

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 73
5641910

BETWEEN WESTERN INSTITUTE OF
TECHNOLOGY AT TARANAKI
Applicant

AND ANGELA PARR
Respondent

Member of Authority: M B Loftus

Representatives: Hamish Kynaston and
Ella McLean, Counsel for Applicant
Angela Parr, on own behalf

Investigation Meeting: 8 May 2017 at New Plymouth

Submissions Received: At the investigation meeting.

Determination: 8 August 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Western Institute of Technology at Taranaki (WITT), claims the respondent, Mrs Parr, breached a term of a mediated settlement the parties entered into pursuant to s.149 of the Employment Relations Act 2000 (the Act).

[2] WITT seeks an order Mrs Parr not breach the settlement again and penalties.

[3] Mrs Parr denies the alleged breach.

Background

[4] Mrs Parr was employed by WITT for some six years as the personal assistant to the Chief Executive. She left in May 2013 with her departure being the subject of a subsequent personal grievance application.

[5] The personal grievance was resolved by agreement of the parties. The agreement was formalised in a settlement signed by a mediator pursuant to s.149 of the Act. The terms of mediated settlements are normally confidential and other than the clause central to this claim I consider it appropriate that remain the case. To that end I order the other terms of the settlement remain confidential to the parties.

[6] The clause central to this claim, clause 4, reads:

Mrs Parr will not make any negative or disparaging statement publicly about WITT or any of its officers or employees. Further, Mrs Parr will not make any comment publicly or to the media about WITT or her employment, or about any of WITT's officers or employees, (other than declining to comment) unless that has been approved by WITT's Chief Executive. Mrs Parr acknowledges that WITT has been subject to considerable negative media attention, and that this clause is essential to WITT. Mrs Parr also acknowledges that if she breaches this clause (or any other clause of this agreement), she may be liable to penalties and compensation.

[7] On or about 14 February 2016 a letter was sent to the Hon. Steven Joyce. The letter raised issues which, according to its author, were of *grave concern to so many who are at present unable to speak or take action due to confidentiality agreements and ongoing court cases.*

[8] A copy was sent to the Hon. David Cunliffe who tabled a version with significant redactions in Parliament on 18 February 2016. The redactions included the signature block and it is that version which is available to the Authority. The letter led to both the Minister Joyce's office and the Tertiary Education Commission (TEC) seeking information from WITT. This proved a considerable imposition on WITT but as a result of the TEC's process WITT's Chief Executive, Barbara George, saw an un-redacted letter. She states it was signed by someone unknown to her - *F Jacks*.

[9] On 21 May 2016 another letter was sent to Mr Joyce. It was again signed by *F Jacks*. As well as referring to the February letter it made various negative observations about WITT's then Chair, Mary Burke. Copies were also to both the TSB Community Trust and the Bishops Action Foundation which were bodies with which Ms Burke was associated. The copy sent to the TSB Community Trust, along with the envelope in which it was sent, was passed to Ms Burke who, unsurprisingly, was less than impressed.

[10] Ms Burke showed Ms George the letter along with the envelope which had a handwritten address. Ms George felt the writing was familiar. She thought it similar to that she had seen on various documents she had perused when dealing with Mrs Parr's personal grievance.

[11] Ms George then looked at various documents on Mrs Parr's personal file which, in her view, enhanced her suspicion Mrs Parr was the author. This was not the first time WITT had been the subject of negative publicity and it was of a view that should not be fuelled by unsupported and inaccurate statements which it felt the May letter contained. Ms George decided to seek a professional view on the authorship of the letter. She sent copies of it and the accompanying envelope to two handwriting experts, Linda Morrell and Mike Maran, along with samples of various documents she sourced from Mrs Parr's personal file. The samples are known as reference material.

[12] Ms Morrell responded on 22 June. Ms Morrell found herself unable to offer an opinion about the signature on the letter. With respect to the handwriting on the envelope she found there were a number of similarities and no significant differences between that and the reference material and concluded ... *A PARR has probably completed the address on the questioned envelope and possibly also completed the line beginning 'Copy – TSB' ... at the top of the of the questioned letter.*

[13] Ms Morrell labelled her conclusion *qualified* as using copies, as opposed to originals, handicaps the examination.

[14] Mr Maran's opinion followed on 28 June. He focused on the signatures of *F Jacks* and *A Parr* and concluded there were many similarities. He went on to say:

The combined circumstances and the signature traits would be difficult to eliminate as coincidental. These traits were too numerous to ignore as having been signed by 2 different authors. ... it is probable the same author did sign [both].

[15] In a similar way to Ms Morrell, Mr Maran also said:

The important traits of pen pressure and line quality which can only be assessed from the originals have limited me from forming a more positive opinion.

[16] These conclusion led WITT to seek a third opinion. It approached Patricia James, a senior document examiner at Police National Headquarters with 20 years' experience and a considerable reputation. Again copies were provided.

[17] WITT received Ms James' report on 25 July. She concluded there were a number of similarities between the specimen handwriting know to be Mrs Parr's, the address on the envelope and the handwritten comment *Copy – TSB Community Trust* at the top of the of the letter. That said she advised a definitive opinion was not possible as the examination was limited by the provision of copies as opposed to originals. She reached an *inconclusive* finding regarding the signature due to a lack of comparable material.

[18] WITT responded by providing further documents including the original letter sent to the Community Trust and its envelope. This allowed further tests to be performed and the resulting report was sent on 14 September 2016. Again the finding regarding the signature was inconclusive but this time Ms James said *the author of the specimens attributed to Angela Parr completed the address on the questioned envelope and the printed entry at the top of the questioned letter.*

[19] According to the notes which accompanied it, this last opinion was to a level ... *used when there is no significant limitation associated with the examination process. This opinion is the highest level of certainty on the part of the examiner, based on unqualified support for one of the propositions.*¹

[20] Armed with this WITT sought an agreement Mrs Parr desist. The approaches were rebuffed on the grounds Mrs Parr has nothing to agree as she was not the author of the documents about which WITT complains and continued to comply with the provision of the settlement agreement including the prohibition on making negative or disparaging statements about WITT.

Determination

[21] To determine this matter I must decide the following. Was the content of the letters of 14 February and 21 May negative or disparaging? If so, was Mrs Parr responsible?

¹ Annexure to the report entitled *A brief overview of the nature of a handwriting examination and the levels of opinion used by the New Zealand Police document examination section*

[22] Given the evidence I can readily reach a conclusion to both questions.

[23] In his submissions Mr Kynaston quotes various parts of the two letters. In particular he refers to three specific entries in the February letter which he portrays as disparaging of WITT.² He also notes Ms George's evidence the un-redacted version she saw contained criticisms of Ms Bourke but accepts that cannot be relied upon as that version is not available to the Authority.

[24] Mr Kynaston also notes four specific passages in the May letter he portrays as disparaging of WITT and five which criticise Ms Bourke.³ Having considered the letters I must say I agree. More importantly Mrs Parr, when questioned about some of the content, also agreed it was negative and/or disparaging. In other words she agrees, albeit indirectly, that if she was the author clause 4 of the settlement was potentially breached.

[25] I say potentially as Mrs Parr did suggest when answering one question that letters sent to a Minister of the Crown are not public. While this argument was not pursued I must say I do not agree. Ministers are public officials but in any event it is difficult to say there has been no publicity when, as occurred with the February letter, the result is enquiries by public agencies and questions in the house with the letter (albeit redacted) being tabled.⁴

[26] These letters were, I conclude, disparaging.

[27] Turning to authorship. WITT says Mrs Parr wrote both letters. She denies it.

[28] I conclude Mrs Parr was the author. In reaching that conclusion I place particular emphasis on Ms James' evidence. She was a compelling witness with impeccable professional qualifications.

[29] With respect to the May letter, or at least the notation on the copy sent to the TSB Community Trust, it is Ms James' unqualified evidence Mrs Parr was the author. She gave the same opinion in respect to the writing on the envelope in which the letter was sent. The level of confidence with which this opinion is given is the highest available, even in a criminal setting.

² Applicant's closing submissions at [67]

³ Applicant's closing submissions at [69] and [70]

⁴ Parliamentary question Cunliffe to Upston on or about 18 February 2016

[30] To that I add the fact there is irrefutable evidence Mrs Parr was involved in the sending of documents to Ministers during 2013 which have content not dissimilar to some of that in the 2017 letters. There is a further documents sent by Mrs Parr to the new chair of WITT in December 2017 complaining about the initiation of these proceedings which also contains sentiments similar to some of those in the two letters and expressed in a similar way.

[31] I also note evidence, accepted to some extent by Mrs Parr, she still harbours a grudge against both WITT and Ms Bourke along with the fact some of her evidence, especially when answering questions about the 2013 correspondence, was confusing, contradictory and unconvincing. Mr Kynaston described it as *selective* and that label could, I conclude, be applied to the way Mrs Parr responded to questions which resulted in an admission she had further correspondence with Mr Cunliffe about matters involving WITT on 16 August and 2 September 2016.

[32] It follows that once I accept Mrs Parr sent the copy to the Community Trust I also accept she sent the copies to both Minister Joyce and the Bishops Action Foundation. There is simply no explanation as how she could have obtained the letter sent to the Community Trust if she was not the original author. Similarly the reference to the February letter in Mays, along with the consistent content and Ms Georges' uncontested evidence about the signatures leads to conclusion both were written by the same person.

[33] The conclusion both letters were disparaging and Mrs Parr was the author leads to a consideration of remedies as it follows, the settlement has been breached.

[34] WITT seeks an order Mrs Parr comply with provisions of clause 4 of her settlement and cease making negative or disparaging statements about WITT publically. I conclude it has valid concerns given continuing correspondence with Mr Cunliffe, the new chair and evidence Mrs Parr still holds a grudge against WITT.

[35] In the circumstances I conclude WITT is entitled to the order it seeks.

[36] WITT also seeks a penalty and asks it be the recipient.

[37] I have accepted there has been a breach for which Mrs Parr is responsible. I also accept that given the attempt to hide the breach by using an alias it was deliberate. Mr Kynaston describes it as *vengeful* and given the content of the letters,

along with other evidence about Mrs Parr's attitude to WITT, I agree. This is an instance in which a penalty is warranted and given the adverse consequences WITT suffered and the costs incurred I conclude it be payable to WITT.

[38] That raises the question of how much. To reach a conclusion on that I must be cognizant of the principals and four step approach enunciated by the Court in *Borsboon v PVT Limited*.⁵

[39] The first question is how many breaches? Five letters were distributed but I note, and agree with, WITT's concession there are only two breaches. They are the two letters with the copies being repetitive actions. I also note that despite strong evidence of further breaches via later letters to Mr Cunliffe and the new Chair WITT has chosen not to pursue these. The maximum penalty for two breaches is \$20,000.

[40] Turning to severity. Mr Kynaston submits various comments contained in the letters are *very much at the upper end of the scale*. I agree. I also conclude the continuing breaches, albeit ones not pursued in a penalty setting as separate breaches, constitute an aggravating feature as does the fact they suggest Mrs Parr has no intention of complying with her settlement agreement unless forced to.

[41] I note Mr Kynaston's submission, which I consider the evidence supports, that:

*The letters were sent ... with the clear intention of damaging Ms Bourke's reputation and having her removed from governance roles. This was a malicious personal attack – a 'personal vendetta'. The letters were also intended to undermine WITT, a public institution, in the eyes of the Government, the Opposition (and thereby the public generally), and the organisations Ms Bourke served (and thereby the local community).*⁶

[42] I conclude the breaches were flagrant, deliberate and at the upper end of wrongdoing. Furthermore by her defence Mrs Parr has shown no remorse. There is a strong case for condemnation and a need for deterrence.⁷

[43] Mrs Parr has offered no evidence of either an ability or more importantly an inability to pay.

⁵ [2016] NZEmpC 143

⁶ Applicant's closing submissions at [113]

⁷ *Tan v Yang and Zhang* [2014] NZEmpC 65

[44] Finally there is the issue of proportionality and I note other cases involving a breach of non-disparagement clauses Mr Kynaston cites and the amounts involved.⁸ This matter I see as more serious than both.

[45] Having considered the evidence and submissions I consider a global penalty of \$6,000 appropriate. It shall, as already said, be payable to WITT.

Conclusion and Costs

[46] Mrs Parr is ordered to comply with clause 4 of the settlement agreement she entered into on 26 February 2014 and in particular she must not make any negative or disparaging statement publicly about WITT or any of its officers or employees nor may she make any comment publicly or to the media about WITT or her employment, or about any of WITT's officers or employees, (other than declining to comment) unless that has been approved by WITT's Chief Executive.

[47] Mrs Parr is to pay a penalty of \$6,000 with payment being made to Western Institute of Technology at Taranaki no later than 4.00pm on Wednesday 6 September 2017.

[48] Costs are reserved.

Mike Loftus
Member of the Employment Relations Authority

⁸ *Kea Petroleum Holdings Limited v McLeod* [2014] NZERA Wellington 113 and *Jack's Hardware and Timber Limited v Beentjes* [2015] NZERA Christchurch 29