

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 370
5638147

BETWEEN ERIC MESSICK
 Applicant

AND THE VICE CHANCELLOR OF
 THE UNIVERSITY OF WAIKATO
 Respondent

Member of Authority: T G Tetitaha

Representatives: J Rushton, Counsel for the Applicant
 D France and J MacGibbon, Counsel for the Respondent

Investigation Meeting: 21 to 22 August 2017 at Hamilton

Submissions received: 28 August and 08 Septemebr 2017 from Applicant
 4 September 2017 from Respondent

Determination: 30 November 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Eric Messick was unjustifiably dismissed by the University of Waikato.**
- B. An order that the University of Waikato pay Eric Messick lost remuneration equivalent to three months salary less PAYE pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.**
- C. An order that the University of Waikato pay Eric Messick compensation of \$20,000 pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment Relationship Problem

[1] Dr Messick alleges he was constructively and unjustifiably dismissed by the University of Waikato. The University alleges he resigned without notice by email on 16 May 2013.

Relevant Facts

[2] Dr Messick is a registered psychologist employed by the University of Waikato since 2000 in various roles within the School of Psychology. From 2005 to 2012 he had a series of fixed term contracts until he accepted permanent employment as a professional supervisor.

Ill Health

[3] Dr Messick became unwell in September 2012. It was during this period he attempted to resign. His line manager, Professor Lewis Bizo refused to accept his resignation. Instead he recommended Dr Messick obtain support through the University's employee assisted programme (EAP).

[4] Dr Messick was granted three paid EAP sessions with a psychologist. He was diagnosed as suffering from depression. He applied for an extension to the number of paid EAP sessions in December 2012 then went on leave.

[5] He returned to work in January 2013 and began setting up the PSYC587 Behaviour Analysis Practicum course for the year. This offered placements in a local school to observe students with behavioural issues. At that time only 7 students were enrolled in PSYC587. Students were required to provide Police checks. They were also required to be supervised by Dr Messick and/or Dr James McEwan, the course convenor. Dr Messick then took a further 10 weeks leave returning to work on 9 April 2013.

EAP

[6] Upon his return Dr Messick emailed Professor Bizo and his professional supervisor Dr Therese Mary Foster on 9 April 2013. He complained about the EAP provider because he had turned up to a psychologist's appointment in January but had not been told his request for further EAP sessions had been refused and would not be paid for by the University. He also raised concerns that he ought to be

remunerated at the equivalent rate of a lecturer. Professor Bizo offered to meet to discuss his concerns.

[7] That same day Dr Messick emailed the EAP provider about his concerns seeking more sessions. Part of his email states:

This plus unfair contracts plus a very high workload has given me a “fuck you” attitude towards Uni as an employer, forgive my language but that is exactly what I have been saying to myself since I’ve been back from leave. ...

[8] The EAP provider requested permission to share those concerns with Jenni Briggs, HR advisor and Carol Gunn, HR Manager. Dr Messick signed a consent form allowing disclosure.

PSYC587

[9] The following day Dr Messick emailed Professor Bizo and Dr McEwan about concerns regarding the increased size of the PSYC587 class to 19 students and the reduced supervision time. He suggested splitting the group and contracting another supervisor. Professor Bizo advised he had approached the Dean about funding a supervisor.

[10] Dr Messick emailed again on 16 April with continuing concerns regarding supervision of PSYC587 students including his professional obligations as a registered psychologist. He detailed his advice to the students in view of those supervision concerns. He also advised he would “refrain from any activity that can be considered supervision for the course until the situation was remedied.” Professor Bizo asked Dr McEwan to attend the PSYC class and clarify the course outline for students to address their concerns.

[11] Dr Messick emailed Professor Bizo on 19 April advising he was co-convenor of the course and had changed the course outline to replace supervision with “group meetings” and removed references to practice.

Warning

[12] The above email triggered a request for a disciplinary meeting to discuss the University’s concerns about the appropriateness of his discussions with the PSYC587 students. A letter dated 19 April 2013 from Jenni Briggs, HR Advisor alleged he had

undermined his colleagues, failed to carry out his duties competently, over-represented his position within the School (as co-convenor) and changed course content without following the appropriate mechanisms. This potentially brought the University into dispute. The letter did not set out any consequences if the allegations should be established as required by the University's code of conduct.

[13] Instead of providing any substantive reply, Dr Messick advised Professor Bizo on 23 April he no longer wished to supervise PSYC587 students due to his concerns and accepted he was not a convenor and therefore would cease all convenor duties. He then emailed Ms Briggs advising:

Dear Jenni

In response to your letter to me dated 19 April 2013, the allegations are unfounded. I therefore decline your invite to attend a "disciplinary meeting."

Sincerely,

Eric Messick

[14] Professor Bizo replied the following day that he expected Dr Messick to teach PSYC587 according to the course outline and no additional resources would be provided. He also would not engage in further email correspondence. If Dr Messick wished to discuss this further he was asked to make an appointment to meet with him.

[15] Ms Briggs emailed Dr Messick on 24 April in respect of his email of 23 April declining to meet. She sought confirmation "that your response is your refusal to comply with a request the University considers fair and reasonable?" Dr Messick did not attend the disciplinary meeting scheduled for the same day. He later replied on 30 April "I don't understand the question. My reply to your invite was clear." He then resent his previous reply.

[16] On 24 April Ms Briggs sent a further invitation to meet on 30 April. It contained additional concerns. These were failing to follow a reasonable instruction to attend a disciplinary meeting, emailing Professor Bizo a changed course outline on 19 April and opting out of supervising a PSYC587 class. The letter again failed to set out any consequences.

[17] Dr Messick replied on 30 April again declining to meet because the allegations were unfounded. He raised two issues that needed resolving from his point of view.

These were his work being that of a lecturer “but my PD and contract do not reflect this” and short staffing. He wished to meet to discuss those issues.

[18] Ms Briggs expressed disappointment but advised the University would still consider the concerns on the information available then advise him of the disciplinary action.

[19] On 1 May 2013 Dr Messick was advised the University found his pattern of behaviour breached the University Code of Conduct by continually undermining the authority of the course and programme convenors. This included his discussions with students without consultation and portrayal of himself as a course convenor. His actions had also confused the students at the placement school. The University also found his refusal to “engage fully with us on these matters” and to follow a reasonable instruction to attend a disciplinary meeting eroded trust and confidence.

[20] The university issued Dr Messick with a final written warning. The length of time this warning would remain on his file was not stated. He was also directed to work under the oversight of the convenor of the programme Dr Foster.

[21] At hearing Dr Foster was adamant she was not the convenor of the programme. Dr McEwan was. None of Dr Messick’s colleagues took exception to his description of himself as co-convenor of PSYC587.

May 2013 meetings

[22] Dr Messick remained concerned about PSYC587. He emailed Dr McEwan on 3 May about students missing Police clearances. Dr McEwan reassured him these were available but they were not until 14 May.

[23] Professor Bizo asked to meet with him on 6 May to discuss a number of issues. Dr Messick refused to meet unless he retracted the final warning. Professor Bizo asked him to meet again the following day.

[24] Prior to meeting on 7 May Dr Messick emailed Professor Bizo. He again voiced concerns he did not want to participate in PSYC587 for the remainder of the semester due to the supervision arrangement. He was worried “I will lose my job if I continue in this course.” He believed his role was blurred and confusing, had a poor grasp of the PYSC587 students cases due to time limitations and concerns about

students still without police clearances in the school. He ended the email with the enigmatic statement “this is my fault.”

[25] On 8 May Professor Bizo met with Dr Messick. He suggested they meet again with Ms Briggs and Dr Foster on 13 May to discuss and clarify his role and discuss the safety issues. That same day Dr Messick received medical treatment for depression and was referred to a psychologist.

[26] Dr Messick emailed Professor Bizo, Ms Briggs and Dr Foster on 11 May. He sought renegotiation of his contract as a lecturer, his job description, salary and workload. He also raised concerns about the disciplinary process, the final warning and its affect upon his health and work. He noted again he was worried about losing his job.

[27] The meeting on 13 May did not resolve matters. Dr Messick raised his concerns about feeling unsafe and unprotected. The meeting allegedly included personal attacks by Dr Messick on the other three attendees. He left 20 minutes later before any discussions could occur.

[28] Ms Briggs then wrote to Dr Messick on 13 May reminding him of the contents of his position description, the requirement he teach PSYC587 as part of his role and the lack of awareness of any reason for him not to teach the course. It also sought further information about his concerns and recent behaviour. It also threatened disciplinary action if he did not meet the University’s expectations.

[29] Dr Messick emailed Dr McEwan on 14 May. He apologised for any impact of his behaviour, referred to his PSYC587 proposal as being “less risky”, raised concerns about PSYC587 students missing police clearances given the low supervision and the video supervision. He also advised he still did not want to be part of PSYC587 and would not be participating that day.

Termination of employment

[30] Dr Messick emailed Ms Gunn on 16 May 2013. It is this email that is alleged to have terminated his employment. The email stated:

Hi Carol I'd like to finish my employment at the University of Waikato with a big Fuck You. Either dismiss me by the end of today or I will come to the University tomorrow and destroy something that you have to. No more emails, phone calls,

letters or EAP. Do it and I will just go in peace, leave me alone and leave my colleagues out of it. I've been humiliated enough.

Eric

[31] Ms Gunn made the decision to accept the email as Dr Messick's resignation without notice. She instructed Kathy Crawford to reply within the hour advising:

Further to your email to Carole Gunn, I advise that the University regards this email as your intention to resign with immediate effect without notice.

Given the threatening comments in your email, your IT and Cardax access will be cancelled immediately and your final pay together with any outstanding annual leave entitlement will be paid into your bank account tomorrow 17 May 2013.

Arrangements will be made for any personal items to be delivered to you.

[32] Dr Messick made no further contact with the University until 13 August 2013 when he raised his personal grievances of unjustified disadvantage and dismissal.

[33] He filed a statement of problem in the Authority on 13 August received on 15 August 2016.

[34] Several personal grievances of unjustified disadvantage were dismissed at an earlier hearing.¹ The only matter that remains before the Authority for determination is the constructive and unjustified dismissal.

Issues

[35] The possibility of this matter being an unjustified dismissal was raised with the parties during the evidence and in an oral indication delivered at the end of the hearing. Parties were given an opportunity to file written submissions. Both have addressed this matter therein.

[36] Therefore the issues for determination are:

- a) Did Dr Messick resign or was he dismissed?
- b) If he resigned, was it a constructive unjustified dismissal caused by a foreseeable breach of duty?

¹ *Messick v University of Waikato* [2017] NZERA Auckland 6.

c) What remedies should be awarded?

Was Dr Messick dismissed or did he resign?

[37] The evidence of the resignation is primarily Dr Messick's email dated 16 May 2013. The email threatens the University to dismiss him by the end of the day or he would destroy property.

[38] Ms Gunn in her evidence at hearing stated the University did not want to dismiss Dr Messick. Instead she took the email as his resignation without notice. The email did not state Dr Messick was resigning without notice. The email of 16 May was not the usual way he spoke to his work colleagues.

[39] Ms Gunn accepted she was aware Dr Messick had a diagnosis of depression in December 2012 but did not believe this was relevant to his actions 4 months later in May 2013. The evidence does not support that belief.

[40] Ms Gunn accepted at hearing prior to dismissal she saw Document C in the common bundle. This is an email dated 17 April 2013 from the EAP provider to Dr Messick about the refusal of his extra EAP sessions. It includes the note "depression relating to dissatisfaction with work situation. Contemplating resigning." Therefore she was aware Dr Messick was unwell due to his work situation and contemplating resigning.

[41] Ms Gunn was also aware of the meeting with Ms Briggs and others 3 days prior and the letter dated 13 May sent on her behalf.

[42] The 13 May letter evidences the University was in a dispute with Dr Messick about his terms and conditions of employment including remuneration as a lecturer, workloads and the supervision component of PSYC587. The letter was the first time the University had addressed Dr Messick's concerns in full. There was no opportunity given to Dr Messick to discuss the University's letter of 13 May. This was particularly important when the University's letter also threatened disciplinary action.

[43] Professor Bizo and Chairperson of the Psychology School were also aware of relevant information about Dr Messick's health and past behaviour. Professor Bizo had knowledge of a previous attempt at resignation by Dr Messick. He also had some

knowledge of his state of mind following the last meeting. There was evidence the Chairperson was aware of concerns regarding Dr Messick's health which were passed onto HR.

[44] The University has a good faith obligation to be active and constructive in maintaining the employment relationship. Despite the University's knowledge of the above matters Ms Gunn accepts Dr Messick's email with the alleged resignation without notice within 1 hour of its receipt. The University's actions appear opportunistic in the circumstances.

[45] I do not accept Dr Messick's email to Dr Foster the same day noting "HR was kind enough to allow me to finish work today" makes his email of 16 May a resignation. The fact he takes no action to retract the purported resignation is understandable given the evidence of his ill health prior to dismissal and up until 5 August 2013.

[46] It is not until the 89th day after dismissal that his lawyers refer to the 16 May email as a resignation when raising a personal grievance. It is after that Dr Messick starts referring to the email as a resignation in his correspondence as well.

[47] At best Dr Messick's 16 May email required investigation about whether he intended resigning without notice or not. Following a suitable cooling off period investigation into his resignation could have been made.

[48] The University should not have accepted the 16 May email as a resignation in these circumstances. Their actions in doing so dismissed Dr Messick.

[49] Although the statement of problem stated this was a constructive unjustified dismissal, the evidence indicates this was an unjustified dismissal instead. The Authority has power under s160(3) of the Act to "concentrate on resolving the employment relationship problem, however described." The Authority is not bound to treat a matter as being a matter of the type described by the parties. It may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.²

[50] The personal grievance of unjustified dismissal was raised with sufficient certainty in the letter raising the personal grievance for the University to reply to in

² Section 160(3) Employment Relations Act 2000.

August 2013. There is no prejudice to the University in the exercise of my powers under s160(3) because they have had an opportunity to reply before this determination was rendered.

[51] In my view a fair and reasonable employer would not have accepted the 16 May email as a resignation without notice. It would have warranted disciplinary action but that did not occur. Therefore Dr Messick was unjustifiably dismissed by the University of Waikato.

Remedies

[52] It was confirmed at hearing Dr Messick does not seek reinstatement. He has a proven personal grievance. He seeks remedies of lost remuneration, lost benefits and compensation subject to any reduction for contributory behaviour.

Lost remuneration

[53] Although there was little evidence of mitigation, this may have been due to Dr Messick's ill health. He has produced evidence of a medical certificate that refers to an appointment on 8 May 2013 "for depression secondary to work related issues...". He was referred to a psychologist and prescribed anti-depressant medication. A letter from his psychologist confirms he was treated throughout June until 5 August 2013.

[54] Dr Messick is required to mitigate his losses.³ Given his ill health he was unavailable to do so except in a minor way up and until 5 August 2013. He did give evidence that he managed to hold down a part time job doing maintenance work.

[55] I am satisfied Dr Messick has in the circumstances of his ill health mitigated his losses. However I intend awarding only the statutory cap of three months lost remuneration as there is no evidence warranting an award in excess of the statutory maximum.

Lost benefits

[56] I accept the University's submission the claimed benefits were not as a result of his dismissal. No award for lost benefits is made.

³ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05).

Compensation

[57] Dr Messick seeks compensation of \$20,000 for the financial losses he has suffered by the University's actions. In similar cases where applicants have suffered ill health as a result of an employers unjustified dismissal (constructive or otherwise) the Courts have awarded \$125,000⁴ (excluding exemplary damages of \$50,000) to \$25,000⁵ to \$10,000.⁶

[58] Dr Messick has produced evidence of the personal and financial effect upon him. He was taking medication for depression 8 days prior to dismissal. There was evidence his depression was connected to his work situation and the University was aware of this. He produced evidence he was seeing a psychologist up and until 5 August 2013. His banking information show his lack of finances. He gave evidence about the effect upon his practice and career.

[59] There is sufficient evidence to warrants an award of compensation of \$20,000.

Contributory conduct

[60] Contributory conduct must be both causative of the dismissal and blameworthy. I accept the University's submission the threatening email could have resulted in disciplinary procedures and was serious misconduct. To that extent it was blameworthy conduct.

[61] However I do not accept it was causative of the dismissal. The University's acceptance of the email in the circumstances caused the dismissal. I also do not accept his dismissal would have been inevitable but for the dismissal. Further investigation may have brought to light the information the University possessed about his health and the effect upon his stated views of his employers.

[62] I decline to make any reduction for contributory behaviour.

Orders

[63] Eric Messick was unjustifiably dismissed by the University of Waikato.

⁴ *Gilbert v Attorney General* [2000] 1 ERNZ 332, 394.

⁵ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71.

⁶ *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4.

[64] An order that the University of Waikato pay Eric Messick lost remuneration equivalent to three months less PAYE pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.

[65] An order that the University of Waikato pay Eric Messick compensation of \$20,000 pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

[66] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority