

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 12/07  
ARC 92/05**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN THE CHIEF EXECUTIVE OF UNITEC  
INSTITUTE OF TECHNOLOGY  
Plaintiff

AND KATHLEEN JOAN HENDERSON  
Defendant

Hearing: 12, 13 and 14 June 2006  
(Heard at Auckland)

Appearances: Emma Butcher, Counsel for Plaintiff  
Christopher Patterson, Counsel, and Colin Ross, Advocate for  
Defendant

Judgment: 19 March 2007

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**JUDGMENT OF CHIEF JUDGE GL COLGAN**

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[1] The issues for decision in this challenge (appeal) by hearing de novo from a determination of the Employment Relations Authority are:

- whether Kathleen Henderson’s summary dismissal from her position as a senior lecturer at Unitec Institute of Technology (“Unitec”) was justified as that is defined by s103A of the Employment Relations Act 2000;
- if so, the remedies to which Ms Henderson may be entitled for unjustified dismissal;
- independently of the foregoing, whether Ms Henderson was entitled to receive a salary increase during the latter part of her employment;

[2] The dismissal that Unitec acknowledges it effected having taken place in 2005, the new test of justification set out in s103A of the Employment Relations Act

2000 is applicable to the case. The Court must determine on an objective basis whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. That test has been examined and interpreted first by this Court in *Air New Zealand Ltd v Hudson* (2006) 3 NZELR 155. I agree with the interpretation given by the Judge to s103A and her reasoning and will apply it to the decision of this case on the facts established. Ms Butcher for the plaintiff accepted that the test to be applied in this case is as interpreted and applied in the *Hudson* case.

[3] I would add only the following by way of general commentary to the new dismissal test. Before s103A, the effect of judgments of the Court of Appeal culminating in *Oram*<sup>1</sup> was to require the Employment Relations Authority and the Employment Court to focus on the process engaged in by the employer to determine whether an employee was disadvantaged in employment or dismissed from it and to determine the justification for those actions. The new statutory test, whilst expressly requiring the Authority and the Court to consider how the employer acted, focuses equally upon an assessment of the merits of the employer's conclusions of fact, what is sometimes referred to as substantive justification for the employer's decision. This will require a balanced assessment of both procedure and substance rather than what has until recently been the perception of some commentators, an undue focus on procedure. That may in turn mean, in some cases, that what the Court of Appeal has termed "*procedural infelicities*"<sup>2</sup> will not now be determinative of personal grievance cases.

[4] The Employment Relations Authority, from whose determination this is a challenge, found that Ms Henderson had been dismissed unjustifiably but that she was not entitled in law to the salary increase claimed (although it urged Unitec to consider paying arrears so calculated to her as part of a negotiated settlement of remedies). Apart from declaring dismissal to have been unjustified, the Authority reserved remedies noting that there was a dispute between the parties' representatives about whether some evidence could or could not be considered by

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<sup>1</sup> *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448

<sup>2</sup> William Young J in *Waitakere City Council v Ioane* [2006] 2 NZLR 310 at para [28], [30].

the Authority. The Authority also reserved costs. This challenge by Unitec appears to have overtaken any further consideration of remedies and costs.

### **The facts**

[5] Ms Henderson had worked in an academic role for Unitec for more than 10 years. At the time of her dismissal in 2005, she was a senior lecturer in Unitec's School for the Built Environment ("SBE"). The Head of the SBE was Roger Birchmore. An Associate Head of the SBE was David Nummy. Mr Nummy's wife Pamela Nummy also worked at Unitec although part-time. It is common ground that Ms Henderson was a satisfactory employee.

[6] In March 2003 Ms Henderson and Mr Nummy began a clandestine "affair". In the following month, April 2003, Mrs Nummy found out about the affair. She was very upset and angry and this reaction manifested itself in frequent verbal abuse of Ms Henderson and occasional threats to her at the Unitec campus. The affair continued nevertheless until late November 2003 when there was a confrontation between Ms Henderson (who was with Mr Nummy at the private residence of a colleague) and Mrs Nummy and the Nummys' son, who both arrived and gained entry to the property by creating a disturbance. This was a physical confrontation between Ms Henderson and Mrs Nummy, as a result of which Ms Henderson required hospital treatment for injuries and she complained to the police of assault by Mrs Nummy. She then applied for a restraining order against Mrs Nummy under the Harassment Act 1997 not only as a result of the events of the evening of 30 November 2003 but in an attempt to deal with the ongoing conflict between her and Mrs Nummy at Unitec. No police prosecution(s) resulted from the affray. At about this time the Henderson-Nummy affair concluded.

[7] The outcome of the application under the Harassment Act 1997 was a mediated settlement between Ms Henderson and Mrs Nummy which was specified to last for a period of 10 months, to expire in December 2004, and included agreements that the two women would have no contact with each other except for professional reasons, that they would desist making derogatory remarks about the other, and Mrs Nummy's agreement not to loiter near or come to any place frequented by Ms Henderson including her private residence, without a compelling professional reason. Exempted from this part of the agreement was the Unitec

campus to and from which Mrs Nummy was free to go for the purposes either of her employment or to visit Mr Nummy. Unitec was neither involved in nor aware of this agreement at the time it was entered into by Mrs Nummy and Ms Henderson.

[8] Despite that agreement, Mrs Nummy appeared to Ms Henderson to be on the Unitec campus more frequently than her part-time job required. Ms Henderson believed that Mrs Nummy had spread rumours about her among other staff. There was some evidence to support this belief of a state of affairs that was difficult to prove as neither of the Nummys was called as a witness at the hearing. It would not have been surprising that Mrs Nummy frequented the SBE, if not to beset Ms Henderson, then to keep tabs on Mr Nummy.

[9] In spite of all that had gone before, in January 2004 the affair resumed at Mr Nummy's instigation, ending finally on 18 April 2004. The end of the affair did not, however, mean the end of negative interaction between Mrs Nummy and Ms Henderson.

[10] On 12 August 2004 there was an incident that triggered the process that resulted in Ms Henderson's dismissal. On that date Mrs Nummy stood outside, but visible from, the lecture theatre in which Ms Henderson was delivering a lecture to students. Ms Henderson describes Mrs Nummy as glaring at her provocatively with arms folded. Ms Henderson feared for her safety on this occasion and it was also, for her, the culmination of a series of behaviours by Mrs Nummy over previous months that she claimed had caused her to fear for her safety at work.

[11] Although, therefore, on 16 August 2004, Ms Henderson first contacted Unitec's conciliator to formally seek assistance about the position, Unitec management had known for some time about some of the background events. The Head of School and Ms Henderson's manager, Mr Birchmore, had been aware of problems between Ms Henderson and Mrs Nummy since December 2003, shortly after the physical affray between Ms Henderson and Mrs Nummy.

[12] Mr Birchmore, as Head of School, was answerable to Unitec's "Vice-President, Community", Yvonne Hawke. Ms Hawke's responsibilities included conducting staff disciplinary investigations at University. She was, in turn, responsible to the Registrar of Unitec, Rebecca Ewert. Others who dealt with these matters at Unitec included the conciliator, Glenda Grant, and Bev Cullen who was

both the co-ordinator of Unitec's Harassment Policy and acting human resources manager at the relevant time.

[13] After making contact with the conciliator, Ms Grant, Ms Henderson's concerns about Mrs Nummy were dealt with informally and in a low key manner for some time. Ms Henderson's dealings were principally with the conciliator who in turn dealt with other relevant management staff. At one point Ms Henderson involved a lawyer and gave notice of a personal grievance being her dissatisfaction with the way in which Unitec was dealing with her complaints.

[14] This grievance was settled as a result of discussions and correspondence with Ms Henderson's solicitor. From time to time Ms Henderson continued to liaise with Ms Grant and, although probably unknown to the defendant, the conciliator was also dealing with the Nummys who had themselves taken their issues with Ms Henderson to the conciliator. Although Ms Henderson, from time to time, wished Ms Grant to become her advocate in dealings with Unitec, the conciliator insisted that her role was facilitative and, although empathetic, she was constrained from representing Ms Henderson as her advocate. Ms Grant's facilitations included, however, periodic and appropriate involvement of a number of relevant persons within the institute including Ms Cullen, Mr Birchmore and Ms Ewert. It is notable that the latter, in effect the Deputy CEO of Unitec, committed significant time and resources to Ms Henderson's situation, both in meetings and lengthy correspondence.

[15] Amongst the clear advice that Unitec's representatives gave Ms Henderson for some time (as it was giving to the Nummys) was to emphasise that the provisions of its code of conduct for staff should be complied with. This included, as would be expected, mutually respectful conduct and prohibited intimidation, harassment, and similar destructive behaviours.

[16] More than once, Ms Henderson was offered the opportunity to complain formally of harassment by Mrs Nummy but chose not to do so, preferring instead to have Unitec remove Mrs Nummy from her environment so that both could continue to be employees.

[17] Towards the end of 2004, and with Ms Henderson's complaints about Mrs Nummy's presence at and near her workplace not being dealt with to her

satisfaction, Unitec proposed an interim solution until the beginning of the 2005 academic year. This was agreed to by Ms Henderson and saw her working at home, including by remote electronic access for the last part of 2004 academic year, so avoiding any contact with Mrs Nummy on Unitec premises.

[18] In late 2004 and for unrelated reasons, Unitec was considering moving the administrative functions in which Mrs Nummy was engaged to another building altogether on the campus. Ms Ewert considered that this prospective move might also have benefits for Ms Henderson by physically separating her and Mrs Nummy whilst at the same time allowing both to remain in their existing roles on the staff of Unitec. There was, however, no certainty about this proposed relocation at the end of 2004. Although Ms Ewert mentioned it to Ms Henderson, the Registrar emphasised that she could not give and was not giving the defendant any assurances about what would happen.

[19] But as is understandable in the circumstances that then prevailed, Ms Henderson so embraced the prospect of Mrs Nummy's removal to another part of the campus that she, Ms Henderson, overlooked or sublimated the clear conditionality of this proposal that Ms Ewert emphasised in her correspondence to the defendant at that time. Ms Henderson believed, erroneously, that Unitec had committed to move Mrs Nummy elsewhere on campus unconditionally.

[20] It was proposed by Ms Ewert that further consideration to this issue would be given in mid-January 2005 after staff had returned from their holidays but before the beginning of the academic year. For a variety of reasons but not connected to Ms Henderson's circumstances, however, hoped-for progress had not been made by mid to late January 2005. Ms Henderson became increasingly frustrated at the prospect of a return to work by both women still located in the same complex of buildings and continuing to encounter each other from time to time.

[21] I conclude that, also understandably but erroneously, Ms Henderson came to regard the lack of transfer by Unitec of Mrs Nummy as the employer renegeing on an agreement it had made with her in late 2004. In these circumstances, Ms Henderson regarded any visual contact between the two women as harassment of her by Mrs Nummy, even in circumstances where the latter was either legitimately engaged in

Unitec business or visiting or coming and going with Mr Nummy whose office was in the same building in which Ms Henderson worked.

[22] This increasing frustration on the part of Ms Henderson led her to write on 9 April 2005 in an e-mail to Ms Ewert that again complained about her predicament: “*You have left me no alternative*”. Ms Henderson asserted in evidence that she meant, by this enigmatic concluding phrase, that this indicated an intention on the part of the defendant to resign. I do not accept that was so. Although these issues had been rehearsed exhaustively over previous months, there had been no mention of resignation. That is also because, on the previous day, 8 April, Ms Henderson had posted a letter to Mrs Nummy at the latter’s home address, containing a single sheet of paper on which was copied a print-out of an intimate and amorous e-mail sent by Mr Nummy to Ms Henderson during the period of their affair. As she acknowledged, Ms Henderson deliberately attempted to avoid making this communication with Mrs Nummy at or during work hours. To achieve this disconnection with Unitec, fearing that its close association with work might trigger disciplinary action against her, Ms Henderson forwarded this and later information about 300 other e-mails between her and Mr Nummy to her own internet service provider address and printed off the amorous e-mail at an internet café. Using a plain envelope with a postage stamp sent to the Nummys’ home address to convey her message to Mrs Nummy, Ms Henderson hoped to distance herself from Unitec.

[23] Although claiming that she sent this amorous e-mail to Mrs Nummy anonymously to attempt to persuade the latter that it was Mr Nummy, rather than Ms Henderson, who had instigated and/or maintained their romantic affair, I do not accept that was the defendant’s true motive. Rather, I have concluded that Ms Henderson, frustrated by what she believed to be Unitec’s inability or refusal to deal with the issue between the two women, set out to upset Mrs Nummy, perhaps hoping that the latter would make changes to avoid further encounters in the way that Ms Henderson believed Unitec had failed to do. Ms Henderson’s was the “*no alternative*” strategy, referred to in the e-mail sent to Ms Ewert, one of direct confrontation with Mrs Nummy.

[24] Also confirming my scepticism of the defendant’s explanation for sending this anonymous correspondence to Mrs Nummy was her advice to Unitec that she was considering sending to its CEO long taped conversations that she had recorded

which she said supported an allegation of sexual harassment of her by Mr Nummy. Ms Henderson announced this intention in an e-mail she sent to the conciliator, Ms Grant, on 10 February. She noted following her threat to unmask Mr Nummy in this way:

*I am at the point of sending John Webster [Unitec's CEO] the 9½ hours opr (sic) so, of tapes outlining DN's sexual harassment of me during the first six months of last year, and his candid opinions of Roger [Birchmore] and other staff, and snippets (sic) of unethical behaviour of the SMT. This will wipe me out once and for all. I understand this will bring the 'house of cards down' and that I will be injured in the collapse. And others if DN carries out his threat.*

[25] On 11 April 2005, Ms Ewert wrote back to Ms Henderson, saying that she understood Mrs Nummy had moved to another location on the campus, and indicating to her that she was making inquiries about this.

[26] On the following day, Ms Henderson e-mailed the conciliator Ms Grant, stating among other things:

*I am now taking matters into my own hands and to hell with the consequences. I have finished talking.*

[27] Ms Grant responded by e-mail to Ms Henderson within two hours of receiving the latter's communication and being justifiably concerned about its tone and contents. Ms Grant's e-mail warned Ms Henderson to think carefully about what she intended to do and take advice about what Ms Grant described as an "ominous" sounding course of action. Ms Grant invited a further approach from Ms Henderson for discussions about these matters. Although unknown to Unitec, matters had already gone too far to allow Ms Henderson to pull back from the brink.

[28] On Saturday 9 April the letter that Ms Henderson had posted to Mrs Nummy on the previous day had been delivered to the Nummys' home address. It was collected and opened by Mr Nummy who elected not to tell his wife anything about it. There was, therefore, no discernible response by Mrs Nummy over the following days as Ms Henderson may have expected.

[29] On Friday 15 April Ms Henderson posted Mrs Nummy another letter, again anonymously, addressed to her at her home. This envelope contained several pages being a "screen dump" or log of e-mails, totalling about 300, and the vast majority of which had been exchanged between Ms Henderson and Mr Nummy at the time or



times of their affair. The subject lines indicated that some of the e-mails had probably been private and intimate exchanges between lovers while others appeared to deal with business matters. Again, there was nothing in this communication to identify expressly the sender but, as with the first e-mail and perhaps even more clearly, it could be inferred that it had come from Ms Henderson. Again her claimed reason for sending this second e-mail was the same as for the first, to attempt to persuade Mrs Nummy that her husband was at least equally, if not more, responsible for the affair, something about which Ms Henderson seemed to have believed Mr Nummy had misled his wife.

[30] Again Mr Nummy collected and opened the mail on Saturday 16 April although, on the following day, he told Mrs Nummy about both letters and showed her the contents.

[31] Following a telephone discussion with the Registrar, or persons at Unitec including Ms Ewert, both of the Nummys made formal complaints of harassment against Ms Henderson in separate letters to the Registrar.

[32] As a result of receiving the Nummys' complaints, the Registrar, Ms Ewert, delegated Ms Hawke to conduct a disciplinary inquiry. Although the Nummys' letters contained a number of other complaints in addition to the two letters received by them in April 2005, these other allegations concerned incidents that Unitec regarded as too historic or that had been investigated by it previously and resolved. So, for example, the Nummy allegations that in mid-2004 Ms Henderson had corruptly used a recorded conversation to obtain appointment to a new position of authority, that she had sent a threatening communication about that appointment and, in mid-August 2004, had sent threatening and intimidating notes and offensive items to Mrs Nummy, were not the focus of Ms Hawke's inquiry. It addressed only the 8 and 15 April 2005 letters. So, too, were excluded from her inquiry an allegation of assault by Ms Henderson on Mr Nummy at work, a complaint of a threat by Ms Henderson, and a statement that protection was sought from the further "attacks" by Ms Henderson anticipated after the formal complaint of harassment was made known to her. Although not investigated as incidents of misconduct by Ms Henderson, these other allegations against her illustrated the seriously dysfunctional relationships between the three staff members.

[33] On 19 May 2005 Ms Hawke met with Ms Henderson handing her a letter of the same date which set out relevant portions of the Nummys' complaint letters but omitted any reference to the other items in them that Ms Ewert had directed not be investigated. The letter concluded by asking Ms Henderson to attend a meeting with Unitec management representatives on 25 May to discuss these matters. Ms Henderson's immediate response to Ms Hawke was to say that her own numerous complaints against the Nummys had not been actioned and that she had been told that nothing could be done. Ms Henderson made an explanation that she had dealt with these issues "*outside Unitec*" and to make Mrs Nummy aware that her husband had instigated the affair(s) rather than she. She also alleged to Ms Hawke that Mrs Nummy had harassed her.

[34] At the next scheduled meeting which took place on 27 May, Ms Henderson was accompanied by an employment advocate. She admitted sending the two envelopes and their contents to Mrs Nummy in April. Ms Henderson claimed that she had asked Unitec to do something about Mrs Nummy's presence on the campus but that the employer had stalled and done nothing. Ms Henderson claimed that she had an agreement with Unitec in November 2004 that Mrs Nummy would be moved but that Unitec's failure to comply with this agreement caused the defendant to send her first envelope to Mrs Nummy on 8 April. The defendant offered the same explanation about the second letter, adding that despite the anticipated receipt of the first, Mrs Nummy had still not been moved. Ms Henderson did not accept that she had attempted to threaten Mrs Nummy and produced, in the course of this meeting, a written reply to the allegations. The meeting concluded with Ms Hawke's advice that she would interview others involved including the conciliator and that if new matters were raised in these interviews, she might need to speak with Ms Henderson again.

[35] Ms Hawke undertook these further interviews promptly. They were fully recorded by a stenographer. Before interviewing Ms Grant who was clearly an important person in Ms Hawke's inquiry, the latter asked the conciliator to forward all written information about these matters to her. Ms Grant did so but by 30 May and consistently with the instructions she had received from the Registrar, Ms Hawke determined that the relevant events were those of the weeks leading up to the

sending of the first letter and concerned Ms Henderson's expectation of Mrs Nummy's relocation.

[36] In the course of her inquiries and on 2 June 2005, Ms Hawke interviewed Mr and Mrs Nummy. It is clear that they raised new complaints in this interview. I find, however, that these were not acted upon or relied upon by Ms Hawke. In the course of her interview Mrs Nummy conceded that Ms Henderson could have had the impression that Mrs Nummy would be located elsewhere but that this could not have been done practicably.

[37] On 3 June Ms Hawke interviewed both Ms Grant and Mr Birchmore and, on 7 June, Ms Ewert. The Registrar emphasised that the question of Mrs Nummy's relocation was a separate process but with potential collateral benefits and that Ms Ewert had advised Mrs Nummy not to go to Ms Henderson's building too often.

[38] Over the course of the new few days, Ms Hawke interviewed other people who had knowledge of relevant events and, on 8 June, met the acting HR manager, Ms Cullen, and had another meeting with Ms Ewert. There followed a further meeting with the Nummys.

[39] Ms Hawke concluded that nothing relevant to her terms of reference of inquiry or that was new had been raised by these further interviews so that nothing further required disclosure to Ms Henderson at another meeting. Ms Hawke considered carefully what she had ascertained and what she should do about this.

[40] Accordingly, on 16 June Ms Hawke prepared a letter of dismissal that was presented to Ms Henderson on the following day, 17 June. It sets out the reasons for Unitec's dismissal of the defendant materially as follows:

1. *Following our meeting on 27 May 2005, attended by you and Mark Nutsford, and by me and Guy Sinclair, and my subsequent communications with you, I write to advise you of the outcome of my investigation. It is my decision that you be dismissed without notice for serious misconduct. The dismissal is therefore effective from 5pm this evening, Friday, 17 June 2005.*
2. *The reasons for my decision to terminate your employment without notices are as follows:*
  - (a) *You have accepted, and I have found, that you did send two pieces of mail anonymously to Pamela Nummy at her home address in April 2005.*

- (b) *I have considered all of the relevant circumstances and found that this conduct amounts to behaviour that caused unreasonable distress to a staff member, amounted to improper use of property belonging to Unitec and amounted to intimidation of a staff member.*

*In relation to the improper use of property belonging to Unitec, I have found that the copies of the emails sent to Pamela Nummy originated from Unitec's email system and therefore transference or copying of them involved the improper use of property belonging to Unitec.*

- (c) *I have considered whether there has been a breach of Unitec's Harassment Policy and found that your actions did involve the use of written language directed at another employee which was intimidating or threatening in nature and was repeated.*

- (d) *In considering what disciplinary action was appropriate I have considered your description of events and reasons for taking the action you did. I do not accept those reasons are entirely accurate as they are not consistent with the content of the emails. The type of emails sent were clearly going to have the effect of aggravating the issues between Pamela and David Nummy and yourself. You did not write any note going with the copies of emails explaining why you had sent them and you knew that Pamela Nummy would know that they were from you. In addition, while I accept that you have complained previously about Pamela Nummy's presence and behaviour, I do not accept that anything you have complained about in the past, amounts to a suitable explanation for your letter.*

- (e) *I believe you have had a reasonable opportunity to state your case and to explain why you should not be dismissed and that a full and proper procedure has been followed, without predetermination by me investigating this matter and reaching a decision.*

- (f) *I believe that the conduct described above is destructive of the necessary relationship of trust and confidence between you and Unitec, therefore justifying dismissal.*

### **Decision – Substantive justification**

[41] The test of justification for Ms Henderson's summary dismissal is whether the investigations conducted by Unitec, and the decision to dismiss, were what a fair and reasonable employer would have done in all the circumstances viewed at the time of the dismissal. Such decisions must be made on an objective basis: s103A Employment Relations Act 2000.

[42] First, I address Unitec's conclusion that the sending of the envelopes to Mrs Nummy amounted to misuse of the employer's property by Ms Henderson. The employer relied upon this ground, amongst others, in dismissing Ms Henderson.

[43] I agree completely with the Employment Relations Authority that Ms Henderson's use of an intimate e-mail sent between her and Mr Nummy and vice versa and her use of an electronic list of e-mails that Mr Nummy had sent her on Unitec's e-mail system, could not reasonably have constituted a misuse of Unitec's property in its e-mail system as it is alleged. The plaintiff did not assert that it was a misuse of the e-mail facility for Mr Nummy and Ms Henderson to communicate intimately, even very frequently as it appears Mr Nummy at least did. Unitec had no effective policy about misuse of its electronic mail system and I agree with the Authority that its categorisation of Ms Henderson's sending of the two envelopes to Mrs Nummy as such, was untenable. A reasonable employer in all of these circumstances would not have so concluded. So one of Unitec's grounds for dismissal is unsustainable.

[44] However, I find that the plaintiff was justified in concluding that Ms Henderson's conduct in sending the two envelopes and their contents to Mrs Nummy constituted harassment of another member of staff and was serious misconduct. The plaintiff was justified in concluding that Ms Henderson's explanation for doing so was untrue or at least insufficient. I agree with Unitec, from the evidence seen and heard by me, that Ms Henderson's true or at least predominant motive was not to seek to persuade Mrs Nummy of Mr Nummy's guilt or complicity in their affair. Rather, it was, at least predominantly, to bring pressure to bear on her (and indirectly Mr Nummy) and to resolve a situation at work that Ms Henderson resented and believed that Unitec was unwilling or at least unable to resolve to her satisfaction. It was the start of an insidious campaign against the Nummys personally. As Ms Henderson's own contemporaneous e-mails to others confirm, she appreciated not only its improper nature, but also the risks that she ran by doing so and accepted.

[45] The nature of the material posted to Mrs Nummy by Ms Henderson and the method of doing so were, in all the circumstances of the case, harassment of other staff members as defined in Unitec's policies prohibiting such conduct. Although Ms Henderson asserted that her removal of these materials from Unitec's

environment protected her against what she clearly anticipated would be the negative reactions of the Nummys and Unitec, that cannot reasonably have afforded the defendant a shield with which to trump these allegations of unacceptable conduct. Constraints on employee conduct such as the prohibition of harassment of colleagues cannot be limited either to the physical confines of a campus or to the working hours in an academic year. To find otherwise would be to license illogically behaviours that, although no different, depended for their enforceability on place or time. Unitec cannot have intended, and its policies and codes of conduct cannot reasonably be interpreted, to have prohibited harassment of students or other staff only during certain hours and/or when some or all of the people were on campus. When so viewed, the absurdity of such distinctions is obvious. Applying another test (“but for”) to the connectedness of harassment or intimidation to the employment relationship, the defendant would not have done what she did to Mrs Nummy had they not both been Unitec employees. Ms Henderson’s belief that she might somehow assume a cloak of invincibility by the way in which she sent the material to Mrs Nummy, is neither credible nor reasonable.

[46] Although, on the one hand, the material posted by Ms Henderson was not intrinsically offensive or intimidating or threatening, and indeed might be said to have been of an affectionate nature (at least when first created), it cannot be viewed in such splendid isolation. Intimate correspondence between lovers can, after the end of the affair and a subsequent acrimonious relationship, be misused as weapons of revenge and intimidation. That is no less so when such items are sent deliberately to someone in Mrs Nummy’s circumstances. It is, in my assessment, more probable that the material was sent by Ms Henderson to Mrs Nummy not, as the former claimed, to right an injustice of deception about responsibility. Rather, Ms Henderson did so in a self-help attempt to strike back at someone whom she perceived to be harassing her when, despite Ms Henderson’s earlier lawful and reasonable attempts to persuade Unitec to move Mrs Nummy elsewhere on the campus, these had failed in the defendant’s view.

[47] The Nummys’ self-reported reactions to the receipt of this material could reasonably have been those of which they complained to Unitec. Even allowing for a significant measure of responsibility for the situation that Mr Nummy must accept, Unitec’s code of conduct, that all three employees had been constantly reminded of

and encouraged to comply with, made such behaviours unacceptable. Not only was it intimidatory towards Mr and Mrs Nummy but Ms Henderson's conduct was corrosive of the trust and confidence that Unitec was entitled to have in the defendant as an employee. Unitec was entitled to conclude that it was intolerable to have one employee behaving towards other employees in this manner.

[48] I am satisfied that Unitec was entitled to conclude that Ms Henderson had engaged in this conduct for reasons other than she offered by way of explanation and had done so deliberately and aware of the likely consequences to her as indeed transpired. Although dismissal from a long-held academic position was a drastic outcome for Ms Henderson and had brought about a significant and probably long-term loss of income to her, what she did was calculated and done in the knowledge of the probable consequences and, nevertheless, in disregard of them.

[49] Ms Henderson had set out (albeit belatedly) on a campaign to harass other employees and to undermine Unitec's efforts to achieve a balanced solution to a difficult staff problem not of its own making. Dismissal was not only an option reasonably open to the employer but, following the s103A test, I am satisfied that it is what a fair and reasonable employer would have done in all the relevant circumstances at the time. But what might be termed substantive justification for the decision to dismiss is only one of two equal elements that s103A requires to be considered by the Court. The other, that may be termed procedural justification, is now given equal prominence in the legislation. So while I have determined that a fair and reasonable employer in Unitec's circumstances would have dismissed Ms Henderson for deliberately harassing and intimidating other staff in full knowledge of the wrongfulness of this conduct and of its consequences, I must nevertheless also be satisfied that a fair and reasonable employer would have reached this conclusion in the manner in which Unitec did.

### **Decision – Procedural justification**

[50] Dealing first with the employer's response to the complaints received from Mr and Mrs Nummy, I am satisfied that in many respects, Unitec's investigation was fair and lawful but in others, it failed to meet that standard.

[51] Unitec neither provided copies of the letters of complaint against Ms Henderson to her, nor disclosed the full extent of the serious allegations that the

Nummys had made. In many cases this lack of candour would be inimical to fair dealing with an employee. In this it was, however, reasonable because I am satisfied that the employer did not rely at all upon those other allegations of which it did not tell Ms Henderson. Indeed, it was to her advantage that Unitec limited the scope of its inquiries and it must be judged on the fairness and reasonableness of this limited process. Although it will probably be rare that an employer's decision not to disclose adverse material to an employee is a neutral factor, let alone one that has advantaged the employee, this is one of those rare cases.

[52] Next, although Ms Hawke interviewed Ms Henderson about the Nummy allegations Unitec had elected to pursue, she subsequently interviewed a range of other persons with relevant information. These included both Mr and Mrs Nummy who made further fresh allegations against Ms Henderson in the course of Ms Hawke's two interviews of them. There were also persons interviewed by Ms Hawke who added to Unitec's information but in ways that were favourable to Ms Henderson's position. Notes were made of each of these several subsequent interviews conducted by Ms Hawke. Unitec did not, however, even tell Ms Henderson of the fact or outcome of these interviews, let alone provide her with copies of the notes of them or allow her to respond to issues affecting her situation that had emerged from these interviews. Rather, Ms Hawke determined both that Ms Henderson had been guilty of serious misconduct in employment and that this warranted summary dismissal. This is likewise a failing that might, in many cases, be fatal to the fairness of the process. But in this, the essential acts of harassment were admitted and other information gleaned in the inquiry did not affect these.

[53] Next, arguably contrary to Ms Hawke's own advice to Ms Henderson in the letter confirming dismissal, I find that Ms Henderson had not been given an opportunity to say why she should not have been dismissed. An employer acting fairly and reasonably in all the circumstances should have given Ms Henderson this opportunity, as Unitec appeared to consider (erroneously) it had.

[54] Unitec was subject to statutory procedural obligations in its inquiries into the complaints against Ms Henderson and in the decision making process that culminated in her dismissal. Section 4(1A) of the Employment Relations Act 2000 required Unitec (and also Ms Henderson) to be responsive and communicative as part of being active and constructive in maintaining a productive employment



relationship. In particular, s4(1A)(c) required Unitec, when proposing to make a decision that would, or would be likely to, have an adverse effect on the continued employment of Ms Henderson, to provide her with access to information relevant about its decision and an opportunity to comment on the information before the decision was made.

[55] While in many cases a discrete opportunity for an employee to address the possible consequences of a finding of misconduct would be necessary as an integral part of a fair process, this case is an exception for two reasons. First, the comprehensive procedures that Unitec bound itself to follow did not so provide. Second, and no less importantly, the consequences of Ms Henderson's admitted misconduct in sending the two letters to Mrs Nummy were canvassed at the first substantive meeting at which Ms Henderson was represented by an employment advocate. So, although ideally, Unitec should have allowed Ms Henderson to know of its conclusion of serious misconduct and to have had input into the question of sanction for it, this breach of the requirement of fair process was neither particularly serious nor, in my assessment, would have affected the outcome of dismissal had it been given by Unitec and taken by Ms Henderson.

[56] Do Unitec's failures to investigate these allegations fairly and reasonably, cause what might be otherwise categorised as a substantively justified dismissal to be unjustified? Section 103A requires the Court to consider both elements to standards of fairness and reasonableness although I do not understand Parliament to have altered the long-established case law that fairness and reasonableness must be assessed broadly and not by the application of inflexible principles by minute and pedantic scrutiny. Put another way, even if in some instances over a long process, the employer might be found to have failed to meet all ideal standards of a fair and reasonable employer, this will not necessarily mean that the resultant dismissal that may itself have been justified, will thereby be declared to have been unjustified and that remedies should be awarded accordingly. As has been accepted in judgments of this Court<sup>3</sup>, the new s103A test does not mean that the Court will substitute its own decisions for those of the employer. So it is not a question of how any individual

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<sup>3</sup> *Air New Zealand Ltd v Hudson* (2006) 3 NZELR 155; *Fuiava v Air New Zealand Ltd* (2006) 4 NZELR 103.

Judge would have dealt with the case as employer. Rather, the Court must apply the standards of a notional fair and reasonable employer, in the particular circumstances of the parties, on an objective basis and at the time of the relevant events.

[57] Set against these process failures or omissions by Unitec must be what I assess to have been an otherwise thorough and deliberative investigation of the complaints against Ms Henderson. Restricting the range of complaints to the assembling of the two letters to the Nummys benefited Ms Henderson. The omission of a number of other serious allegations of harassment made by the Nummys limited the risk to which she was put in her employment. Ms Hawke's inquiries on behalf of Unitec were wide-ranging, thorough and well documented. Ms Hawke set out her reasoning at the time making transparent her thought processes that took into account elements favourable to Ms Henderson. There was no question that Ms Henderson had sent this material to Mrs Nummy: she admitted doing so. Ms Hawke evaluated carefully Ms Henderson's professed reasons but rejected them as I also have in light of other contemporaneous evidence. Ms Hawke was also entitled to take into account, as she did, Ms Henderson's own e-mail admissions that she knew what she was doing, the risks inherent in doing so, and her deliberate disregard of those risks.

[58] In all these circumstances the need for a scrupulously rigorous and fair investigation was less critical than in other cases although nevertheless largely undertaken by Unitec. It follows that its failures to attain consistently the highest standards of fair procedure would not have affected the outcome for Ms Henderson.

[59] To have concluded that the flaws in Unitec's investigative process caused the subsequent dismissal to be unjustified would have been to scrutinise that process minutely, pedantically and without sufficient regard to its overall fairness and reasonableness. Such an approach is not mandated by s103A. Alternatively, even if such an examination may have resulted in a finding that the process was unfair or unreasonable, I am satisfied that even if appropriate standards had been met by the employer, it would nevertheless have dismissed Ms Henderson. Finally, even if dismissal had been unjustified, Ms Henderson's conduct that gave rise to the circumstances in which she was dismissed was so significant and substantial that she would have been unlikely to have received any remedies.

[60] Despite the arguable procedural failures or omissions identified, I am satisfied, on an objective basis, that the manner in which Unitec acted in investigating and deciding the complaints against Ms Henderson was what a fair and reasonable employer would have done in all the circumstances. Her dismissal was justified.

### **Remuneration arrears**

[61] The parties addressed this part of Ms Henderson's claim as a question of fact. Unitec says that it sent a letter dated 20 May to Ms Henderson offering to vary her individual employment agreement including to increase her remuneration with effect from 1 February 2005. Unitec requested that a copy of the letter be signed and returned by 30 May but that when Ms Henderson failed to do so, it considered that she had rejected its offer of increased remuneration and proposal for other variations to her terms and conditions of employment and is now not entitled to the higher rate of salary. Ms Henderson's case is that she did sign and return Unitec's letter within the time prescribed and although she included an obviously mistaken date associated with her signature, this was attributable to her state of high anxiety and distress at the relevant time.

[62] I accept Ms Henderson's evidence that she did return the offer signed within the prescribed period. I accept too that Unitec did not receive this. It is probable that this letter was mislaid and there is no suggestion that Unitec deliberately concealed its receipt of the letter in any connection with the broader dispute with Unitec that was then developing.

[63] The question of Ms Henderson's entitlement to this increased remuneration does not need to be determined on this basis however. That is because clause 7.1 of the parties' employment agreement provided: "*Remuneration and any other benefits paid under this contract will be determined by the employer and will be reviewed annually.*"

[64] Unitec made that determination, that is that Ms Henderson should be paid an increased annual salary. The contract did not provide that its receipt by her would be conditional upon her agreement. Rather, the contract provided that it would be a matter for unilateral determination by the employer. Its letter of 20 May to Ms Henderson amounted to advice to her of this unilateral determination and she was accordingly entitled to the increased annual salary of \$68,539 as from 1 February

2005. It was not open to Unitec, under the terms of the 1997 contract, to make liability for payment of this sum conditional upon her agreement to other variations to the contract. Ms Henderson is entitled to succeed in this aspect of her claim. If the parties cannot agree on the amount of the arrears due, leave is reserved to apply for these to be fixed. However, because of my conclusion that, overall, Unitec's dismissal of Ms Henderson was justified, there can be no other remedies for her.

### **Costs**

[65] Costs were reserved but, as I understand the position, these have not been determined in the Employment Relations Authority. Because, in both respects, this judgment reaches different conclusions than did the Authority, it will be appropriate for this Court to deal with questions of costs between the parties.

[66] Because there may have been offers of settlement without prejudice except as to costs as sometimes happens in cases such as this but which are, for good reasons, not disclosed to the Court, I will reserve costs formally. In the absence of any such offers of settlement, however, I am at present disinclined to make any award for the following reasons. First, Ms Henderson has succeeded, albeit in a relatively minor aspect of her case. Second, although Unitec has succeeded in establishing that it dismissed Ms Henderson justifiably, several aspects of its procedure in doing so were deficient and indeed caused me to consider seriously finding dismissal to have been unjustified on those grounds. In these circumstances, and subject to any considerations of which I am not aware, I consider that the most just course as between the parties in both the Employment Relations Authority and in this Court will probably be to leave the parties to meet their own costs without contribution from the other.

GL Colgan  
Chief Judge

Judgment signed at 11.30 am on Monday 19 March 2007