

**Attention is drawn to the  
non-publication order at  
para.[1]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 99  
5630484

BETWEEN            BETTINA NEU  
                                 Applicant

AND                    THE VICE CHANCELLOR OF  
                                 VICTORIA UNIVERSITY OF  
                                 WELLINGTON  
                                 Respondent

Member of Authority:    Michele Ryan

Representatives:        Geoff O’Sullivan, Counsel for Applicant  
                                 Geoff Davenport, Counsel for Respondent

Investigation Meeting:    7 July 2016 at Wellington

Submissions Received:    At the investigation meeting

Determination:            15 August 2016

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**DETERMINATION OF THE AUTHORITY**

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**Prohibition from publication**

[1]    Publication of the names of current or past tutors and students of Victoria University of Wellington (VUW) who, either directly or indirectly, were involved in the complaints referred to in this determination, or enrolled in courses taught by the applicant, is prohibited.<sup>1</sup>

**Employment relationship problem**

[2]    Ms Bettina Neu lived and worked in Germany until 2010 when she accepted a position as senior lecturer at the VUW’s School of Design. Terms and conditions of

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<sup>1</sup> Clause 10, Schedule 2 Employment Relations Act 2000

her employment are contained in the ‘Victoria University of Wellington Academic Staff Collective Agreement’ (the CEA)<sup>2</sup>. Schedule 6 of the CEA contains discipline and dismissal procedures. Clause 12 provides that the duration of a warning will not exceed 12 months and will be removed from the employee’s file when no longer current.

[3] In a letter dated 28 May 2014 Ms Neu received a written warning for misconduct. The warning was said to last for 6 months. Ms Neu was advised that her interactions with a junior staff member were not in accordance with her obligations at cl. 4(1)(f) of the ‘Staff Conduct Policy’ to: “*when holding a position of seniority or authority, act in ways...which demonstrate sensitivity to unequal degrees of power*”. The letter detailed VUW’s future expectations as follows:

“The fact that you are a senior academic...creates an expectation on you to behave in a professional, collegial and respectful manner and...that you...will display exemplary behaviour in this regard.”

[4] On the condition there be no further incidents to which the warning related, in August 2014 VUW accepted the union’s request to shorten the duration of the warning and have it conclude on 27 October 2014. The union asked VUW to confirm the “*expunging of the warning letter and any reference to it from Ms Neu’s personal file from that date.*” There is no evidence of VUW’s response to the union on this matter but an email sent from a VUW advisor to the Head of School states “*the paperwork does get removed from Bettina’s file at the end of the warning period*”.

[5] Following the receipt and investigation of a student complaint in September 2014 the parties agreed Ms Neu would engage in a Performance Improvement Plan (PIP) focussed, in part, on improving her interpersonal relationships and communication. Evidence as to the progress of the PIP was scant but it appears to have commenced in February 2015 and concluded in or about October 2015.

[6] In September 2015 three students laid a complaint alleging Ms Neu had not behaved respectfully towards them. Additional concerns about how Ms Neu conducted the course and her distribution of student phone numbers amongst the class were raised. VUW commenced an investigation into the complaint.

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<sup>2</sup> At the investigation meeting I noted the written warning was issued prior to the term of current CA Counsel for the respondent confirmed (and it was not challenged) that Schedule 6 in the previous CA was identical to the current CA provisions.

[7] At a meeting on 8 December 2015 Mr Douglas Easterly (now Head of School) was informed on the status of the investigation and delegated the role of decision maker. During the briefing he was furnished with a copy of the 2014 written warning held on an HR file.

[8] Mr Easterly met with Ms Neu on 15 December 2015. In a letter dated 18 December 2015 he advised Ms Neu of VUW's preliminary decision to issue a final written warning for 12 months in response to the students' complaints. Reference was made to the written warning of May 2014, the expectations contained in the warning, as well as the PIP.

[9] In a meeting held on 18 January 2016 Ms Neu questioned how Mr Easterly had become aware of the incidents in 2014 and advised that, but for her understanding that the written warning would be deleted from her file, she would have challenged it at that time.

[10] On 28 January 2016, Mr Easterly informed Ms Neu both verbally and in writing that she would receive a final written warning which would be in place for 12 months. It is clear the primary matter of concern for VUW was Ms Neu's practice of providing negative feedback to students in front of their peers and the impact that action had on one of the complainants. Amongst other things the letter stated:

18. You have questioned my preliminary decision being influenced by a previous written warning issued in 2014 suggesting this should have been disregarded.

I do not agree with you on this point. While this warning has been removed from your personal file a key aspect of the complaint which culminated in this warning being issued was your interactions with others, specifically subordinates, and the impact your conduct, although unintended, can have on them. This warning highlighted important expectations in terms of your behaviour and the need to be aware and sensitive to the impact of our conduct on others, especially subordinates. A further incident later in 2014 culminated in a performance improvement plan which included the need to focus on communications and interactions with others... I remain of the view the underlying issues in this matter – communications and interactions with others – are consistent with the incidents of 2014 and as such cannot be ignored.

[11] On 27 April 2016 the union raised a personal grievance on Ms Neu's behalf. It alleged VUW had unfairly relied on the 2014 warning when forming its decision to issue the final written warning. VUW's Employment Relations Manager responded

the following day. He denied the allegation but proposed the parties address the matter at mediation, which was attended on 1 July 2016.

[12] Unfortunately the parties were not able to resolve their differences and the Authority must now resolve the employment relationship problem.

**Did VUW consent to the late raising of the personal grievance?**

[13] Ms Neu's grievance was raised on the 91<sup>st</sup> day after the action alleged to amount to a personal grievance – in this instance the issuing of the final written warning – occurred and came to her notice. VUW says it has not given consent to the personal grievance after the expiration of the 90 day period.

[14] I agree Ms Neu did not meet the requirement<sup>3</sup> to raise her grievance within 90 days of those events. However s114(1) provides that that a personal grievance may be validly raised outside the 90 day timeframe if the employer consents to it.

[15] It is settled law that an employer's consent to a personal grievance raised outside the 90 day limit need not be express and may be implied by conduct.<sup>4</sup> The Employment Court in *Hawkins v Commissioner of Police*<sup>5</sup> held that the employer's failure to protest a late submission of a personal grievance coupled with active engagement to resolve the matter without notification of a 90 day issue, evidenced implied consent. In a challenge to that judgement the Court of Appeal<sup>6</sup> affirmed that the employer had impliedly consented to the personal grievance by his conduct.<sup>7</sup>

[16] VUW's conduct following receipt of Ms Neu's submission of a personal grievance is analogous to *Hawkins*. When VUW received Ms Neu's notice of a personal grievance it objected to the grounds of the personal grievance but not to the raising of the personal grievance in and of itself. In the same correspondence VUW requested the parties attend mediation to resolve the matter, and did so 5 weeks later without raising a dispute as to the timeliness of the grievance. I consider VUW impliedly consented to the personal grievance despite it being raised after the expiration of the 90 day limitation.

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<sup>3</sup> Section 114(1) Employment Relations Act 2000

<sup>4</sup> *Vulcan Steel Ltd v Wonnocott* [2013] NZCA 398 at [14]

<sup>5</sup> [2007] ERNZ 762

<sup>6</sup> *Commissioner of Police v Hawkins* [2009] NZCA 209

<sup>7</sup> *Ibid* at [23]

**The issues**

[17] The Authority is required to determine whether VUW breached Ms Neu's employment agreement by taking into account the written warning when it issued Ms Neu with the final written warning.

[18] In the alternative, the Authority needs to decide whether VUW unjustifiably disadvantaged Ms Neu by taking into account the expired written warning when it issued the final written warning.

[19] The above matters require the following to be examined:

- (i) what was agreed between the parties in respect to expired warnings;
- (ii) was VUW able to consider the expired written warning of May 2014 and/or the expectations contained in that warning when determining what action it would take in response to the September 2015 complaint?
- (iii) if VUW was not able to rely on the expired warning or expectations set out in that warning, was the issuing of the final written warning justifiable?
- (iv) if its actions were not justifiable what, if any, remedies should be awarded?

***What was agreed between the parties?***

[20] The starting point is to consider what was agreed between the parties. Clause 12 of the CEA states:

“All warnings shall be for a reasonable period and specify a date of expiry but that period shall not exceed 12 months, excluding any periods of research and study leave. Warnings no longer current shall be removed from the employee's file.”

[21] The principles appropriate to the interpretation, application or operation of contractual provisions are settled.<sup>8</sup> In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*<sup>9</sup> a majority decision of the Supreme Court observed:<sup>10</sup>

*“...the proper approach is an objective one, the aim being to ascertain ‘the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract’. This objective meaning is taken to be that which the parties intended.*

...

*While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.*

[22] VUW submits it was compliant with its obligation at cl. 12, in as far as the warning was removed from Ms Neu’s personnel file, although it accepts that that a copy of the warning was held on an HR file. Counsel suggests that to remove the warning entirely from VUW’s documentation would be a breach of its obligations under the Public Records Act.

[23] Looking at the language used within the context and purpose of the provision – in this instance how a warning, once expired, will be treated - I find cl. 12 plainly signals that the removal of a warning from an employee’s file requires it to be taken away such that it can no longer be taken into account when disciplinary action is being considered.

[24] I am not persuaded that a reasonable and properly informed third party would consider the parties intended an contractual term to have a warning removed from a file and therefore from future consideration – but that it could be taken into account if placed on an alternatively named file. An interpretation that allows for that conclusion would eliminate any meaningful purpose of cl. 12 and does not accord with common sense.

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<sup>8</sup> See for example *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC; *Vector Gas Limited v Bay of Plenty Energy Ltd* [2010] NZSC 5, *Air New Zealand v New Zealand Airline Pilots Association Incorporated* [2016] NZCA 131

<sup>9</sup> *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC

<sup>10</sup> *Ibid* at [60] and [63]

[25] I accept that VUW may have a statutory duty to hold records. I am not persuaded the requirement to ensure safe recordkeeping pursuant to the Public Records Act sanctions the use of those records for purposes not prescribed under that Act.

***Was VUW entitled to consider the conduct leading to the expired written warning of May 2014 and/or the expectations contained in that warning when determining what action it would take in response to the September 2015 complaint?***

[26] Mr Easterly's evidence emphasised that any regard given to the written warning of May 2014 looked towards both the conduct which led to the warning and the instruction given to Ms Neu only for the purpose of assessing an appropriate sanction in the current matter.

[27] VUW refers to *Butcher v OCS*,<sup>11</sup> as providing precedent that an employer may, as part of "all the circumstances", consider an expired warning when examining more recent similar conduct by an employee, and is a factor the Authority may regard when assessing the reasonableness of the employer's response to the conduct.<sup>12</sup> VUW says *Butcher* also provides authority for an employer to rely on directions, albeit contained in a previous warning, when assessing an employee's more recent conduct.

[28] Turning to an employer's ability to consider past warnings, I am not persuaded that *Butcher* is applicable to the circumstances of this matter. The Employment Court determined *Butcher* in a context whereby the employer's power to consider an expired warning was not governed by agreed contractual terms. In the present matter I have found VUW's contractual obligation to remove the 2014 expired warning from Ms Neu's file precluded it from future access to and consideration of the warning. I am unwilling to find the contractual prohibition applied only to the penalty aspect of the warning. VUW's obligation to remove the 2014 warning logically encompassed all matters referred to in it. It follows that VUW was not entitled to take into account any matters referred to in the written warning material. In doing so it breached the CEA.

***Was the decision to issue a final written warning justifiable?***

[29] Whether an action is justifiable is determined by assessing the employer's actions and how the employer acted against what a fair and reasonable employer

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<sup>11</sup> [2008] ERNZ 376

<sup>12</sup> *Ibid* at [55]

could have done in all the circumstances at the time the action occurred.<sup>13</sup> VUW says that even if it could not have regard to the matters contained in the 2014 warning when it issued the final written warning in 2016, it submits that the decision to issue the sanction of a final written warning was nevertheless a justifiable response given the gravity of Ms Neu's conduct.

[30] There is no real argument that the allegations in September 2015 against Ms Neu were investigated and that VUW found Ms Neu's conduct was in breach of various aspects of its Staff Conduct Policy.

[31] The conduct associated with the 2014 written warning concerned Ms Neu's communication with a tutor about her commitment to that role. The final written warning appears to have been in response to Ms Neu's communication style generally during student presentations and in particular her questioning of a student during a presentation as regards her understanding of English. VUW did not state whether it regarded the behaviour as misconduct or serious misconduct. I agree with counsel there is no legal or contractual requirement that a finding of serious misconduct must be made before an employer may issue an employee with a final warning.

[32] I note VUW was entitled to consider the PIP as a component of "all the circumstances" given that that process is not subject to exclusion by the CEA.

[33] Viewed objectively I consider it finely balanced as to whether the more recent conduct warranted a final written warning. However, that matter must be considered amongst all the circumstances at the time including the contractual arrangement between the parties as regards expired warnings.

[34] Mr Easterly's written evidence states that he would have issued a final written warning even if there had not been any warning issued in 2014, however I consider it telling that an important aspect in reaching his decision as to penalty, is that "...*this behaviour was being repeated despite those earlier instructions. In other words, the earlier messages [the written warning, the expectations, and the PIP] had not gotten through.*"<sup>14</sup> Mr Easterly also accepted during questioning that the 2014 warning did impact on his decision as to penalty although he says he did not think the warning was especially important.

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<sup>13</sup> Section 103A(2) Employment Relations Act 2000

<sup>14</sup> Para. 37(vi) of Doug Easterly's Witness statement and reiterated at para.41 and 42.

[35] Having considered the evidence I am unable to safely conclude that VUW's consideration of the written warning (and its contents) did not sway the decision to increase the severity of the disciplinary action against Ms Neu more than it might otherwise have done. Given the contractual arrangement at cl. 12 the consideration to the 2014 warning was not an action open to VUW in any event.

[36] I consider it unlikely that VUW intended to unjustifiably disadvantage Ms Neu, but by taking into account the 2014 warning when it determined the penalty for the 2015 complaint that is the effect of this action. I find Ms Neu has a valid personal grievance claim for an unjustified disadvantage.

### **Remedies**

[37] It would be unjust to award separate remedies for a breach of contract and an unjustifiable disadvantage given those claims arise from the same actions. I have looked to the provisions contained in the Employment Relations Act to guide my assessment as to remedies.

[38] Ms Neu seeks an unspecified compensation for hurt, humiliation and injury to feelings as a consequence of her personal grievance. Evidence as to the impact the final written warning had on Ms Neu was relatively limited however I accept her testimony that she felt humiliated and distressed (and continues to do so) by VUW's breach of cl. 12. I consider compensation of \$2,000 under s. 123(1)(c)(i) of the Act is appropriate. She did not contribute to VUW's omission to comply with the CEA and her remedy is not impacted by s.124 considerations.

[39] I have found there was a genuine dispute between the parties as to the correct interpretation and application of cl. 12 of Schedule 6 of the CEA in respect of the treatment of expired warnings. I do not consider it appropriate in these circumstances to order a penalty for a breach of that agreement.

### **Costs**

[40] Costs are reserved.

Michele Ryan  
Member of the Employment Relations Authority