an impartial person to effectively keep the peace between Ms Nicholls and Dr Kirkland. These motives were well intentioned. I believe that the action fell within the range of responses of a fair and reasonable employer in the circumstances. I therefore reject the notion that this amounted to an unjustified disadvantage.

Did Ms Nicholls falsely accuse Dr Kirkland of being rude to Ms Hook?

[63] Although I believe that no personal grievance was validly raised by Dr Kirkland with respect to this allegation, it was investigated by Mr Seales when he received Mr Kirkland's letter of 24 October 2012. Ms Nicholls explained in evidence that it was Dr Kirkland's tone that had upset Ms Hook. I accept Ms Nicholls' evidence that Ms Hook had been upset as a result of her perception of Dr Kirkland's tone when questioning her, which was that it had been rude. I also accept Ms Nicholls' evidence that she herself genuinely thought that Dr Kirkland had been rude to Ms Hook in the use of her tone. In light of this, I accept that Ms Nicholls did not falsely accuse Dr Kirkland of being rude to Ms Hook.

Did Ms Nicholls falsely accuse Dr Kirkland of being rude to Ms Postlewaight and Mr Moore?

[64] I accept the evidence of Ms Nicholls that she genuinely felt that Dr Kirkland had been rude to Ms Postlewaight and Mr Moore. This is because of the email that Dr Kirkland had sent questioning the right of Ms Postlewaight and Mr Moore to be at the SMAG meeting, which suggests that Dr Kirkland would have questioned their right to be there at the meeting itself. I also take into account the fact that the minutes of the subsequent management meeting record that Mr Moore said he felt that he and Ms Postlewaight were not felt to be welcome.

Did Ms Nicholls refuse to provide details of the alleged rudeness?

[65] On balance, I do not believe that Ms Nicholls unreasonably refused to provide details of the allegations of rudeness to Dr Kirkland. I believe that Ms Nicholls did tell Dr Kirkland that she felt Dr Kirkland had been rude to Ms Hook in the way she had spoken to her, and that she had made Ms Postlewaight and Mr Moore feel

unwelcome. I believe that Ms Nicholls did not have the opportunity to give details to Dr Kirkland of Dr Webster's perceptions of Dr Kirkland's rudeness.

[66] I accept that Dr Kirkland did not understand how she had been rude, and I also accept that Dr Kirkland was not being deliberately difficult when she did not accept that she had been rude without further details.

[67] The question is, should Ms Nicholls reasonably have been expected to have taken pains to have spelled out further for Dr Kirkland how she had been seen as rude until her concerns were understood? In my view, if she had been told unequivocally that Dr Kirkland needed more detail, then she should have tried to give it. However, I am not convinced that this was ever made clear until much later, in May 2013, by which time the relationship between Ms Nicholls and Dr Kirkland had broken down and Dr Kirkland was no longer attending work. I analyse below the correspondence passing between Dr Kirkland and the university and find that the prevailing view of the university, reasonably held until May 2013, was that Dr Kirkland was accusing Ms Nicholls of making up the allegations of rudeness.

[68] In conclusion, I do not believe that Ms Nicholls unreasonably failed to provide details of the alleged rudeness, and do not therefore believe that Dr Kirkland suffered an unjustified disadvantage in respect of this. I should also add that I saw no evidence of Ms Nicholls' *continu[ing] to misrepresent [their] discussions to third parties*.

Did Dr Kirkland suffer an unjustified disadvantage in her employment by way of a failure by the respondent to investigate properly her allegations of bullying?

[69] What needs to be examined is whether either the university reasonably failed for several months to understand that Dr Kirkland wanted full details of the allegations of rudeness so she could either refute them or adapt her behaviour, or the university understood what she wanted, but deliberately failed to pursue a course that would have assisted Dr Kirkland in reaching that understanding. During his oral evidence, when asked what he thought Dr Kirkland wanted, Mr Seales said that he believed that Dr Kirkland wanted either for Ms Nicholls to be dismissed or for her to cease to be her manager. However, it does not appear that Dr Kirkland or her counsel had ever requested this.

[70] It appears from correspondence that, between October 2012 and May 2013, the university was adopting the view that Dr Kirkland's only material complaint was

that Ms Nicholls had fabricated the complaints of rudeness. This was confirmed by Mr Seales in his oral evidence. I accept that Mr Seales had investigated this particular complaint in November 2012 and had, correctly, found that the complaints had not been fabricated.

[71] However, from November 2012, correspondence continued between Dr Kirkland's counsel, and the university (and later its counsel) for a further six months with the university and Dr Kirkland being unable to resolve her fundamental unhappiness that she had been accused of conduct on three occasions that she did not understand. Although between October 2012 and May 2013 around 45 pages of correspondence passed between Dr Kirkland's counsel and the university, and later between Dr Kirkland's counsel and the university's counsel, the university never appeared to accept until the Authority's investigation meeting that Dr Kirkland's concerns were to understand the details of the allegations rather than just to allege that they were made in bad faith.

[72] Mr Seales gave evidence that he had not investigated the substance of the allegations of rudeness because he had not wanted to escalate matters into a disciplinary process. Mr Seales said that the business of the university would grind to a halt if every allegation of rudeness was formally investigated and that most people engage in self-reflection and modify their behaviour. Mr Patrick had, indeed, told Dr Kirkland in February 2013 that the university was not going to pursue the allegations further.

[73] The extent of Mr Seales' investigation had been to ask whether the complainants had had a genuine belief that Dr Kirkland had been rude to them. He did not investigate whether those beliefs had been reasonably held. To do so would have meant delving much further to ascertain what had been said by Dr Kirkland in each case, how it had been said, what the contexts were, and whether a reasonable person could have found Dr Kirkland's communications rude. It could also have extended to what Dr Kirkland could do in the future to avoid perceptions of rudeness, if it had reasonably concluded that the perceptions of her rudeness were genuinely and reasonably held.

[74] I accept that this approach would have necessitated a full, thorough, and formal investigation. However, this is what Dr Kirkland says she wanted, and this would not necessarily have entailed a disciplinary process. It could have been carried

out in a neutral way, with the university adopting a no blame approach, in light of its decision in February 2013 not to pursue disciplinary action against Dr Kirkland.

[75] The question is, was the university's failure to carry out this investigation what a fair and reasonable employer could have done in all the circumstances? A careful reading of all of the correspondence from Dr Kirkland's two counsel shows the following:

- a. In the 24 October 2012 letter from Mr Kirkland, there is a statement that Dr Kirkland disputes the allegations of rudeness towards Dr Webster and there are references to the allegations being unfounded, but no clear request for details of the alleged rudeness.
- b. In Mr Kirkland's emails to the university of 20 December 2012 and 1 January 2013, there are no requests for details of the alleged rudeness.
- c. In Mr Kirkland's letter of 2 January 2013 to Mr Seales, he refers to the lack of detail in the complaints of rudeness, and to Ms Nicholls being reluctant to provide the allegations in writing. However, the letter finishes by requesting that any meetings be held in a mediation setting. No request for an investigation was made.
- d. In Mr Andersen's letter to Mr Seales dated 25 February 2013, he says that the university has failed to investigate properly the allegations of bullying and harassment but does not clearly request details of the alleged rudeness.
- e. In his letter dated 19 March 2013 to Mr Seales, Mr Andersen states that Ms Nicholls is not prepared to put in writing the allegations (that Dr Kirkland is rude) that she makes to Dr Kirkland when they are alone.
- f. In his letter dated 26 March 2013 to Mr Seales, Mr Andersen states that Dr Kirkland disputes that the university has investigated her allegations against Ms Nicholls and found them to be unfounded. He does not clearly request details of the alleged rudeness, however.

- g. In his letter dated 13 May 2013 to Mr Dorking, Mr Andersen states that the university has not protected Dr Kirkland from unjustified allegations by either investigating the allegation or requiring Ms Nicholls to provide details of exactly what the behaviour is that she describes as *rude* and/or *unprofessional*. He states that the failure to investigate if the allegations of rudeness are well founded or not (as opposed to simply being made) creates stress to Dr Kirkland as she cannot protect herself by modifying her behaviour. Other statements in the letter also make clear that Dr Kirkland was seeking details of the rudeness.

[76] Whilst I accept that the correspondence prior to Mr Andersen's letter dated 13 May 2013 either did not state that Dr Kirkland wanted an investigation, and details of the alleged rudeness, or did so in a way that was confusing to the university, the letter dated 13 May spelled out what she wanted. I accept that, until 13 May 2013, the university's actions in not investigating the substance of the allegations as mooted above were actions that a fair and reasonable employer could have done in all the circumstances at the time. The correspondence up to that date was either, generally speaking, openly litigious, somewhat unclear as to what Dr Kirkland wanted, and/or scant on specificity. The respondent could therefore be forgiven for not clearly grasping what Dr Kirkland wanted. This is especially and significantly so given that she appeared to Mr Patrick to have accepted on 15 February 2013 that she would reluctantly *let [the matter] go*.

[77] However, the letter of 13 May 2013 was in response to the proposal to dismiss Dr Kirkland, and it spelled out in detail why she should not be dismissed, and what she needed to make her workplace feel safe for her – namely, the investigation into the substance of the complaints against her. Notwithstanding this, Mr Dorking's response, written on the instructions of the respondent, did not accept that the reasons given changed anything. It appears to continue to insist that an investigation had been carried out.

[78] My conclusion is that, from receipt of the letter of 13 May 2013, the respondent had been fixed unequivocally with knowledge of what it was that Dr Kirkland required in order for her to feel that her workplace was safe again. That is, an understanding of what it was about her behaviour that people perceived as rude.

Whilst Mr Seales appears to have been asserting that Dr Kirkland should have simply taken the word of Ms Nicholls that she had been rude, Dr Kirkland clearly lacked the ability to conceive what it was about her behaviour that caused offence. She was entitled to have the details of her behaviour explored further and explained to her in as much detail as she reasonably needed.

[79] I believe that the university's failure to investigate the substance of the complaints against Dr Kirkland after 13 May 2013 was not the action that a fair and reasonable employer could have done in all the circumstances at the time. This failure clearly caused her disadvantage in her employment (as she felt unable to work in the environment where she might be accused of being rude again) and it was unjustified.

Was Dr Kirkland unjustifiably suspended without pay?

[80] Dr Kirkland argues that, between 22 March 2013 (when her sick pay entitlement ceased) and 16 August 2013 (when her employment terminated) she was not allowed to return to work and so was suspended without pay. She seeks reimbursement of her pay for this period.

[81] The medical certificate dated 22 February 2013 stated that Dr Kirkland was medically unable to work until 22 March 2013. The certificate dated 8 April stated that there had been no changes to the circumstances of her work environment, and so it would have been detrimental to her health to have returned to work at that point in time. No return to work date was mentioned in that certificate. At that time, however, I am satisfied that the university did not reasonably understand what Dr Kirkland needed in order to find her working environment to be safe, and so she cannot reasonably argue that her absence on sick leave was due to the university's unjustified failings.

[82] The medical certificate dated 17 May 2013 states that Dr Kirkland was fit and healthy to do any work, but the doctor who issued the certificate also stated that he fully supported her decision not to work in a hostile bullying environment.

[83] Therefore, it is only from 17 May that a doctor had stated that Dr Kirkland was fit and healthy, and so it can only be from that date that her claim that she was suspended without pay can be considered. In addition, the university reasonably knew from 13 May 2013 what could have made her working environment tolerable to her. Prior to that date, she had been certificated as unwell, and so was properly

treated by the university as being away on sick leave. Therefore Dr Kirkland cannot be entitled to pay for the period when she was on that sick leave after her entitlement to paid sick leave expired.

[84] However, after 13 May 2013, Dr Kirkland had made clear what she required in order to be able to return to work. That is, a full and thorough investigation into the allegations of rudeness. I have found that the respondent failing to investigate the substance of the complaints of rudeness against Dr Kirkland gives rise to a personal grievance.

[85] Therefore, had the university started to investigate the details of the alleged rudeness immediately after 13 May 2013, at some point it would have been able to have provided the details of the rudeness to Dr Kirkland. At some point after that, Dr Kirkland would have been in a position to decide whether she felt the working environment was safe to return to or not. I analyse the effects on remedies of these speculations below.

Did the respondent unjustifiably dismiss Dr Kirkland?

[86] Having found that the university had failed unjustifiably to investigate the substance of the complaints of rudeness against Dr Kirkland, and that this failure caused her to feel that her working environment was unsafe, it follows that the requirement of the university that Dr Kirkland must provide a certificate confirming that she would be fit to return to work in the existing environment, or be dismissed, was unjustified. It was effectively saying, *we will not take steps to change the environment, you say the environment is intolerable, but your doctor must certify you as fit to work in the environment nevertheless or we will dismiss you.*

[87] It further follows that dismissing Dr Kirkland for not being able to produce such a medical certificate is unjustified. I am satisfied that dismissal was not the action that a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Therefore, the dismissal was unjustified.

Remedies

[88] In respect of her dismissal Dr Kirkland seeks 12 months lost wages, in the gross sum of \$90,313, pursuant to ss. 123(1)(b) and 128(2) of the Act. She also seeks the further sum of \$180,000 for compensation under s.123(1)(c)(i) of the Act,

presumably in respect of both the dismissal and the unjustified disadvantage. She also seeks payment of her salary for the period from 22 March 2013 until 16 August 2013, the period during which she states she was suspended without pay.

Reimbursement of lost wages arising from the dismissal

[89] Section 123(1)(b) refers to reimbursement of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. Section 128 (1) refers to a situation where the Authority determines that the employee has a personal grievance and has lost remuneration as a result of the personal grievance. Section 128(2) provides that, where the Authority determines that an employee has a personal grievance and has lost remuneration as a result of the personal grievance, then subject to subsection (3) and section 124, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration. A discretion exists under s. 128(3) for the Authority to award by way of compensation for remuneration lost by that employee as a result of the personal grievance a sum greater than that to which an order under that subsection may relate.

[90] In each case, the reference in the sections above is to remuneration *lost*, in the past tense; that is to say, actual loss. That refers to loss as assessed at the date of the Authority's investigation meeting.

[91] For this reason, I do not accept that the Authority has the power to award as lost remuneration a sum greater than that actual loss as assessed at the date of the investigation meeting. From the date of the dismissal (16 August 2013) to the date of the investigation meeting, is 82 days, or two months 21 days, and Dr Kirkland cannot receive reimbursement of lost wages for a period longer than that.

[92] If that assessment is incorrect, what Dr Kirkland asks for is for the Authority to assess her prospective loss. However, Dr Kirkland gave no objective evidence whatsoever to support such a request for the Authority to assess her prospective loss of income. Dr Kirkland did assert that she has worked in the field of academic marketing for around 10 years and that this will make it harder for her to find work in other areas of marketing. She did not produce any objective evidence that this was the case, such as expert evidence from a specialist recruitment agent. Without more cogent evidence that Dr Kirkland is likely to find it significantly difficult to find

senior marketing roles in other industries, I cannot justify awarding reimbursement of prospectively lost wages.

[93] In addition, I take into account the fact that there are other universities in New Zealand, as well as several other establishments of tertiary education, and that there are several such institutions in Eastern Australia for which Dr Kirkland could probably work. She never gave any evidence to suggest that she could not travel.

[94] In addition, Dr Kirkland has been working part time in Auckland on a six month contract for a law firm since 19 August 2013, which would have given her experience of at least one other industry.

[95] All in all, I therefore do not believe that Dr Kirkland will find it particularly hard to find new work in the field of marketing and I do not accept that it is appropriate to award her the equivalent of one year's gross salary, or indeed, more than her actual loss sustained between 17 August 2013 and 6 November 2013, the last day of the Authority's investigation meeting.

[96] Having determined that, pursuant to s. 128(1) of the Act, the Authority must order the respondent to pay to Dr Kirkland the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration. Three months' ordinary time remuneration amounts to the gross sum of \$22,578.

[97] Between 19 August and 4 October 2013 Dr Kirkland has worked a total of 33 days for Carter Kirkland Morrison, for which she has earned (if not yet fully received) a total of \$19,800 gross. She has also worked a total of around 20 hours for Otago Polytechnic, although no payment is due to her until she completes a written report, which has not yet been started. As no earnings are yet due for the Otago Polytechnic project, I shall take no account of it.

[98] Dr Kirkland's earnings during the period of 13 weeks from the date of termination therefore amount to \$19,800, and the balance between that total and three months' ordinary time remuneration is \$2,778. I therefore award Dr Kirkland \$2,778, subject to the requirements of s.124 of the Act.

Compensation for humiliation, loss of dignity, and injury to Dr Kirkland's feelings

[99] Turning to compensation for humiliation, loss of dignity, and injury to Dr Kirkland's feelings under s. 123(1)(c)(i) of the Act, the sum of \$180,000, amounting to two years' gross salary, is a sum that far exceeds what is appropriate in this case, and the maximum that the Authority is ever likely to award.

[100] Having found that Dr Kirkland had suffered an unjustified disadvantage in her employment due to the university's failure after 13 May 2013 to investigate the substance of those allegations, I must consider the effects on her of that failing, as well as of the dismissal. However, I believe that it would be artificial to try to separate out these effects, and no evidence was given about the separate effects of each unjustified action.

[101] Dr Kirkland said in evidence that she had not been put on medication as a result of the stress she had been suffering, and had not sought counselling. She said that she had had trouble sleeping, had suffered a loss of confidence, and a loss of faith in the institution she had been proud of. All in all, I accept that Dr Kirkland suffered stress for as sustained period, and certainly from May 2013, when the respondent's failure to investigate created a personal grievance, until after her dismissal. This sustained nature of the effects of the university's conduct and failings should be reflected in the level of compensation, which I fix at \$10,000.

Reimbursement for lost wages between 22 March and 16 August 2013

[102] Had the respondent not caused Dr Kirkland unjustified disadvantage to her employment by failing to investigate her complaints after 13 May 2013, it is conceivable that she would have been reasonably able to return to work before 16 August 2013. It would be speculation to determine exactly when that investigation into the substance of the allegations of rudeness would have been completed, and further speculation as to whether the findings would have reasonably satisfied Dr Kirkland, so she would have felt safe to return to work.

[103] It would be reasonable to assume however that, if the respondent had complied with its duty, the investigation would reasonably have taken one month, and been completed by 16 June 2013. I am unable to decide with any certainty whether Dr Kirkland would have accepted the findings and returned to work, and it is likely in any event that mediation would have been necessary to repair her relationship with

Ms Nicholls, which was by then seriously impaired. This mediation could well have reasonably taken a further month to arrange and take place.

[104] In my view, the fairest, non-technical approach to adopt is to assume it would have reasonably taken two months from 13 May 2013 for the investigation and mediation to have taken place and that there would then have been a 50% chance after mediation that Dr Kirkland would have returned to work. Therefore, I award Dr Kirkland 50% of the pay that she would have received had the investigation and mediation taken place between 17 May and 16 July, and she would have returned to work shortly thereafter until 16 August 2013. This amounts to two weeks' gross pay, in the sum of \$3,763.

Reduction for contribution

[105] Section 124 of the Act provides that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[106] I believe that Dr Kirkland had spoken to Ms Hook, Mr Moore, Ms Postlewaight and Dr Webster in ways which were reasonably seen by them as rude. It is highly unlikely that all of them had separately formed perceptions of rudeness unreasonably. Whilst I accept that Dr Kirkland did not intend to be rude (in the sense that she did not intend to cause offence), she still contributed to the situation giving rise to the personal grievance by her words and tone. Dr Kirkland is an educated and intelligent person who could reasonably have been expected to have been able to communicate with her colleagues without causing offence. On balance, I therefore believe that her actions in doing so must carry some elements of blame. I therefore believe that a reduction in the remedies for her contribution must be made.

[107] I also take into account Dr Kirkland's actions in recording Ms Nicholls' conversations without her knowledge, which exacerbated the breakdown of the relationship between Dr Kirkland and Ms Nicholls when Ms Nicholls found out, and which I also find was a blameworthy action. I also take into account the unnecessarily litigious approach taken by Dr Kirkland through the agency of

Mr Kirkland's letter dated 24 October 2012, which initiated a defensive and legalistic response from the university which continued until Dr Kirkland's dismissal. Given that Dr Kirkland was still an employee, such a litigious approach by her was not conducive to resolving her employment relationship problem, and arguably was in breach of her duty under s.4(1A)(b) of the Act to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative.

[108] Taking all these factors into account, I believe that it is appropriate to reduce the remedies awarded by 25%. I include in this reduction the award of two weeks' lost wages referred to in paragraph [104] above, as I believe that these factors contributed to the respondent's failure to investigate Dr Kirkland's concerns after 13 May 2013.

Recommendation

[109] Pursuant to s.123(1)(ca) of the Act, if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, it may make recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring.

[110] I should like to record that I am of the opinion that the breakdown in the relationship between the parties was exacerbated by the litigious and/or legalistic approach adopted in correspondence between them (mainly via their representatives, but I include correspondence from Mr Seales). Whilst such an approach may be appropriate after the termination of an employment relationship, it is rarely so while it is on-going and is capable of a positive resolution that preserves employment.

[111] I shall not attempt to attribute precise blame between the parties for the way the correspondence developed, and expressly recognise Dr Kirkland's role in this, but I will take this opportunity to recommend to the respondent that it works to develop a set of strategies to deal with situations involving staff members who adopt an aggressive or defensive approach to informal performance management, which goes beyond written communications with that staff member, and which has as its principal aim the resolution of the relationship problem rather than the defence of threatened legal action.

Orders

[112] I order the respondent to pay to Dr Kirkland the following:

- a. The gross sum of \$2,882.25 to compensate Dr Kirkland for the wages she is likely to have earned had the university investigated and resolved her concerns from 13 May 2013;
- b. The gross sum of \$2,083.50 pursuant to s.123(1)(b) of the Act;
- c. The sum of \$7,500 pursuant to s. 123(1)(c)(i) of the Act.

Costs

[113] The parties are directed to seek to agree how costs are to be dealt with between them, but in the absence of such agreement, any party seeking costs may do so by serving a lodging and memorandum of costs within 28 days of the date of this determination, and any memorandum in opposition must be served and lodged within a further 14 days.

David Appleton

Member of the Employment Relations Authority