



DYHRBERG DRAYTON
EMPLOYMENT LAW

26 August 2022

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Tēnā koe

Summary of the Ministry of Foreign Affairs and Trade Independent Review Report

- 1 This letter provides a summary of the Ministry of Foreign Affairs and Trade Independent Review Report (**the Review**).

Background

- 2 In July 2021, a junior staff member of the Ministry (**the Complainant**) made a complaint to the Ministry alleging a senior Ministry staff member (**the Respondent**) behaved inappropriately towards her. The Complainant made allegations the Respondent made inappropriate comments of a sexual nature and touched her without her consent. An independent investigation into the allegations was conducted and the findings were reported to the Ministry in September 2021.
- 3 The Ministry has commenced a programme of work centred around Positive Workplace Cultures. As part of this, the Ministry wanted to continue to evolve its approach to these issues. The purpose of the Review was to assess the approach that was taken by the Ministry in its response to the complaint and identify opportunities for improvement in future cases.
- 4 The Review was completed by Steph Dyhrberg, Partner of Dyhrberg Drayton Employment Law with the assistance of Paddy Miller, Lawyer.

Executive Summary

- 5 After reviewing all of the available information and interviewing key participants, my assessment is that although largely consistent with its internal policies and common HR practice, the Ministry's approach to the complaint and the independent investigation were not complainant-centred or best practice.
- 6 The managers who received the disclosure and supported the Complainant were well intentioned and caring but had not been trained in how to deal with such a disclosure. PEP were committed to

running a robust process, but lacked experience and insight about how best to support the Complainant and the process. They were guided by legal advice but that at times resulted in an overly formal and less empathetic approach to the Complainant than is desirable.

- 7 PEP and managers cared about the welfare of the people involved. They took appropriate steps to put in place an independent investigation. They believed they were providing adequate support to the parties to the complaint. However, the participants did not feel well supported. The initial measures to ensure the Complainant's safety were inadequate.
- 8 The Ministry was overly concerned with protecting the Respondent's reputation and the Ministry's interests. Confidentiality and anonymity were enforced to the point the Complainant was isolated, silenced and disempowered.
- 9 Assumptions were made about what was in the Complainant's interests and what she wanted. The Complainant was not listened to at times. There was inadequate understanding of the Complainant's vulnerability and fears for the impact on her career of making a formal complaint. This meant offers of support, paid time off etc were not effective. The Complainant's workload was not proactively managed and there was insufficient co-ordination between the Complainant, her manager and PEP.
- 10 The person who became the Complainant's support person was a manager as were other people who were trusted by the Ministry to offer support to the Complainant. The Complainant should have had a support person of her own choosing and the offer of paid representation and advice. This would have provided the Complainant with much better support and may have avoided some of the events that disempowered and harmed her.
- 11 The investigation process was solely focused on the Complainant's allegations, despite indications a wider and more thorough process was required. The Ministry should have been more proactive about ensuring there was a thorough investigation, including expanding the scope to look into another potential complaint raised early in the process.
- 12 The process did not take an inordinate time (as investigations commonly become protracted), but the reasons for delays were not well communicated, which caused the Complainant considerable anxiety and distress.
- 13 There was confusion about the extent to which the Complainant would be consulted before final decisions about the outcome were made. This increased tension and stress for the Complainant and her support person. The support person was viewed critically for advocating strongly on the Complainant's behalf. That perception was not fair.
- 14 The internal and media communications from the Ministry did not give sufficient weight to the Complainant's interests. Consultation with the Complainant was meaningless because no changes were made based on her feedback.
- 15 The Ministry is willing to make changes required to improve its workplace culture and practices around preventing and addressing sexual harassment. This will require top down education, training and utilising expertise to adopt a genuinely complainant-centred approach.

Future focus: the need for a new paradigm

- 16 The Ministry's approach was well intentioned and people were alert to the fact the Complainant should be supported and her voice heard. There was a genuine commitment to running due process and concluding a formal process, with accountability for the findings.
- 17 Many of the actions of which I am critical would have been based on policy, standard HR or government agency practice and legal advice. There would have been assessments of how to mitigate perceived risks to the Ministry.
- 18 It must be remembered that legal advice is just that: advice. The decisions and legal responsibilities of good faith and ensuring a safe and healthy workplace are those of the employer. In this case, the way the Ministry chose to do things resulted in the Complainant's feelings of being objectified and traumatised, adverse publicity for the Ministry, and this review.
- 19 The experience the Complainant had is far from uncommon in this country and others. In some respects, this process was 'better' than in many cases. But it was not the best it could be and it caused the Complainant harm.
- 20 I have assessed this process and the ways in which it could have been better from two perspectives. First, I have had many years of experience applying employers' policies (many of which I have written or reviewed), protecting the interests of employers and mitigating perceived risks.
- 21 Second, I have increasingly represented and supported victims of sexual harm at work, hearing their stories of how traumatising the standard approach and processes are, and educating myself from research and collaboration with experts in the field of sexual harm prevention and treatment about how we collectively can do better.
- 22 Doing better, i.e. supporting and empowering complainants, rather than re-traumatising them, requires far greater recognition of the enormity of the challenges for anyone who has experienced sexual harassment in the workplace. Education is needed to bust myths about who can be a harasser, who can experience harassment, how they may react and that there is no such thing as a 'perfect' victim.
- 23 The Ministry's Speak Up Safely policy, harassment prevention and similar policies and procedures are important, but most are too detailed, do not use plain language and are seldom published in anything but English. They must be fit for purpose from the perspectives of everyone involved. The perspective of vulnerable or marginalised people in the workplace about how those policies and procedures are written and how they work would be useful.
- 24 There needs to be much greater recognition of the power imbalances in workplaces, especially those with rigid hierarchies and/or gender imbalances.
- 25 Deep and wide culture work is required to ensure senior leaders and managers role model appropriate conduct at all times, and there will be accountability for unacceptable conduct, no matter who you are and how important you may be.
- 26 There has to be genuine commitment to educating the entire workforce from the Executive Leadership team down about what respectful behaviour at work looks like and how to insist on adherence to those standards. Those conversations need to be frequent, with clear messaging.
- 27 People at work have to know that they can speak up, confident in the knowledge they will be treated with respect, their safety and wellbeing will be a priority and they will be centred in the process. Much more work needs to be done at the start of a process to assure people like the



- Complainant that they are doing the right thing by speaking up, they will be supported and will not be judged, punished or disadvantaged for making a good faith complaint. The potential complainant needs to be well informed about the options, the nature of the process, their part in it and who they can contact during the process.
- 28 The processes for addressing sexual harm allegations need to be refocused to ensure greater representation for complainants and that their views and rights are understood and respected. Independent support, advice and advocacy make a huge difference to their experience and the outcome.
- 29 Excellent initial triage and planning, including assigning responsibility for contacting parties, providing updates and ensuring support is provided will avoid many problems. Everyone who may have to deal with a disclosure or a complaint requires training and access to specialist advice that centres the complainant's perspective.
- 30 The employer must remain open to the possibility that there may be more than one complainant and there may be witnesses. Careful communications are required to identify people who may be able to contribute or who may wish to raise an issue themselves. They might need a meeting to discuss the process, support, protections and why their participation matters.
- 31 The priority accorded to the natural justice and privacy interests of respondents is understandable. However, there is a balance to be achieved. The complainant has the right to be kept informed, especially about the respondent and other witnesses' responses, and the reasons for any redactions. They should get updates about progress and the reason for any delays.
- 32 I note the Ministry did the right thing in this case and informed the Complainant about the outcome. Many complainants are never even told whether their complaint was upheld. This disempowers them, particularly if there is a repetition of the behaviour. They feel there is no point raising it because as far as they know 'nothing happened' last time.
- 33 Insisting on confidentiality to the point of secrecy can do harm. It can isolate and disempower the complainant and prevent other people speaking up. It can seek to silence people from speaking about their lived experience. It may be inconsistent with ensuring accountability.
- 34 The communications at the end of the process need to be accurate and balanced. The complainant's viewpoint and feelings need to be considered and respected. If a finding is made that harassment occurred, it is highly problematic to treat the harasser as the victim.
- 35 Respondents are not always well served by the current policies and processes. The Respondent's support person contributed to the Review by agreement. That person did not feel there was sufficient support for the Respondent or an adequate focus on his welfare. The support person was also concerned a restorative approach was not attempted at the outset.
- 36 Restorative approaches in sexual harm cases are not without risk. If a respondent acknowledges fault, i.e. they admit the conduct, are genuinely remorseful and wish to make amends, that is something to explore with great care. The complainant would have to be very well supported, feel safe and be willing to engage in the process. Many complainants are not prepared to be in a room with the respondent, which is entirely reasonable. Some are prepared to do so, if well supported.
- 37 The Complainant was certain she wanted a formal process, not just for her own sake but for the safety of others. It would not have been appropriate to explore a restorative process as an alternative to either a formal investigation or disciplinary action.

38 The Ministry, as with all workplaces, needs to have clear conversations and review policies about alcohol and social functions associated with work. Alcohol is not the cause of sexual harm, and it is not an excuse for misconduct. But the risks, particularly to young people, in social contexts where there is a lot of drinking are well known. Managers and senior leaders have a health and safety obligation to ensure drinking is not unsafe or creating risks. Someone at work functions needs to be the responsible, sober adult.

Conclusion

39 The process the Ministry undertook in many respects conformed to its internal policies and procedures, and typical approaches to such complaints. However, it was not complainant-centred. It did not adequately respect and prioritise the interests and welfare of the Complainant. That caused her harm.

40 I want to thank the Ministry for the opportunity to undertake this review. Everyone involved had a genuine desire to make positive improvements at the Ministry. There was real regret on the part of the PEP personnel I spoke to about the impact of the process on the Complainant. However, in my view PEP held some unhelpful views about confidentiality, control, the role of a support person and how a complainant should participate. Those views persisted into the interview process. That requires some self-reflection in light of this assessment.

41 Lastly, but most importantly, I want to thank the Complainant. She is, like all the junior Ministry staff I have ever known, smart, loyal, hardworking and ambitious. She is also courageous and resilient. The Complainant and her peers are recruited because they are of a very high calibre. They deserve the best working environment, in which they can thrive and be safe.

Nā māua noa, nā

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