

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2019] NZEmpC 40
EMPC 157/2018**

IN THE MATTER OF proceedings removed from the
 Employment Relations Authority

BETWEEN STEPHEN BERRY
 Plaintiff

AND THE CHIEF EXECUTIVE OF THE
 MINISTRY OF BUSINESS,
 INNOVATION AND EMPLOYMENT
 Defendant

Hearing: 10-11 December 2018
 (Heard at Auckland)

Appearances: S Berry, plaintiff in person
 E Tait, counsel for defendant

Judgment: 5 April 2019

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings have been removed to the Court by way of a minute of the Employment Relations Authority (the Authority) dated 1 June 2018. In view of the nature of the dispute, the removal was an appropriate step for the Authority to take.

[2] The plaintiff, Mr Stephen Berry, is an Authority Officer at the Employment Relations Authority and is employed by the defendant, the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE).

[3] As a result of a sequence of events occurring at the Authority's Auckland office involving Mr Berry and an Authority Member, Ms Vicki Campbell, Mr Berry is aggrieved at the way he has been dealt with by MBIE in relation to those events. He has commenced proceedings alleging breach of the duty of good faith and a finding to that effect. He does not seek any monetary penalties. He seeks reimbursement of legal costs and a disbursement for a filing fee.

Factual outline

[4] On 9 March 2017 an incident occurred at the Authority's Auckland office relating to an investigation meeting which was to be conducted that day. A delay occurred in commencing the meeting because one of the parties was not able to arrive at the Authority's offices in time. A complaint was made against Ms Campbell by the other litigant. The complaint was to be dealt with by the Chief Member of the Authority, Mr James Crichton. During the investigation of that complaint, a disagreement arose between Mr Berry, the employee involved in administering the investigation meeting, and Ms Campbell who was to hear it and who later became the subject of the complaint. The disagreement between Mr Berry and Ms Campbell concerned different recollections they each had as to what occurred and what was said between them over it.

[5] The dispute escalated when Ms Campbell made a request to Mr Berry for a written statement of the events leading to the investigation meeting. Mr Berry, in his account, stated that he gave his office desk phone to Ms Campbell so that she could listen to a telephone message left on Mr Berry's telephone by the litigant who was having trouble getting to the meeting on time. However, Ms Campbell denied that Mr Berry had given her the telephone to listen to the message in the way that he stated. Mr Berry's written statement was to be given to Mr Crichton by Ms Campbell to consider as part of the complaint against her.

[6] The matter would probably have gone no further if left at this stage. However, Mr Berry alleges that Ms Campbell said to him that before she gave his statement to Mr Crichton she intended to delete from it the reference to the telephone being handed to her by Mr Berry. Ms Campbell denied saying this to Mr Berry. The dispute

therefore escalated from this point. Arising from a minor episode, the dispute evolved into an issue of credibility between Mr Berry and Ms Campbell as to whether she said she was going to delete part of Mr Berry's statement and whether she did in fact make the deletion.

Representation and publication of names

[7] Mr Berry represented himself at the hearing of this matter. Ms Tait appeared as counsel for the defendant. There was no representation on behalf of Mr Crichton or Ms Campbell. No representation was sought by them and neither appeared as a witness. Prior to the first directions conference being convened in this matter, however, the Court Registry received an email from Crown counsel at the Crown Law office. The email reads as follows:

Dear Ms Kelly

I understand there is a teleconference in the above matter this morning at 9.30. I was instructed by the Employment Relations Authority in respect of the matter last week and am looking to finalise my instructions from the Authority.

I do not have confirmed Authority instructions for this morning's teleconference, and therefore do not propose to seek to be joined to the conference.

Since I have instructions from the Authority I may seek to be heard on the matter at short notice.

I understand Mr Berry has no email address for service so I will telephone him and advise him of the above.

Kind regards

Peter Gunn
Crown Counsel/Team Manager

[8] Nothing further was received from Mr Gunn and it was therefore presumed that neither Mr Crichton nor Ms Campbell wished to be heard.

[9] At the outset of her final submissions, Ms Tait raised the position of the original litigants before the Authority. I agreed that it would not be appropriate for their names to be mentioned in this judgment. Accordingly, their names have not been mentioned. I did consider whether it would be appropriate not to name either Mr Crichton or

Ms Campbell in the judgment and I addressed both Ms Tait and Mr Berry on this point. However, in view of the nature of the dispute as set out in this judgment, it would be somewhat artificial not to mention their names and I have chosen to do so particularly as they did not seek to participate in the proceedings and made no application in respect of publication of their names.

The relevant contemporary documents

[10] As already indicated, in preparation for Mr Crichton dealing with the litigant's complaint against Ms Campbell, Mr Berry put his recollection of events in writing. In addition, a Senior Authority Officer, who was present when the events occurred, was asked to add her own comments to Mr Berry's written account and she did that. This was prepared on 15 March 2017 and forwarded by email to Ms Campbell. The email contained the statement that the telephone had been handed to her so that she could listen to the message. This was stated to be at approximately 9.42 am on 9 March 2017. The investigation meeting had been due to start at 9.30 am on that day.

[11] Ms Campbell spoke to Mr Berry the following day. After this conversation Mr Berry sought the assistance of his Support Manager, Mr Brett Wilson, and also the assistance of Mr Crichton. In a report to Mr Wilson dated 24 March 2017, Mr Berry stated that Ms Campbell had denied she had listened to the telephone message and had said to him that she was going to remove the comment from his statement. Following this, in an email dated 27 March 2017, Mr Berry asked his Support Manager and the Chief Member of the Authority to intervene and to confirm whether the reference to Ms Campbell listening to the phone message had indeed been deleted. In his email requesting the inquiry, Mr Berry implied that there might have been some dishonesty on Ms Campbell's part. As will be seen from my findings in this judgment that comment was without foundation. Mr Berry also requested CCTV footage, recorded in the Auckland office, to be viewed to see whether Ms Campbell had indeed been handed Mr Berry's phone by him so that she could listen to the message. The footage when viewed proved to be inconclusive.

[12] Following the email of 27 March 2017, there was a conversation between Mr Berry and Mr Wilson. This was over the matters as they then stood. That occurred

on 10 April 2017 and was confirmed in an email the same day sent by Mr Berry to Mr Wilson and Mr Crichton. In it Mr Berry confirmed that he was requiring MBIE to carry out an investigation in “terms of the duty of good faith as set out in s.4 of the Employment Relations Act 2000”. He also confirmed that he was making a formal complaint to the Chief Member of the Authority about Ms Campbell’s conduct.

[13] On 13 April 2017 in an email sent to Ms Campbell and copied to Mr Crichton and Mr Wilson, Mr Berry confirmed a conversation which he claimed had taken place between the Authority Member and him. This email came to be a significant document during a later inquiry into all these matters undertaken by the defendant’s Manager of Business Advisory Services Employment, to be discussed more fully shortly in this judgment. The email reads as follows:

To Vicki

Just to summarise what was said this morning in our conversation at approx. 8.10 am.

You apologised for any upset (or ‘upsettedness’) you might have caused me by taking out my comment [from my report] about you listening to the phone message [on my desk phone].

You said that whether you listened to it or not was not material and I agreed with that.

I said that what it was that upset me was that you kept saying on whatever date it was [in fact it was Thursday 16 March 2017], you kept saying ‘it didn’t happen’, ‘it didn’t happen’, whenever I said anything to explain what happened.

You said that you genuinely didn’t recall listening to it but the important thing was that there was a message.

You said that we were allowed our differences and again apologised for any ‘upsettedness’ [and I am sure you used that term] you had caused.

I concluded with ‘that’s fine’.

The conversation would have lasted about 2-3 minutes.

Please advise if I have missed or misunderstood anything.

Thank you

Stephen Berry/Authority Officer

The words in square parentheses are curious additions. Presumably they represent Mr Berry’s interpolations of words which may not have been spoken but inferred from the conversation.

[14] There appears to be no doubt that Ms Campbell received this email. However, she chose not to respond to it. She certainly made no denial, at that stage, of the assertion that she had apologised for any upset caused by deleting Mr Berry's comment about the phone message from his report. The fact that she did not dispute the contents of the email would naturally leave Mr Berry with the impression that she had admitted deleting the comment. Whether or not the phone had been handed by Mr Berry to Ms Campbell on the day for her to listen to the message is unimportant. However, any statement by Ms Campbell that she intended to delete information or any action by her to delete information from Mr Berry's report before it was handed to the Chief Member of the Authority during his inquiry into the complaint against her would have been unacceptable.

[15] On 28 April 2017 Mr Wilson sent an email to Mr Berry advising that in view of the nature of the dispute and the fact that an apology had been given by the Authority Member, he did not propose to take any further action.

[16] On 5 May 2017, Mr Crichton wrote to Mr Berry following his inquiry into the complaint Mr Berry had made about Ms Campbell. The letter to Mr Berry dealt mainly with the dispute as to whether Ms Campbell listened to the telephone message on Mr Berry's answerphone. On that aspect of the matter the complaint was dismissed. There is comment about that part of the matter being trivial and Mr Berry I am sure, would agree with that assessment, and indeed confirmed his view of that himself in previous emails. However, the letter from Mr Crichton failed to deal adequately with the more important aspect as to whether Ms Campbell told Mr Berry that she was going to remove a portion of Mr Berry's report to the Chief Member of the Authority concerning the complaint against her by the litigant, and whether she did in fact remove a portion of Mr Berry's report. What Mr Crichton said about that in his letter is the following comment:

12. I think you are correct when you say that the reference to Member Campbell listening to the voicemail message was removed from your statement and as I have already noted, the issue was simply not referred to in the response that I wrote to the complainant because it was not relevant.
13. I hope this response will enable you to put this issue to one side and get on with the job of helping Members in their duties.

[17] These comments by the Chief Member of the Authority were somewhat dismissive since an issue of integrity between Ms Campbell and Mr Berry had arisen by this time. It needs to be kept in mind, however, that Mr Crichton's primary objective at that stage was dealing with the complaint by the litigant. His comments need to be read in that context. It was subsequently ascertained that Ms Campbell's own report to Mr Crichton contained no mention of the telephone message. Mr Crichton, however, had no evidence of Ms Campbell having removed any portion of Mr Berry's statement prior to it being given to Mr Crichton as an attachment to Ms Campbell's report. Mr Berry's statement held by Mr Crichton was in fact unredacted in any way. However, the comments by Mr Crichton would have added to Mr Berry's impression that Ms Campbell had in fact interfered with his statement by removing a part of it. In the subsequent inquiry, Mr Crichton stated to the inquirer that he had no basis for making this statement in the letter to Mr Berry. When asked why he did so, his response was that he simply thought that it is the sort of thing that Ms Campbell might have done to make it go away and he just wrote it down.

[18] From Mr Berry's point of view, first the fact that Ms Campbell had not responded to his email of 13 April 2017 and secondly receipt of Mr Crichton's letter would not have assisted him in resolving matters. They would have added to his concern that his integrity was being questioned. On 11 May 2017 he wrote to the Chief Executive of MBIE enclosing copies of previous email correspondence, setting out a brief summation of the events and requesting an investigation which he stated needed to "be open and transparent and independently conducted, especially given the lack of enthusiasm shown 'in house' to undertaking it".

[19] Some delay in MBIE dealing with the matter occurred at this point in the sequence of events. Restructuring was occurring at management level within MBIE. There was also a referral of Mr Berry's complaints to the then Chief Judge of the Employment Court in the hope that he could intervene. He was not prepared to do so but suggested that the matter should be referred to private mediation. A retired Judge of the Employment Court agreed to conduct this. Mediation, however, proved unsuccessful in that no agreement was reached on the complaint against Ms Campbell or Mr Berry's concerns resolved. The mediation took place on 29 September 2017. In view of the failure of the mediation and the indication from Mr Berry that he

intended to continue with his complaint to the Chief Executive of MBIE, Ms Campbell, who must have been aware from the mediation of the escalating nature of the dispute, sent a memorandum to Mr Berry dated 4 October 2017. This memorandum has some consequence in subsequent events and is set out in full as follows:

1. I note your notification to Jim, Brett and I that you will be proceeding with your complaint to the Chief Executive of MBIE. I have noted in your complaint dated 11 May 2017 that you allege my apology to you was for any upset I might have caused by taking your comment out of your report.
2. I have attached to this memo a complete colour copy of the documents I left on Jim's desk in relation to the complaint from [name deleted].
3. For your edification I have highlighted the staple marks that have been left by the staple I would have put into the documents when they were left on Jim's desk so that you can see this was a complete set of documents.
4. I have also attached a copy of your original email sent to Deb and me on 15 March 2017. As you will see I only attached the email that included Deb's comments in blue. On a thorough analysis you will see that I have not deleted any comments from your report.
5. It would be appreciated if you could please retract your allegation that I made a deletion to your report from your complaint.

[20] Attached to the memorandum were copies of the complaint from the litigant, Mr Berry's written outline of events including the comments from the Senior Authority Officer and Ms Campbell's own memorandum to Mr Crichton for the purposes of his inquiry into the complaint by the litigant. Patently the purpose of attaching these documents was to show Mr Berry that she had made no deletions from his report.

The MBIE investigation

[21] Prior to the investigation occurring, Ms Tamsin Lakeman was brought in to oversee the matter on behalf of MBIE. She was, at that time, on secondment as Manager, Business Advisory Services Employment at MBIE. In that role she was responsible for overseeing MBIE's support functions in relation to the Employment Relations Authority.

[22] Ms Lakeman viewed several documents which had been sent to her by Mr Wilson. She then spoke to Mr Wilson. Her primary reason for that was to ensure that both Mr Wilson and Mr Berry were receiving adequate support in view of the period which had elapsed and the pending mediation. She wrongly assumed at that time that Mr Berry was maintaining a complaint against Mr Wilson. She received information from Mr Wilson that both he and Mr Berry were maintaining a good working relationship. Ms Lakeman asked Mr Wilson to check that Mr Berry knew the EAP (Employee Assistance Programme) was available and that MBIE would provide him with whatever support was necessary in the circumstances. She also made the same offer to Mr Wilson.

[23] During the conversation Mr Wilson briefed her about the matter in relation to an initial complaint made against Mr Crichton and also the complaint against Ms Campbell. Mr Wilson informed her that Mr Crichton had been involved with him in the investigation to that point and in viewing the CCTV footage of the Authority office as had been requested by Mr Berry.

[24] At that stage Ms Lakeman, who was also in discussion with her own Manager, Mr George Mason, was hopeful that mediation would resolve matters. She then received two further emails from Mr Wilson advising that mediation had been unsuccessful, and that Mr Berry was maintaining his complaint to the Chief Executive of MBIE.

[25] Once it was known that mediation had failed, Ms Lakeman put in train steps to relieve Mr Wilson of his involvement in the matter in view of his close association with Mr Berry in the Authority at Auckland. She also put in place steps to meet with Mr Berry as soon as possible and indeed put aside other commitments to see him.

[26] On 9 October 2017 she met Mr Berry in the Authority offices in Auckland. Her actions from that point, in my view, amounted to a thorough and careful investigation into Mr Berry's complaints. She ascertained from him that he was not in fact maintaining a complaint against Mr Wilson and that the complaint against Mr Crichton had been resolved. The complaint that remained unresolved was against Ms Campbell.

[27] In summary, Ms Lakeman's discussion with Mr Berry as to how the investigation would proceed from that point consisted of:

- (a) Apologising to Mr Berry for the delay from the initial stages of the complaint.
- (b) Offering Mr Berry EAP and time off work if he needed to recover.
- (c) Going through the matters raised by Mr Berry to clarify the nature of the complaint which remained.
- (d) Assisting Mr Berry in untangling the issues that remained.
- (e) Discussing with Mr Berry the relevance of the CCTV footage. He agreed with Ms Lakeman that it would not assist because it was inconclusive.
- (f) Eliminating complaint items which Ms Lakeman would have no jurisdiction to investigate.

[28] At the end of the conversation Ms Lakeman reached the view that the key issue to be investigated was whether Ms Campbell had removed the reference, in Mr Berry's report, that she listened to the voicemail message as Mr Berry had indicated. Ms Lakeman, in her brief, states that the fact that the complaint was not made about a MBIE staff member but about a third party over whom MBIE did not have any employment jurisdiction made the situation more unusual than a normal internal human resources complaint. She indicated correctly that MBIE could not just launch an investigation as it might do in relation to an issue between two of its own staff. She therefore considered that any decision as to how to proceed had to be made jointly by MBIE and Mr Crichton as the Chief of the Employment Relations Authority. Because of that, once she had finished meeting with Mr Berry she went immediately to Mr Crichton's office to discuss the matter with him.

[29] The steps Ms Lakeman then took to progress her inquiry, both in discussions with Mr Crichton and subsequently, can be summarised as follows:

- (a) She obtained the permission of Mr Crichton to investigate matters involving one of the members of the Authority.
- (b) She obtained copies of the correspondence Ms Campbell had sent to Mr Crichton. She ascertained from him that he had received only hard copies from Ms Campbell and that she had not electronically transmitted documents to him.
- (c) Ms Lakeman compared Mr Berry's statement which he had given her with a statement attached to the memorandum of Ms Campbell to Mr Crichton. The documents were identical. There were no redactions or editing to Mr Berry's statement.
- (d) Despite Mr Crichton stating he had only received hard copies, she obtained Mr Crichton's and Ms Campbell's consent to check emails between them to ascertain if there might have been an earlier email version of Mr Berry's statement sent electronically.
- (e) She indicated to both that she would be running a forensic analysis over their Inboxes to look for emails. They both agreed.
- (f) She arranged for the forensic analysis to be carried out by an MBIE ICT (Information and Communications Technology) Operations employee. Key words and date ranges were selected. By this process nothing else relevant was located in addition to the documents already available. The analysis included more than one search between 12 and 26 October 2017.
- (g) Mr Berry was kept informed as matters progressed.
- (h) Ms Lakeman did not interview Ms Campbell. In her evidence she stated that this was because she knew Ms Campbell denied changing Mr Berry's report and Ms Lakeman therefore felt that nothing would be gained from an interview.

- (i) Ms Lakeman prepared her draft report. She circulated it to Mr Mason, Mr Berry, Mr Crichton, Mr Wilson and Ms Campbell. She did this for the purposes of ensuring that the draft report was factually correct and that those recipients could provide her with feedback. She received feedback from them and then prepared a final report containing some significant amendments to the draft report.

The draft and final reports of Ms Lakeman

(a) The draft report

[30] Ms Lakeman's draft report was dated 27 October 2017. She requested that those to whom she circulated it check it for factual accuracy and reply with any comments by 31 October 2017. As there were significant changes made following the feedback she received, Mr Berry has raised this change to the draft as part of his allegations of a failure by MBIE to act with good faith particularly so far as the changes arising from the feedback from Ms Campbell and Mr Crichton are concerned. It is therefore necessary to deal with the sequence of events which followed the draft report being issued and comment on the changes made.

[31] The draft report set out the background as discussed earlier in this judgment. Two matters are noted relating specifically to Mr Berry's complaint against Ms Campbell. There are five short paragraphs dealing with these matters as follows:

In the process of investigating the complaint, Vick[i] Campbell asked Steve to provide his recollection of the events that morning as they related to the late start of the hearing. This was completed on the 15th of March and sent to Ms Campbell. In it, it stated that Ms Campbell had come to Mr Berry's desk and heard the message from the late participant.

On the 16th of March Ms Campbell discussed this with Mr Berry as she did not recall that in quite the same way (she did not remember actually listening to the message) and at that point made a comment that led Mr Berry to understand that she was intending to remove this sentence from the information he had provided prior to sending it to Jim Crichton (the Chief of the Authority).

There were a few emails and discussions around this as Mr Berry was not comfortable with his statement being changed. On the 27th of March, Mr Berry made a formal complaint to Mr Crichton about the actions of Ms Campbell and requested an investigation.

During April, a conversation was held between Ms Campbell and Mr Berry where Ms Campbell apologised and Mr Berry transcribed this conversation and emailed it out for confirmation; Ms Campbell did not reply to this. Also during April, Brett Wilson (Mr Berry's Manager) confirmed in writing that the complaint was about an ERA member and therefore was being handled by the Chief of the ERA rather than MBIE.

This investigation was completed by Mr Crichton and a letter was sent to Mr Berry to that effect. The outcome of his investigation was that there had been no wrongdoing (though the initial letter did say that Ms Campbell had changed the statement, this was later corrected).

[32] Ms Lakeman sets out the nature of her investigation. She states that part of the investigation was carried out by Mr Crichton. Mr Berry took some issue with this at the hearing. The circumstances of Mr Crichton's involvement and the reasons for it are discussed earlier in this judgment. I do not think his involvement can be validly criticised.

[33] The conclusions in the draft report are as follows:

It is not possible to confirm whether Ms Campbell did or did not listen to the phone call at Mr Berry's desk. She noted herself that she said she had intended to remove part of Mr Berry's statement but she did not follow through on this.

This paper concludes the investigation process into this complaint and it is closed with no further action to be undertaken. It is hoped that this document provides a level of closure to all parties.

All documents relating to this investigation will be filed in Mako in the Employment Services area under Business Administration/Complaints.

(b) Feedback received

[34] As to the feedback, the following passages from Ms Lakeman's brief of evidence set out sequentially the contact she had with each of the recipients of the report. Mr Wilson did not provide any feedback, which is understandable as the report hardly affected his brief involvement.

49. The following Monday, 30 October 2017 I received an email from Ms Campbell wanting to speak on the phone. We spoke shortly afterward. She was very upset by my statements relating to the 'apology conversation'. I had based this preliminary conclusion on Steve's email concerning that conversation. As she had not replied to the email, I presumed she agreed with it.

50. However, when we spoke, I asked her to open the email from Steve in her inbox, and read it. She go[t] partway through reading it aloud and saw it said she apologised for any upset she might have caused Steve by taking out his comment from his report. I heard the sound of horror in her voice. It became clear to me that she hadn't read the apology email properly in full before. As a result, when it came to the final report, I changed what I said about the apology conversation.

51. I received feedback on the draft report from both Steve and Ms Campbell. Ms Campbell sent hers to me by email on 30 October. She commented by tracking suggested amendments into the draft report.

52. Steve provided feedback to me by email on Tuesday 31 October. This consisted of nine separate points, and was accompanied by an annotated and highlighted copy of the draft report. He also attached to his email a copy of Ms Campbell's memo to him of 4 October, and one of its annexures.

53. On Wednesday 1 November I replied to Steve's email. I specifically addressed each of the nine comments he had made, indicating ones that were accepted, and ones that were not, and providing further comments where appropriate.

54. That same day, I had emailed Mr Crichton to seek confirmation that I had accurately summarised what had happened with regard to him changing his mind about the conclusion he expressed in his initial investigation memo of 5 May 2017. He confirmed that my summary was accurate.

55. Also on 1 November 2017, I had one of my regular one on one meetings with George. Following this, George sent me a copy of his notes from the meeting. These set out his suggestion that I tie off the conclusion to the report by referencing the relationship building work which was being undertaken to ensure better communication and relationships between the ERA members and support staff.

56. On Thursday, 2 November I sent George a copy of my revised report, for him to review my updated wording in the conclusion about improving communication inside the ERA. George tracked some changes into this 'relationships' aspect of the conclusion, and sent the report back to me.

57. I then emailed a copy of this revised wording to Mr Crichton, as a heads up and so he could tell me if he had a problem with it before I finalised the report. I did this because that part of the conclusion was not strictly part of the remit of the investigation and although I felt it was all true, I did him the courtesy of seeing it prior to my finalising the document as the head of the organisation I was making comment on.

58. Shortly afterward, I emailed my final version of the report to Steve and Ms Campbell. The final version included changes based on the feedback received from both Steve and Ms Campbell.

59. Where their comments were just semantics or editing changes, I accepted them. However, I did not accept their suggested changes without careful consideration. For example, Ms Campbell's comments were her personal view. They overweighted the value of her opinion as compared to Steve's. I reflected what she had stated, and what Steve had stated in a

balanced way. But I wrote the conclusions in my own words based on what I had found.

60. The final report was longer and more detailed taking into account the feedback received. The base conclusion – that Ms Campbell had not removed anything from Steve’s email statement – remained unchanged. However, I changed the wording concerning whether she had said she was intending to remove part of Steve’s statement, from my original assumption that she had, to a conclusion that it wasn’t possible to determine this either way (given that each party had strongly held and opposing views about what had been said).

[35] In view of Ms Campbell’s realisation of the effect of her failure to reply to the email dealing with the apology, she provided an edited version of the report highlighting her proposed changes. The changes, while not completely accepted by Ms Lakeman to be included in her final report, give a belated explanation by Ms Campbell as to how a misunderstanding may have occurred between her and Mr Berry. It might also explain partially how Mr Crichton came to make the comment he did in his findings. Because Mr Berry did not agree with those changes which were accepted and inserted in the final report, I set out here Ms Campbell’s proposed editing on the primary subject of the inquiry showing her proposed tracked changes as follows:

...

On the 16th of March Ms Campbell discussed this with Mr Berry as she did not recall ~~that in quite the same way (she did not remember~~ actually listening to the message) and at that point made a comment that led Mr Berry to understand that she was intending to remove this sentence from the information he had provided prior to sending it to Jim Crichton (the Chief of the Authority). The comment was along the lines that Vicki would not refer to, or would leave out any reference to listening to the call in her response to the Chief.

This led Mr Berry to believe Vicki intended removing the comment from his emailed report.

...

During April, a conversation was held between Ms Campbell and Mr Berry where Ms Campbell apologised and Mr Berry ~~transcribed~~ provided a summary [of] this conversation and emailed it out for confirmation; Ms Campbell did not reply to this. ~~Also during April, Brett Wilson (Mr Berry’s Manager) confirmed in writing that the complaint was about an ERA member and therefore was being handled by the Chief of the ERA rather than MBIE.~~ Ms Campbell has recently read the email carefully and notes that Mr Berry says she apologised for any upsettedness caused by taking his comment out of his email. Ms Campbell had not noticed this comment previously and states that this was not part of the discussion she had with Mr Berry. Ms Campbell

believed she was apologising for the difference of opinion between them about whether the message had been listened to or not.

Also during April, Brett Wilson (Mr Berry's Manager) confirmed in writing that the complaint was about an ERA member and therefore was being handled by the Chief of the ERA rather than MBIE.

...

- a) There is a difference of opinion between Mr Berry and Ms Campbell about what was said during the apology conversation in April. – Ms Campbell confirmed says she did not confirm that she had said that she was intending to remove a reference from Mr Berry's statement. Ms Campbell did apologise to Mr Berry but that was in relation to the difference of opinion about whether she had listened to the message or not. and she apologised for doing so.

...

Conclusion

It is not possible to confirm whether Ms Campbell did or did not listen to the phone call at Mr Berry's desk. She noted herself that she ~~said she had intended to remove~~ did not intend to refer to this part of Mr Berry's statement ~~but she did not follow through on this~~ in her response to the Chief but did provide a complete copy of Mr Berry's email report to the Chief for his information.

[36] Mr Berry also sent a copy of the draft report to Ms Lakeman which highlighted nine points. This was accompanied by an email in which he explained why he was raising these points. Ms Lakeman responded to Mr Berry by adding her responses to his email. She accepted that several of the points were valid and that the report would be updated to include them. She disagreed with other points which he raised.

[37] Mr Mason also provided feedback to Ms Lakeman. His proposed changes were directed more at how in future a situation of the kind which arose in this case, could be avoided and how there could be better liaison between the administrative staff under the jurisdiction of MBIE, the Chief Member of the Authority and the Authority Members themselves. Mr Mason's comments led to a lengthy paragraph being inserted in the final report which I consider to be entirely appropriate.

(c) Final report

[38] The final report was dated 2 November 2017. In respect of the matters primarily in dispute between Mr Berry and Ms Campbell and following the feedback

she had received from both, Ms Lakeman made an alteration to one significant paragraph contained in the “Background” section of the report and another change to the “Investigation” section. I will set these out. There was a third notable change made in the conclusion. I set out the full conclusion as well as it contains not only the finding on the primary point in dispute but also Mr Mason’s proposals as to the communication and working relationships within the Authority.

[39] The changes to the “Background” and “Investigation” sections are as follows:

Background

...

On the 16th of March Ms Campbell discussed this with Mr Berry as she did not recall listening to the message and at that point made a comment that led Mr Berry to understand that she was intending to remove this sentence from the information he had provided prior to sending it to Jim Crichton (the Chief of the Authority).

...

Investigation

- a) The summary by Mr Berry of the apology conversation in April states that Ms Campbell apologised for removing a reference from Mr Berry’s statement. Due to this not being responded to it was assumed for some time that the summary was correct. Ms Campbell states that she did not review the email in detail at the time she received it and had not noted the phrasing. She states that this was not part of the conversation though she did apologise, she recalls that it was an apology for the difference of opinion and upsettedness. It is concluded that the member does not agree that she said that she would remove the statement.

...

[40] The conclusion reads as follows:

Conclusion

It is not possible to confirm whether Ms Campbell did or did not listen to the phone call at Mr Berry’s desk. It is also not possible to confirm whether she stated that she would remove part of Mr Berry[’s] statement. It is possible to confirm that regardless of the first two points, Ms Campbell did not remove anything from Mr Berry’s statement.

Aside from factual matters, the investigation has highlighted that there are some opportunities to enhance communication and working relationships inside the ERA. This is particularly given the challenges that arise in an

environment where independent statutory functions are serviced by an employed administrative secretariat. In this regard, the matters revealed through this complaint and inquiry provide further support for the work that is already underway in the ERA at the request of the Chief to drive increased collegiality, shared understanding and collaboration as between the members and the ERA secretariat.

It is clear to the investigator that a more fluid, open and flat communication structure could have substantially reduced, or removed, the need for this complaint. It would also have created a foundation for good conversations during the early stages of any concern which would have likely removed the secondary complaints and mediation process. The work the Chief has commissioned and is currently progressing, if successful, would likely have prevented the escalation of this matter. The full participation in that work by all members and ERA secretariat staff is encouraged accordingly.

This paper concludes the investigation process into this complaint and it is closed with no further action to be undertaken. All documents relating to this investigation will be filed in Mako in the Employment Services area under Business Administration/Complaints along with the reviews provided by Mr Berry and Ms Campbell to confirm facts and dates.

Jurisdiction

[41] Mr Berry alleges that the defendant has acted in breach of good faith in the way it handled his disputes, particularly that relating to Ms Campbell. Initially, I raised with Mr Berry how the Authority, and therefore the Court, upon proceedings being removed, has jurisdiction to inquire into MBIE's actions and grant him the remedies he seeks. He indicated that he relied upon s 4 of the Employment Relations Act 2000 which sets out the obligations of the parties to an employment relationship to deal with each other in good faith, and further provisions explaining the nature of the obligations. Since I find that MBIE did not breach good faith in the way it dealt with Mr Berry's complaints, there is no need to delve fully into jurisdictional issues. I shall do so only briefly.

[42] Section 4A of the Act makes provision for the Authority or the Court to impose a penalty for certain breaches of the duty of good faith set out in s 4(1) of the Act. Mr Berry does not claim any penalty and indeed makes it plain that he is not claiming any monetary award whatsoever. However, even if he had applied for a penalty under s 4A, the circumstances of this matter would not meet the requirements of that section. Obviously, however, before a penalty could be awarded under s 4A there would need

to be a finding of the Court that there had indeed been a failure to comply with the duty of good faith as set out in s 4(1) of the Act.

[43] Section 161(1) of the Act sets out the exclusive jurisdiction of the Employment Relations Authority. Section 161(1)(f) of the Act provides jurisdiction to the Authority to make determinations concerning matters about whether the good faith obligations imposed by the Act have been complied with in a particular case. That may be referring to the imposition of a penalty under s 4A. However, in combination with the other provisions dealing with the jurisdiction of the Authority, the jurisdiction to comply with good faith obligations may extend into matters such as breach of implied or express conditions as to the obligations of good faith contained in employment agreements and damages arising from such a breach.

[44] These matters were not fully argued, although Ms Tait referred in her submissions to this Court's decision in *Hally Labels Ltd v Powell*.¹ That decision, insofar as it related to good faith, involved a pleading claiming damages for breach of a statutory duty, not to breach of a contractual obligation. For the reasons set out in that decision, the Court did not consider it had jurisdiction to award damages for the alleged breach of a statutory duty.²

[45] In the present case Mr Berry is simply seeking a finding that MBIE breached the duty of good faith whereby parties to an employment relationship must deal with each other in good faith. The wording he uses is that he seeks a judgment to that effect and refers to s 4 of the Employment Relations Act 2000 without being more specific as to which obligation under s 4 has been breached. He does, however, specifically refer to the investigation into the actions of Ms Campbell. He has not commenced any claim based on an alleged personal grievance.

[46] While I find that there has been no breach of the good faith obligations by MBIE in this case, I also consider that, in view of the nature of the dispute and involving as it does a dispute between a member of the registry staff and a judicial

¹ *Hally Labels Ltd v Powell* [2015] NZEmpC 92, [2015] ERNZ 940.

² There has been some recent consideration of this issue by Fitzgerald J in *Li v 110 Formosa (NZ) Ltd* [2018] NZHC 3418.

officer of the Employment Relations Authority, it would have been inappropriate simply to dismiss the matter on procedural grounds. For this reason, I have investigated the actions of MBIE and the further matters raised by Mr Berry in his statement of claim, his evidence and submissions.

Conclusions

[47] The Court can only look at the actions of MBIE as employer, even though the dispute arises from the relationship between an MBIE employee in the Employment Relations Authority registry and a judicial officer of that Authority. Technically Ms Lakeman had no control or jurisdiction over Ms Campbell. However, Ms Lakeman decided she had an obligation to ascertain whether Mr Berry had been unfairly treated by an Authority Member. If his complaint was seen by Ms Lakeman to be justified it could then be taken further through proper channels, primarily by way of a further complaint to the Chief Member of the Authority. Insofar as an inquiry into the employment relationship is concerned, Mr Berry could only bring proceedings against his employer, which he has done, based on its handling of his complaints concerning Ms Campbell and the way that was then handled by supervising managers within MBIE.

[48] I have reached the view that Ms Lakeman cannot be criticised for the way that she dealt with the matter. She was not making her inquiry in an adversarial environment. Her obligation was to get at the truth. Once she had done so she might make recommendations to the Chief Member of the Authority, but those would not be binding on him. In any event he had already completed his inquiry into Mr Berry's complaint to him against Ms Campbell.

[49] Ms Lakeman was unable to resolve the dispute, which was founded first in Ms Campbell's denial that she listened to the voicemail message and then the allegation she said she was going to delete part of Mr Berry's memorandum which he had prepared. Finally, there was the issue of whether Ms Campbell did in fact make any such deletions.

[50] Ms Lakeman discovered that Ms Campbell failed to ascertain what was contained in Mr Berry's email relating to the apology meeting. This meant she lost the opportunity at an early stage to correct those parts with which she disagreed.

[51] Once Ms Lakeman got feedback from Ms Campbell, she saw there could be a different perspective to what Mr Berry was claiming. Ms Campbell appears to have decided not to include, in her own report to Mr Crichton, mention of Mr Berry's claim that she listened to the message. She made no mention in her own conclusions that there was a disagreement between her and Mr Berry over the phone call, even though he had mentioned it in his memorandum.

[52] It would have been clear to Ms Lakeman that a misunderstanding may have arisen in that early conversation. This possible misunderstanding would have become apparent to her when considering the changes which Ms Campbell, at a much later stage, proposed to the draft report which had been prepared by Ms Lakeman. However, the belated way in which Ms Campbell attempted to correct the position by those proposed tracked changes in the draft report led to Ms Lakeman not accepting them and simply stating that she could not resolve the matter. In reaching this conclusion she also had regard to the feedback she had received in the nine points raised by Mr Berry. In the circumstances that was a fair and reasonable approach.

[53] Mr Berry raises as one of the grounds for his claim that there has been a breach of good faith on Ms Lakeman's part, by the fact that she allowed Ms Campbell to have input into the final report. This, however, is not a reasonable objection and indicates that Mr Berry was trying to get Ms Lakeman to resolve the dispute by adversarial means, which was not what MBIE was required to do. In trying to ensure that her findings were accurate and to get to the truth of the matter, it was not unreasonable for her to submit them in draft form for input from those who had been involved in the dispute.

[54] In my view, weighed against the relevant requirements contained in s 4 of the Act, the following are ways in which Ms Lakeman acted to ensure there was compliance with the good faith obligations imposed upon MBIE:

- (a) The way that she promptly responded once becoming involved in Mr Berry's complaint, as set out earlier in this judgment.
- (b) Her decision at an early stage to distance Mr Wilson from the matter.
- (c) When she saw that she had jurisdictional problems over the judicial officers of the Authority, she drew Mr Crichton into the matter at an early stage.
- (d) She made every effort to get to the bottom of the matter by getting hard-copy documents and obtaining permission to carry out forensic analysis, and then arranging for professional assistance in carrying out that analysis.
- (e) She kept Mr Berry informed of progress with the matter.
- (f) She gave those involved the opportunity to respond to her initial draft report and findings. She had regard to their input. This was reasonable to ensure accuracy.
- (g) She dealt with the error which Mr Crichton had clearly made. She got to the bottom of that even though the outcome may not have been satisfactory to Mr Berry.
- (h) She, in conjunction with Mr Mason, provided a formula in the final report for a way forward to improve the relationships within the Authority, between Authority Members and registry staff.

[55] Perhaps the only criticism which could be levelled at the way Ms Lakeman handled the matter was her decision not to interview Ms Campbell on the basis that she felt she knew what Ms Campbell's position was in the matter. If such an interview had taken place at an earlier stage and prior to the preparation of the draft report, it would have revealed to Ms Campbell at that time the consequences of her failure to respond to the email from Mr Berry dealing with the apology meeting. This in turn might have avoided the somewhat messy way in which Ms Campbell was left to

present her position. Nevertheless, Mr Berry cannot complain about the ultimate result, in that Ms Lakeman, having received Ms Campbell's explanation by way of the tracked changes, did not accept that explanation in preference to Mr Berry's account of what had transpired.

[56] Mr Berry has also raised, although not with any great force, reference in some of the documentation to conversations which took place between Ms Lakeman and Mr Crichton. I do not consider that they give any indication that Ms Lakeman has approached this matter in anything other than a professional and unbiased fashion.

Disposition

[57] Apart from any contribution the parties to the dispute may have made to its escalation, albeit unintentionally, I find that there are certainly grounds for concluding that misunderstandings have occurred. Positional and inflexible approaches to the matter did not help. Certainly, Mr Berry had reason to believe that his integrity was impugned and that his complaint was not being adequately attended to. Ms Lakeman took the complaint seriously when she was asked to be involved. However, the primary problem was that which Ms Lakeman initially identified, in that the complaint was against a member of the Authority over which she had no jurisdiction. Once apprised of the situation, she carried out the task of investigating the matter in a thorough and professional manner. She uncovered a great deal of information, the primary part of which ascertained that, while she could not resolve the competing allegations of Mr Berry and Ms Campbell, Mr Berry's report had not been amended or redacted in any way. The depth of the analysis she made into the matter also revealed to her that there was no other document in existence, either hard copy or electronically, which was different to the hard copy documents Ms Campbell delivered to Mr Crichton for the purposes of his inquiry. Further, it was appropriate for Ms Lakeman to involve Mr Crichton in her own inquiry, in the absence of which she would have had difficulty in being able to fully get to the bottom of Mr Berry's complaints.

[58] My finding, therefore, is that Mr Berry, apart from any jurisdictional difficulties existing, is not entitled to the judgment which he seeks, and his claim is dismissed.

[59] Insofar as costs are concerned, in circumstances where there is a continuing employment relationship and a need to repair such a relationship, it is not appropriate that there be any award of costs in this matter. Ms Lakeman, with the support of Mr Mason, has proposed a way forward in an endeavour to set up systems to ensure that such a matter as this does not arise again. I suggest as part of the adoption of that process, further mediation may be of assistance.

M E Perkins
Judge

Judgment signed at 11.15 am on 5 April 2019