

Mrs Appleton for her to make an informed response to the complaints and allegations that have been made.¹

Background Facts and Evidence

[2] Mrs Appleton is employed as a tutor in the Centre of Language at Wintec, teaching English as a second language.

[3] Via a letter dated 10th December 2009, from Ms Jo Thomas, then Acting Head of the School of English Language, Mrs Appleton was invited to attend a disciplinary meeting on 11th December 2009. The evidence is that some complaints from students enrolled in the Intermediate Class B, were raised informally with Mrs Appleton, in a meeting attend by Ms Thomas and Ms Caitlin Feenstra, on 23rd October 2009. The letter of 10th December informed that Ms Thomas had; “... *received additional student complaints on 19 November 2009 through Meg Wang International China Desk Representative that are of a similar nature to the complaints received on 16 October 2009.*”

[4] Ms Thomas further informed, under the heading ***Serious misconduct and/or misconduct***, that two of the complaints related to the conduct of Mrs Appleton; specifically:

- *Using disrespectful comments about student’s countries. In particular, comments such as:*
 - a. *China is dangerous and communism is a bad thing;*
 - b. *Somalia is not a good place because of the presence of pirates; and*
 - c. *Taiwan is a separate country from China.*

One further matter under this heading referred to Mrs Appleton failing to inform her class “... *of the change to the test timetable despite Kate Flintoff asking you and you agreeing to inform your class of the change at lunchtime on 17 November 2009 to run the test on 18 November instead of 19 November 2009.*”

[5] Then under the heading: ***Performance***, Mrs Appleton was informed that Wintec wished to “*formally address*” eleven further complaints, four of which related to her interaction with another tutor, Mr Mohamed Shakoor. Mrs Appleton was informed that if the complaints were substantiated, there may be breaches of the Wintec standards of behaviour and the principles of professional practice. The letter

¹ I am now aware that since the investigation meeting, matters have deteriorated to such an extent that Mrs Appleton has now been dismissed and that my findings in this determination may now have limited relevance.

concluded that the outcome of the meeting with Mrs Appleton; “ ... *may be disciplinary action, up to and including termination of your employment without notice.*”

[6] On 11th December 2009, Mrs Appleton’s lawyer, Mr Scott, replied to the Wintec letter. Not surprisingly, he conveyed that given the substance of the matters that Mrs Appleton was expected to respond to, the request to meet on the day after receiving the letter, was; “*unfair and unreasonable.*” Mr Scott also informed that before a meeting between Mrs Appleton and Wintec could proceed, Wintec was required to provide:

1. *Details of the complaints, including who they are from and copies of any documentary evidence.*
2. *Any notes or statements from other staff members or students in relation to the allegations.*
3. *Further detail as to the allegations that will enable Liz to be able to make a full contribution to the process.*

[7] On 16th December 2009, Ms Sheryl Richards, the Wintec Senior Human Resources Advisor, forwarded to Mrs Appleton further information pertaining to the matters raised in the letter of 10th December. This material included:

- (a) A statement from Ms Thomas relating to student complaints and her meeting with two student classes (Intermediate B and pre-Intermediate) on 19th and 20th October 2009, and further student complaints raised by Meg Wang.
- (b) Details of an informal meeting with Mrs Appleton on 23rd October 2009 to discuss student complaints.
- (c) Details of a CDC² meeting with Mrs Appleton on 27th October 2009.
- (d) Details of the student complaints received from Meg Wang.
- (e) Details of the Intermediate Student Class issues arising from the meeting with them on 19th October 2009.
- (f) A list of action points arising from the informal meeting with Mrs Appleton on 23rd October 2009.
- (g) Notes of a CDC follow up meeting with Mrs Appleton on 17th November 2009.

[8] On Thursday, 4th February 2010, a meeting took place with Mrs Appleton and Wintec representatives, Ms Richards and Ms Thomas, along with the lawyer engaged

² Capability Development Cycle

by Wintec, Mr Hood. Mrs Appleton was represented by Mr Scott and Ms Singh, with Mr Appleton also present. The evidence of Ms Richards is that the meeting was aggressive and confrontational on the part of Mr Scott and it seems that Mrs Appleton did not respond to any of the allegations and simply left following what appears to have been a series of less than constructive exchanges.

[9] Later that day Mr Scott wrote to Wintec and informed that while Mrs Appleton wished to engage in the disciplinary process, she required further information: “*That is the names of the students and the specific complaints they had.*” Mrs Appleton required this information about the complaints; “*... so that she may put them in context for a full reasoned and rationale response.*” However, despite this, an urgent application was made to the Authority which was received on Monday, 8th February 2010. The parties attended mediation and following this, via a letter dated 18th February 2010 Wintec informed that:

At the outset of the disciplinary process, Wintec provided you with information that is more than sufficient to enable Liz to make an informed response to the allegations, the majority of which are performance-related. Liz has not identified any disadvantage if the individual students are not named and in any event, Wintec is not able to say which particular student made which comment.

Wintec also proposed as solution to the “impasse” whereby:

... the parties meet to discuss only the performance allegations listed in its letter dated 10 December 2009. Given that performance concerns are, by nature, less serious than allegations of serious misconduct and/or misconduct, Wintec expects that Liz will agree to meet with it to discuss the performance allegations, based on information presently in her possession.

[10] In the meantime, on 12th February 2010, the Authority set the case down for an investigation meeting to take place on 15th March 2010. On 4th March 2010, Wintec wrote again to Mrs Appleton indicating disappointment that there had been no response to the letter of 18th February and taking a somewhat more conciliatory position in that it was prepared to:

... downgrade the allegations of serious misconduct and/or misconduct to allegations of misconduct. We are obliged to advise Liz that if these allegations are substantiated, Wintec may take disciplinary action up to and including a first and final warning.

Wintec also provided statements from Mr Shakoor, Ms Meg Wang, Ms Feenstra and Ms Thomas, all related to several of the concerns that had initially been raised in the letter from Wintec to Mrs Appleton. There is no evidence of any response from Mrs Appleton and the investigation meeting took place on 15th March 2010.

Analysis and Conclusions

[11] In regard to the matters of concern raised by Wintec, in the letter to Mrs Appleton, dated 10th December 2010, essentially there is now only really one particular aspect of those concerns that Mrs Appleton requires further information from Wintec about.³ This pertains to the complaints from several Chinese students in regard to purported disrespectful comments allegedly made by Mrs Appleton regarding the political environment in China, its relationship with Taiwan and inferences that China is a dangerous country. Mrs Appleton requires Wintec to provide her with:

- (i) the names of the Chinese students who made the complaints; and
- (ii) the specific nature of the complaints.⁴

The reasons given by Wintec pertaining to why they cannot provide the information requested.

[12] Firstly, Wintec says that it does not know the names of the students who made the complaints. The evidence of Ms Thomas⁵ (which I accept) is that when she met with the two classes of students:

There were numerous students making comments, speaking over one another and adding to or reinforcing other's points. My focus was on asking them to clarify their meaning to make sure I understood correctly and taking a note of each point raised. At no point did it even occur to me to ask the names of each class member – I was speaking to the class – they were addressing me as the Head of the School and it was my job to listen.

Ms Thomas added further that:

... there was nobody who stood out as 'the one complaining.' It was very clear that these concerns were generally shared by the class.

[13] Secondly, the further evidence of Ms Thomas is that Wintec students have the right to complain anonymously and for students from Asian countries, it would be culturally inappropriate to be individually named as a complainant, and that to do so, would cause an “*extreme*” loss of face to the student and to their family and to the institution. Ms Thomas says that it has taken “*considerable courage*” for the students to complain to the extent that they have, as from her experience, the students must

³ It was agreed at the investigation meeting that upon receiving a written request from Mrs Appleton, Wintec would provide further statements from Mr Shakoor and Ms Flintoff. [See minute of the Authority dated 15th March 2010.]

⁴ As requested in the letter from Mr Scott to Wintec dated 4th February 2010.

⁵ The Director of the Centre for Languages.

have been concerned about their learning environment to do so. Ms Thomas adds; that apart from the cultural inappropriateness of naming the students, (if their names were known), it would be “*extremely damaging*” to the business of Wintec in the Chinese market. Ms Thomas says that:

The institutions Wintec has partner relationships with trust us to care for their students – we are very much loco parentis in their eyes. Chinese teachers also play a very parental role with their students and they expect a continuation of that care when they send their students to us.

And:

To have their children publicly named as complaining about a teacher would be deeply humiliating. Few parents would trust Wintec after that. This has the potential to seriously damage Wintec’s business with our China market.

[14] The evidence of Ms Thomas, as to the potential affects on the market for Chinese students, is collaborated by the evidence of Mr Stewart Brougham, Internationalisation Director for Wintec. Mr Brougham also emphasised various aspects of the student/teacher relationship in Chinese culture. Finally, Mr Brougham referred to the potential damage to the business that could result if a loss of good faith and trust were to result from placing students in an “adversarial” situation or where students were to be challenged by people in “authority.”

[15] Much has been made by both parties of the findings of Colgan J. in *Porter v Board of Trustees of Westlake Girl’s High School* [1998] 1 ERNZ 377. Of particular relevance to the arguments for both parties is that:

Generally also, the identity of the person or persons making the complaint of serious misconduct will be a very material fact without which an employee will be at an unfair disadvantage in first, knowing of the allegation and, second, in having an opportunity to respond to it. There may, however, be circumstances in which, although unfair to the employee, an employer is nevertheless justified in then withholding details of identity for **good reason** [emphasis added].

[16] Therefore, applying *Porter*; on the one hand, the identity of the students making the complaint of about misconduct by Mrs Appleton is a material fact without which Mrs Appleton could be at a “*material disadvantage*,” but conversely, the circumstances that Wintec has advanced for not revealing the identity of the complainants, including not actually knowing the names of the students, could be seen as a “*good reason*”.

[17] But any legal analysis of the respective positions is at best an academic exercise and at worst, entirely pointless, simply because it must be accepted that the names of the individual students are not known to Wintec hence, even setting aside

the cultural issues, which nonetheless should not be treated lightly, Wintec is (I accept) more probably than not, quite unable to provide the information sought by Mrs Appleton, in regard to the names of the students who made the complaints.

[18] In regard to the specific complaints made by the students, the statement of Mr Shakoor (1st March 2010) and the statements of Ms Wang (24th February and 3rd March 2010) provide a sufficient amount of information about the general nature of the complaints made by the students, for Mrs Appleton to provide a reasonable response to the obvious concerns of Wintec and I do not accept that they “parrot” the earlier information provided by Wintec, as submitted by Mr Scott. Nonetheless, it seems to me that the complaints are of such a disparate nature that it is difficult to see how Wintec could place sufficient weight on them, in a disciplinary setting, to rationalize a finding of serious misconduct. However, it is clear there are valid concerns regarding the interaction between Mrs Appleton and some students and that a proactive approach is required to ensure that Wintec and Mrs Appleton take corrective and preventative action.

[19] In this regard, I note the Wintec *Principles and Procedures: InformUs Student Feedback* document. Section A of this document provides that:

Regular feedback, such as compliments, suggestions, services requests, complaints and academic appeals is important to us to enable service delivery. [Emphasis added]

Then further, at clause 1.0 - *Principles of the Student Feedback Process*, we are informed of an electronic feedback system that logs, and tracks student feedback which presumably would include complaints. Consistent with the evidence from Wintec is an undertaking that:

In order to protect the privacy of all parties, investigations and correspondence will be treated as confidential by all concerned. Names of complainants will only be disclosed to Directors, Unit Managers, Heads of Schools and Programme Managers as appropriate. This policy and procedures operates within the parameters of the Privacy Act (1993).

There then follows at clause 2.0 – *Procedures for Feedback*, and at sub-clause 2.3, there is a five stage process. At Stage 1 of the process:

Complainants who are not comfortable to discuss a complaint with a member of staff may log their complaints at Stage 2 below.

Stage 2 allows for two particular methods for a student to lodge a complaint:

- (a) Using the InformUs web form (online or hardcopy); or
- (b) Writing a letter to the relevant Head of School/Manager.

There then follows details of what will happen after a complaint is lodged:

- *it is logged and progress tracked on the InformUs feedback system.*
- *it will be acknowledged within two working days of receipt.*
- *a report will be provided to the complainant within the next five working days setting out the result/progress of the investigation and the action that will be taken. If the investigation takes more time, the complainant will be notified by the Head of School/Manager and a new timetable agreed.*

[20] At Stage 5 of the process there is further information in regard to students referring the matter onwards, in the event that a complaint is not resolved. Particularly relevant to the circumstances of this case is that domestic students can refer the matter to the Office of the Ombudsman, while international students can contact the International Education Appeals Authority. The reason why I draw attention to this particular provision is that rather than some international students being treated differently than domestic students, as appears to be the general position espoused by Wintec, the internal complaint procedure appears to provide that all students have access to what appears to be, an effective complaints procedure, that allows for complaints to be made anonymously, if a student should so wish.

[21] It seems to me that had this procedure been followed, Wintec would have then been in a position to have identified more clearly the specific complaints being advanced by the students and progressed them according in accordance with sub-clause 2.3.1 of the procedure. My observations in this regard should not be interpreted as being overly critical of Wintec or that Mrs Appleton was treated unreasonably. I simply make the observation that Wintec have in place a feedback (including complaints) procedure that appears to be available to both domestic and international students and I suggest that all students should be made more aware of such, in order to avoid any future confusion as to how complaints should be processed, and more importantly, specific complaints should be more clearly identified (in writing) and progressed appropriately.

Determination

[22] I find that on the evidence available to the Authority, it was not possible for Wintec to provide Mrs Appleton with the names of the Chinese students who made complaints pertaining to Mrs Appleton. This is because I accept that Wintec do not know the identity of each student. In regard to Wintec providing details of the specific nature of the complaints, I conclude that the totality of the information made available to Mrs Appleton was adequate for her to provide, at the very least, an initial response for the consideration of Wintec. But I also make the observation that, because the complaints made by students were of such a disparate nature, and the manner in which this information was gathered appears to have been so tenuous, it is problematic as to how much weight could, in due course, be placed on it in a disciplinary setting.

Costs

[22] The parties are invited to resolve the matter of costs if they can. In the event they cannot, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The Applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority