Mr X and the nurse

Getting the procedure right is the key, as a district health board recently discovered. **Paul Robertson** looks at how a flawed investigation resulted in an award for hurt, humiliation and distress.

A RECENT EMPLOYMENT Relations Authority decision illustrates the difficulties an employer has in "getting the procedure right" when investigating alleged misconduct. It also illustrates the problems that an employee can have even when they are successful with their claim.

The case concerns a registered nurse who was working in a specialist unit for a district health board. For some years she had been not getting on with a fellow employee, Mr X. She complained about harassment by Mr X.

The employer first became aware of the concerns when Mr X approached a fellow employee seeking to gain support with his complaints about the nurse. That employee notified their line manager who investigated, and found that the complaints about the nurse were unjustified.

Mr X was directed to continue to work professionally and abide by the DHB's code of conduct.

The nurse was unaware of the complaints until after the caution was given to Mr X. When she heard about the complaint, she sent in her own letter of complaint listing such things as Mr X leaving notes on her desk pointing out her failure to turn off her computer, his practice of keeping notes about her actions to build a case against her, being insensitive in his comments about the death of a patient and encouraging other staff members to complain about her.

THE DHB INVESTIGATES
The DHB undertook an investigation involving a senior staff member and an external investigator. Their preliminary findings were that the complaints were historic, dating back to 2012, or related to the more recent incident where Mr X had already been investigated and told to be more collegiate.

The DHB viewed the problem as a breakdown in their relationship and held there was insufficient evidence to justify the matter being investigated to a disciplinary level.

The nurse was upset with the decision and in December 2014 she raised a personal grievance about the investigation to that point. She referred to such things as not all witnesses having been interviewed and the failure of the DHB to consider whether the individual actions amounted to harassment when considered together.

The investigators in their final report concluded that only the allegation Mr X had solicited other staff members in an effort to get rid of the nurse should be investigated. That was investigated, but they decided to only interview Mr X. Mr X expressed some remorse for his actions and the DHB decided to not take the investigation further, but instead to encourage the nurse and Mr X to resolve their differences.

ROUND ONE TO THE DHB
The nurse was dissatisfied with this outcome. She applied to the Employment Relations Authority alleging that she has been disadvantaged by the investigation. At the investigation meeting the DHB asked that all complaints subsequent to what was set out in the letter of December 2014 should be ignored. This is because no reference to any concerns amounting to a personal grievance had been raised after 8 December 2014. After reviewing the statement of problem and the witness statements the Authority agreed, and so only the concerns in the letter of December 2014 were investigated.

… AND THE NURSE WINS?
Referring to the complaints about the process adopted by the board/its investigators, the Authority member accepted that aspects of the investigation were flawed. These included the DHB's decision to focus on individual complaints and not the overall behaviour of Mr X, its failure to interview all possible witnesses and the overall failure of the DHB to investigate the allegations thoroughly.

The nurse was awarded $6000 for hurt, humiliation and distress. She is likely to have been considerably out of pocket in spite of this 'victory'.
Crush v Southern District Health Board [2017] NZERA Christchurch 117

PAUL ROBERTSON is a partner at Heaney & Partners in Auckland.