

**YOUR ATTENTION IS DRAWN TO  
THE NON PUBLICATION ORDER  
ON PAGE ONE OF THIS  
DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 108/08  
5098814

BETWEEN                      PAUL BUCHANAN  
   Applicant  
  
AND                              VICE-CHANCELLOR,  
   UNIVERSITY OF AUCKLAND  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Ray Parmenter for Applicant  
   Shan Wilson for Respondent  
  
Investigation Meeting:     20 and 21 February 2008 at Auckland  
  
Submissions Received:    22 February 2008 from Applicant  
   3 March 2008 from Respondent  
  
Determination:              26 March 2008

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1] By consent, I order that the names of the student and staff member Dr Buchanan emailed in early 2007 and any evidence which could lead to their identification are not be published. This order is made under clause 10 of Schedule 2 of the Employment Relations Act 2000.

**Employment Relationship Problem**

[2] Dr Buchanan was appointed to Auckland University as a Senior Lecturer in Latin American and/or Environmental Politics with effect from 1 July 1997. He is recognised internationally as an authority on Latin American politics, US foreign and security policy, unconventional warfare, terrorism, intelligence collection and analysis, authoritarianism, democratisation, comparative labour relations and grand strategy.

[3] In July 2007 he was dismissed for serious misconduct. The University concluded that an email Dr Buchanan had sent to an international student was so serious that it undermined the trust and confidence the University had in Dr Buchanan as an academic staff member with specific responsibilities for student. That dismissal has been the subject of much media interest and is at the heart of this employment relationship problem. Dr Buchanan claims the dismissal was unjustified and is seeking remedies including reinstatement.

[4] Pursuant to section 103A the Authority must actively scrutinise Auckland University's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[5] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

[6] Although the Authority does not have unbridled licence to substitute its decision for that of the employer (*Dr White v Auckland District Health Board* [2007] 1 ERNZ 66) it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome (*Air New Zealand v Hudson* [2006] 1 ERNZ 415).

### **Relevant terms of employment**

[7] At the time of his dismissal Dr Buchanan's employment was governed by the University of Auckland Academic Staff Collective Employment Agreement 2006-2007.

[8] The collective agreement requires the University to act as a good employer in all dealings with its employees. The collective agreement allows termination of employment without notice for serious misconduct or on the conviction of a criminal offence.

[9] Further, notice of one month may be given if an employee proves to be incompetent, if an employee breaches any of the terms of the agreement or if the

employee becomes incapacitated or of unsound mind and is unable to continue to perform the required duties.

[10] Schedule 3 of the collective agreement, sets out the disciplinary procedures to be followed when dealing with academic staff. Serious misconduct is defined as:

Misconduct which is so serious as to warrant summary dismissal and may include, but is not limited to, sexual harassment, assault, theft, fraud, misappropriation, wilful negligence, wilful disobedience, wilful misconduct failure to disclose a conflict of interest or breach of the University's policy against harassment or otherwise conduct warranting dismissal without notice as set out in the applicable employment agreement.

[11] Misconduct is defined as:

- a. The failure of a Staff Member in their employment to maintain proper standards of integrity, conduct and concern for the public interest or the well being of the students or other members of the staff of the University; or
- b. The failure of a Staff Member to comply with policies or directions of the University, Head of Department, or other persons in authority at the University.

[12] The process for dealing with disciplinary matters is also outlined in schedule 3 and requires a meeting to be arranged to allow discussion in an informal and constructive way regarding the aspect of the behaviour that is perceived to be unsatisfactory. At this meeting, the employee will have the perceived shortcomings explained and be given an opportunity to provide an explanation. If necessary the Head of Department will outline the expected behaviours and explain the ways in which improvement is needed and the period for the employee to attain those standards. In the absence of a satisfactory explanation, the employee may receive an oral or written warning.

[13] Where an employee does not attain the required standard within a set timeframe the behaviours will be reported to the Vice-Chancellor who will then appoint a Delegate to arrange a subsequent meeting. The Delegate has the power to make disciplinary decisions.

[14] The subsequent meeting will be notified in writing and will follow the same process as the first meeting. A written warning is a possible consequence of this meeting, where the Delegate considers the employee's explanation is not satisfactory, or the required improvements have not been made.

[15] Following the issue of a written warning, the penalty for future misconduct may include dismissal.

[16] Where an employee is under suspicion of serious misconduct, the employee may be suspended on pay while an investigation is carried out. The investigation

is to be conducted by the Delegate who will call a meeting to seek the employee's explanation. If the Delegate is satisfied the employee has committed serious misconduct the penalty may include dismissal.

### **Relevant policies and procedures**

#### *Political Studies Coursework Guide*

[17] This guide sets out the University's policies regarding extensions for the handing in of assignments. The guide is primarily for student use, and advises the University's expectations when seeking extensions. Faculty members have discretion to accept or reject requests with or without supporting information. The guide requires any request for an extension to be made before the date on which the assignment is due to be handed in.

#### *Information communications Technology Acceptable Use Policy*

[18] This policy sets out the guidelines for the use of the University's email system and applies to all employees and students. The policy prohibits the use of any electronic communication by a use that is "...likely to cause offence to others or harass or harm them." Penalties for breaches of the policy include warnings, restriction or termination of access and disciplinary sanctions including dismissal.

[19] Professor Kenneth Strongman, the Pro-Vice-Chancellor College of Arts at Canterbury University gave evidence that all lecturers have obligations of pastoral care and that these are paramount in a university environment. Pastoral care obligations include the obligation to encourage, nurture, mentor and educate all students irrespective of how old they are or where they come from. Dealing with students in a disrespectful way is a breach of the pastoral care obligation.

[20] Dr Buchanan says it is his job to impart specialised knowledge in his field which includes giving assistance to help students succeed within his area of expertise, however, it was not within his purview to be a guidance counsellor.

### **Application for extension**

[21] On 22 May 2007, seven days before her final assignment was to be handed into the Faculty office for marking, Ms Asma Yammahi emailed Dr Buchanan saying:

Good morning,

Hope you are fine,

As all students know from the beginning of the semester, we can't ask for an extension just if you accept the reason why we want to extend the time?

But, can I ask for an extension because the last two weeks I was under pressure because my father was in the intensive care. Unfortunately, on Friday morning at 7.30am, he

passed away and I couldn't manage to go to attend my father's funeral back home in Dubai. All this after your confirmation.

Also, can I ask some questions about the last essay. Please can you illustrate further what does bibliographic essay? Should I do the essay on a topic which interests me?

I will appreciate your cooperation with student.

Looking forward to hearing from you.  
[my emphasis]

[22] Dr Buchanan confirmed in his written evidence at the investigation meeting that this request for an extension was made seven days before the essay was due. In his response to Ms Yammahi Dr Buchanan expresses compassion and provides the following advice:

Dear Asma:

If you need an extension you must go to the University medical centre and speak to a mental health counsellor who can verify your loss and the stress sit (sic) has caused you. Having lost both of my parents in recent years, I can sympathise with your grief, but in the interests of fairness to the other students I am required to request certification that your request is legitimate. I hope that you will understand this reasoning.

A literature review or bibliographic essay crucially surveys and assesses a sub-field of the literature on security studies. You can choose the sub-field according to your interests (the field is wide and varied). What you must do is find 5-10 core sources in that sub-field and outline their strengths and weaknesses, the major points of debate, themes, methodological approaches etc. The idea is not to just describe what other people have written on the subject, but to analyse what they write. Yor (sic) analysis is the part where you show your knowledge of the sub-field.

I hope that this helps and wish you the best.

[23] Ms Yammahi followed the steps set out by Dr Buchanan and a week later, on 30 May 2007, the day after the essay was due to be handed in Ms Yammahi emailed Dr Buchanan and advised him that she would like to see him when he was free as she had received the medical certificate from the Health Centre.

[24] Dr Buchanan says he had been inundated with requests for extensions. He says Ms Yammahi's request was the last straw for him and when he responded to her he was angry. It was this response from Dr Buchanan which led to the termination of his employment:

Dear Asma:

I say this reluctantly but not so subtly: you are not suitable for a graduate degree. It does not matter if your father died or if you have a medical certificate. I have been too nice and given you too high marks all along (at c+). I do not anticipate that you will do better in the final exercise. You are already a day late. The extension is meaningless because you have not attended for the last few classes and are the worse (sic) performer in the class. Of course by a far stretch, You will have the obituary of your father, but even if available and the student health people might have believed you, I do not. You are close to failing in any event, so these sort of excuses-culturally driven and preying on some sort of Western liberal guilt-are simply lame.

Prove that your father died and you were distraught and unable to complete assignments- in spite of your abysmal record to date as an underperforming and underqualified student- and perhaps you might qualify for an extension to get a C-. But as it stands, you will flunk since your (sic) are already a day+late, and you (sic) track record is poor.

By the way-are you a Hoadley student? That would explain a lot of things.

In a word: NO-I do not accept your extension request.

[25] This email from Dr Buchanan is in direct contrast to his first email where he expressed empathy with Ms Yammahi's situation.

[26] At 4.15am the following morning (1 June 2007), Dr Buchanan emailed Ms Yammahi once again, this time apologising for his comments the previous day. Dr Buchanan wrote:

I apologise for my annoyed response-I had a series of extension requests and other student excuses yesterday and yours was the last of the day.

If you can provide a medical or mental health certificate justifying the extension request I shall grant it, but be aware that you will have to lift your game in order to meet graduate-level standards.

Again, my apologies for being hard on you and a reiteration that I will consider your extension request.

Sincerely

[27] Dr Buchanan viewed his email as a sincere apology. The apology seems to me to be half hearted and completely ignores the fact that Ms Yammahi applied for her extension over a week earlier, and that her email on 30 May was merely a request for a meeting to produce the documented evidence Dr Buchanan had requested.

[28] Also I find the content of his email to be confusing. In the second paragraph he says that if Ms Yammahi provides the medical certificate he will grant the extension, but in the next breath he says he will "...consider..." her extension request. I can only begin to imagine how confusing such an email would be for an international student who has English as her second language.

[29] Dr Buchanan has never accepted that the death of Ms Yammahi's father was the reason for her not completing her assignment on time. In his further communications with Ms Yammahi he continued to justify his 30 May response to her, and consistently reminded her of her failings.

[30] Inexplicably, on 1 June 2007 Dr Buchanan emailed Ms Yammahi and stated:

Unfortunately, if I do not hear back from you I must assume that you do not have a valid medical or mental health certificate and will not hand in the final essay. As you are three days late in submitting it, that means that you have already lost a full mark without the extension being granted.

Under university, faculty and departmental regulations, extensions cannot be granted AFTER the submission date. You made your request AFTER the last class and submission date. Hence-and the reason for my original annoyance-you had missed the deadline for requesting an extension based upon certified medical or mental health reasons. I was perfectly justified to say no under those circumstances.

However, because I was rude in my original message I feel that I must offer you the opportunity to deliver a literature review that will allow you to pass the course. I urge you to take advantage of this opportunity and offer a certified justification for my granting an extension.

I have the other essays in the class already marked and will deliver them to be finalised on Tuesday. I hope to hear from you before then but if not will have to enter a mark of 0 for your final assignment.

Please consider what amounts to a second chance to pass the course.

Sincerely

[31] I find this email to Ms Yammahi surprising for a number of reasons. Dr Buchanan knew Ms Yammahi had the medical certificate on 30 May, however, his email reads as if he has heard nothing from Ms Yammahi at all.

[32] Further, this email compounds any distress to Ms Yammahi and contains some inaccuracies. Ms Yammahi applied for the extension a week before the assignment was due; Dr Buchanan confirms his annoyance expressed on 30 May; and confirms his earlier advice to her that he was justified in refusing an extension. He also reiterates that Ms Yammahi will receive a failing grade if he does not hear from her before the following Tuesday.

[33] Ms Yammahi replied to Dr Buchanan, pointing out that on 30 May all she had asked for was an appointment to hand him the medical certificate. She requested once again, for a time to see him.

[34] In response Dr Buchanan invited Ms Yammahi to attend his office on Tuesday 5 June 2007 at 11.30 where he asked her to deliver both the essay and the medical certificate. Ms Yammahi thanked Dr Buchanan for his cooperation. Dr Buchanan points to Ms Yammahi's communication as an acceptance of the apology he made to her on 1 June 2007. I do not agree with him. There is nothing in the emails to suggest Ms Yammahi either did or did not accept Dr Buchanan's apologies.

[35] Indeed it was Dr Buchanan's own evidence that on 2 June 2007 he learnt from another student that Ms Yammahi was filing a complaint about the email. This seems to me to be a fairly strong indication that Ms Yammahi had not accepted Dr Buchanan's apology.

[36] The next day Dr Buchanan emailed Ms Yammahi and advised her that he was aware she was making a complaint and that any further meetings with him would require him to have union or legal representation present. This is a heavy handed approach from a senior lecturer writing to a young international student and is in conflict with Dr Buchanan's pastoral care obligations.

[37] As events transpired, Ms Yammahi handed in both her essay and medical certificates on 6 June 2007 and received a passing grade for the assignment.

[38] Ms Yammahi approached the International Student's office regarding the emails she had received from Dr Buchanan. Ms Yammahi was referred to Ms Barbara McCulloch, the University's Mediator and Prevention of Harassment Officer. Ms McCulloch met with Ms Yammahi on 6 June 2007 which is the same day she left to return to Dubai. Ms McCulloch had Ms Yammahi's consent to discuss the situation with Dr Buchanan's Head of Department and the Dean of Arts, which she did.

### **Disciplinary inquiry**

[39] On 8 June 2007 Ms Sandra Lem, the Arts Faculty HR Advisor emailed Dr Buchanan and advised him that there was a serious issue to be investigated by the University and requested him to defer taking annual leave until after the conclusion of the investigation.

[40] Dr Buchanan responded by setting out the steps he had taken to apologise to Ms Yammahi and to make amends. Dr Buchanan also acknowledged that he was wrong to have been angry with Ms Yammahi. Dr Buchanan's response does not provide any indication of the types of stresses he was later to claim at the Authority's investigation meeting, which he was under at the time of writing the offending email.

[41] On 11 June 2007 Mr Andrew Phipps, Deputy Director of HR Advisory Services wrote to Dr Buchanan requesting that he attend a meeting the following day. Dr Buchanan was advised the matter was being regarded as very serious, that his employment could be in jeopardy and that he was entitled to have a representative with him. In accordance with the collective agreement the Vice-Chancellor had appointed Professor John Morrow as the Delegate to investigate and deal with the disciplinary process.

[42] Mr Phipps' letter to Dr Buchanan makes reference to an incident which occurred in 2006. Dr Phipps's says Dr Buchanan was "...warned/counselled..." after

sending an email to all university staff which the Dean had complained, was offensive. Dr Buchanan had written:

...although we should be diplomatic in our response, I do not feel that we should gloss over the failures of leadership and institutional sclerosis that led to the department receiving a less than stellar review. We have no reason, other than for the sake of nicety, to cling to the Chapman legacy other than as historical backdrop, and it is way past time for us to move away from the Pakeha male "old boys" way of doing things that characterised decision-making until the very recent past.

[43] Professor Vowles, the Head of Department at that time, found the email offensive and complained to the Dean, Professor Morrow.

[44] I have reviewed the evidence relating to the University's letter to Dr Buchanan in July 2006 and I have concluded that Dr Buchanan was counselled that his style of communication was unacceptable and unprofessional. There was no warning that his job was in jeopardy should there be a repeat of that conduct. Indeed, the letter states that any similar substantiated complaint would be dealt with as misconduct.

[45] Further, in his letter, Mr Phipps refers to Dr Buchanan's pending departure on annual leave which Mr Phipps says was not authorised and advised Dr Buchanan that the matter needed to be dealt with urgently.

[46] Following receipt of Mr Phipps' letter Dr Buchanan sought medical advice and was told to take two weeks sick leave to assist in his recuperation from previous surgery as he was still not fully recovered.

[47] The surgery referred to was undertaken in September 2006 and January 2007. Dr Buchanan had suffered a ruptured bowel which resulted in emergency surgery, including a colostomy in September. In January 2007 the colostomy was reversed. Following both surgeries Dr Buchanan returned to work, he now admits, too quickly and without the opportunity to fully recover from two serious operations.

[48] I am satisfied from the evidence presented at the investigation meeting that Dr Buchanan's recovery from two major operations was slower than usual. Not aided, I am sure, by Dr Buchanan's tireless efforts to return himself to full physical fitness by attending his gym each morning for one to one and a half hours. Further, I am satisfied that he was suffering with insomnia, low moods and tiredness and that these symptoms were common in patients who had been as unwell as Dr Buchanan had been.

[49] An initial meeting took place on 12 June 2007. Following that meeting Mr Phipps wrote again to Dr Buchanan, and set out concerns that Dr Buchanan had obtained his medical certificate and leave in an attempt to avoid answering the allegations against him. In any event, the disciplinary meeting was postponed until after Dr Buchanan returned from his leave.

[50] At the first disciplinary meeting on 18 July, meeting it was agreed that the only issue to be discussed related to the May email exchange between Dr Buchanan and Ms Yammahi. Notes taken from the meeting indicate that Dr Buchanan characterised his email on 30 May as unprofessional, inappropriate and over the top.

[51] Dr Buchanan relied on his early apology and the fact that he had granted the extension and given the student a passing grade as mitigating factors. Dr Buchanan also identified steps which he would be prepared to take in the future to ensure there could be no repeat of his conduct. He also emphasised that he had an unblemished record over 22 years with no formal student complaints (his employment with Auckland University spanned 10 of those 22 years).

[52] Prior to a second meeting, on 20 July 2007, Mr Phipps wrote to Ms Jane Kostanich, Dr Buchanan's representative, and advised her that further investigations into Dr Buchanan's assertion that he had an unblemished record of 22 years had shown his statement to be incorrect.

[53] Mr Phipps referred Ms Kostanich to two complaints, one received from a student (X) and the other from a fellow staff member (Y) in early 2007. Both complaints relate the content of emails sent to them by Dr Buchanan.

[54] X was an honours student who had missed the first lecture of one of Dr Buchanan's papers due to a conflict in X's commitments. X emailed Dr Buchanan to seek assistance in obtaining a copy of the reading list for the paper. Dr Buchanan responds:

I do not engage in hand holding of immature or ill-prepared students. I suggest you take responsibility for your course preparations immediately.

[55] After receiving X's response to his email, where X explains why the first class was missed, Dr Buchanan replies:

Given that you knew when the first day of class was long in advance, what sort of excuse is it to say you had a "prior commitment?" Geez, get your priorities straight! I suggest that you drop the course as it is over-subscribed ...

[56] X expressed concerns to the University of a lack of confidence that X would have any success in Dr Buchanan's paper given the tone of his emails.

[57] The email to Y was sent after Y responded to a request from Dr Buchanan. Y told Dr Buchanan in an email:

[I] strongly resent your offensive accusation that I am being "precious" ... I am not a student who has to take whatever you choose to dish out..."

[58] In response Dr Buchanan told Y to "...grow a thicker skin", and that Y was "...emotionally fragile and have things to deal with that transcend our employment relationship. Go solve them".

[59] In his letter, Mr Phipps again refers to the letter Dr Buchanan received in July 2006 relating to his unprofessional communication style.

[60] Mr Phipps acknowledged in his letter that the two complaints were never followed up formally by the University as Dr Buchanan had at that time, just had surgery and the Head of the Department wished to show him some compassion. In his letter Mr Phipps explains that he was seeking to rely on these complaints to demonstrate that Dr Buchanan's assertion that he had an unblemished record was not correct.

[61] At the next meeting on 24 July 2007, Dr Buchanan disputed the ability of the University to raise the two unrelated complaints, made at a time when the University acknowledges he was unwell.

[62] I agree with Dr Buchanan on this point. Having decided not to address the communications between Dr Buchanan and X and Y, it was unfair and unreasonable for the University to seek to rely on them to show Dr Buchanan in a bad light. In any event, there is no evidence to support the University's assertion that either X or Y made a "complaint" about the emails. Indeed the evidence shows that Dr Buchanan was told to have a talk to, and sort out his problems with Y, which he did.

[63] On 24 July Dr Buchanan reiterated the steps he would take in the future to ensure a similar situation to 30 May, did not occur and sought feedback from the University as to any suggestions Mr Phipps or Professor Morrow could make which would help to reinforce his commitment to avoiding any future issues. This opportunity was never taken up by the University.

[64] The parties met once again on 25 July 2007. During this meeting Dr Buchanan was told that the fact he had not acknowledged that the emails to X and Y were inappropriate had counted against him. The University concluded that the 2006 incident, the X and Y emails and the complaint from Ms Yammahi all demonstrated that Dr Buchanan's total history suggested he would offend again.

[65] Dr Buchanan was dismissed without notice for serious misconduct on the basis that the email Dr Buchanan sent to Ms Yammahi was so serious that it undermined the trust and confidence the University had in Dr Buchanan. This decision was confirmed by letter dated 26 July 2007.

### **Determination**

[66] Dr Buchanan was on notice through the policies published by the University that email language was to be professional. He was reminded of this in 2006 and told his communication style was unprofessional and unacceptable. As already set out in this determination the X and Y emails were never the topic of a disciplinary process. Indeed, the X email was never discussed with Dr Buchanan, until the disciplinary process was underway.

[67] Dr Buchanan has readily acknowledged the email he sent to Ms Yammahi on 30 May 2008 was wrong. He says he was within his rights to deny Ms Yammahi's extension because she was a day late in requesting the extension. I have found that evidence to be inconsistent with the documents provided to the Authority. Ms Yammahi's initial email in which she asks for an extension was received by Dr Buchanan seven days before the due date for the assignment.

[68] On 30 May 2007, Ms Yammahi was simply requesting a meeting with Dr Buchanan to provide him with the requisite medical certificate which he had requested, having followed the steps he outlined to her.

[69] Throughout the Authority's investigation meeting Dr Buchanan described in graphic detail the medical symptoms he had suffered following his January 2007 surgery. Dr Buchanan says it was these symptoms that created the stress which caused him to over react to Ms Yammahi's request.

[70] The University did not have the benefit of the extensive knowledge of Dr Buchanan's medical condition during its disciplinary inquiry, which the Authority was provided with.

[71] However, I am satisfied Dr Buchanan raised his medical condition during the University's disciplinary inquiry. While that was done with regard to the frustration he was experiencing about his lack of physical fitness, I am also satisfied that on 18 July 2008 he raised with the University that his recovery from the operations he had, had not gone well, that he was just trying to get to the end of the semester and that he was particularly bad in the evenings. No more or less was made of his medical issues.

[72] It was always open to Dr Buchanan to provide more specific information to the University. For whatever reason, he chose not to. Copies of transcripts from radio interviews Dr Buchanan held following his dismissal, and articles written and published in which Dr Buchanan is quoted, were provided to the Authority during its investigation process. Interestingly enough in all the media interviews Dr Buchanan held following his dismissal, and prior to December 2007, there is no suggestion from Dr Buchanan that he sent the email for any reason other than he was angry. There is certainly no hint that he was suffering from any sort of medical condition.

[73] Indeed in most of his interviews he talks about the anger that he felt when he received the email from Ms Yammahi on 30 May 2007. He reiterated this position at the Authority's investigation meeting when he explained that an article which published in the Student newsletter "Cracken" was not phrased as clearly as he would have liked, but he was trying to explain his anger at receiving what he saw as a request for an extension after the close off date.

[74] It was only following the setting down of the Authority's investigation meeting that information pertaining to Dr Buchanan's medical condition began to surface in his media interviews.

[75] Having said that, I have concluded that a fair and reasonable employer would not have dismissed Dr Buchanan for the reasons it did and in all the circumstances that then prevailed.

[76] As already set out the University took into account email correspondence between Dr Buchanan and X and Y in early 2007. I have already concluded that the action of the University in taking these two emails into account was unfair and unreasonable.

[77] The University escalated Dr Buchanan's conduct to that of serious misconduct. I find that was unreasonable in all the circumstances. It is beyond

doubt that there was misconduct by Dr Buchanan. The University has defined misconduct to include the failure of a staff member to maintain proper standards of integrity, conduct and concern for the well being of the students or failure to comply with policies or directions of the University. What Dr Buchanan did was breach the misconduct rule by sending email correspondence to a student which appears to have little regard for the well being of that student. Further, in 2006 the University made it clear that unacceptable and unprofessional communications from Dr Buchanan would be dealt with as misconduct.

[78] Dr Buchanan made some suggestions to the University during the disciplinary process which would go some way to ensure a similar situation did not recur. These suggestions seem to have been completely ignored or overlooked. It was open to the University to apply other sanctions and behavioural correctives and safeguards with a view to ensuring such misconduct would not recur. (*X v Auckland District Health Board* [2007] 1 ERNZ 66).

[79] For the foregoing reasons I find Dr Buchanan was unjustifiably dismissed.

## **Remedies**

### *Contributory conduct*

[80] I have concluded Dr Buchanan contributed significantly to his grievance. Dr Buchanan sent an offensive email to a student, to whom he had pastoral care obligations, which he then half heartedly apologised for. He then continued to communicate via email, purportedly attempting to arrange for delivery of the requisite medical certificate as documentary proof of the reason for the extension, while at the same time criticising her and reiterating his view that she was an under-performing student.

[81] Even taking into account the 10 years unblemished work record of Dr Buchanan, his conduct is significantly blameworthy. I have assessed Dr Buchanan's contribution at 25%.

### *Reinstatement*

[82] To remedy his grievance Dr Buchanan seeks reinstatement to his former position. Reinstatement is strongly opposed by the University on the basis that the required trust and confidence in Dr Buchanan no longer exists.

[83] In making my decision not to reinstate Dr Buchanan I have taken into account, the impact on the University, of Dr Buchanan's public appearances following his dismissal.

[84] I am satisfied that Dr Buchanan is required to work autonomously with little supervision. He also has an obligation with regard to the pastoral care of his students. Given Dr Buchanan's evidence on this point I have grave doubts that Dr Buchanan comprehends this important obligation, specifically as it relates to international students. He has also demonstrated throughout the Authority's investigation meeting very little understanding of the impact his communication style has on those receiving his communications.

[85] During media interviews following his dismissal Dr Buchanan levelled accusations against the University that the University was motivated by reasons other than his conduct when he was dismissed. That there was some political motivation behind the dismissals. There has been no evidence to support such accusations from Dr Buchanan.

[86] Throughout the media interviews Dr Buchanan is critical of the management of the University and in particular what he refers to as the "bums on seats mentality coming before quality of education".

[87] During both the University's disciplinary process and then again during the Authority's investigation interview with Dr Buchanan, he was very forthcoming in describing his own personal style when it comes to grading students work. Dr Buchanan acknowledged that he treats students differently, when grading their work, depending on the level of loyalty shown to his courses. Also, if a student is trying hard, then he will not "flunk" them, irrespective of their academic achievements. This seems to me, an unlikely way to ensure students are receiving a "quality education", but does demonstrate preferential treatment to some students. The University was understandably critical of Dr Buchanan's approach which it viewed as totally unacceptable.

[88] Finally, Dr Buchanan promoted himself as a straight talker, with a blunt communication style. Traits Dr Buchanan promotes as being positive. This self assessment is short of the mark.

[89] At the investigation meeting Dr Buchanan told me that he spoke to his wife about the 30 May email and says his wife told him he came across as a bully. In my opinion, Dr Buchanan's wife's advice is insightful. Bullying may be seen as

something that someone does repeatedly to gain power and dominance over another, including any action or implied action, such as threats, intended to cause fear and distress. Invariably bullies lack insight into the impact their behaviour has on others.

[90] Having read the email communications provided to the Authority throughout the investigation, I would describe Dr Buchanan's communication style as bullying. His perception that his style of communication is positive shows that he lacks any insight into the affect he has on students and colleagues alike.

[91] Submissions made on behalf of Dr Buchanan focussed on the findings in *X v Auckland District Health Board*. I have distinguished that case on its facts. The Court found that while X's actions in sending penile photographs of himself to his colleagues was bizarre and reprehensible, X was sincerely apologetic and remorseful. Further, the Court found that X's conduct was not directed at patients, and took into account evidence that X could be relied on to be a competent surgeon.

[92] I have found Dr Buchanan's apologies to Ms Yammahi to be half-hearted. Further, Dr Buchanan did address his email to a client. Ms Yammahi was an international student who had English as a second language. As pointed out earlier in this determination Mr Buchanan's communications to her were often confusing and compounded her distress, rather than alleviating it. This has led me to conclude that I could not be confident in Dr Buchanan's competence when faced with similar issues in the future.

[93] In spite of reinstatement being a primary remedy I am satisfied there are good reasons not to order reinstatement. It is simply not practicable for the University to employ Dr Buchanan in a role where he is unsupervised and unmonitored and has failed to demonstrate a fundamental awareness of how his own actions and conduct impact on those he works with and teaches. Further I have taken into account the very public and extremely critical remarks made by Dr Buchanan following his dismissal.

#### *Lost wages*

[94] Dr Buchanan was dismissed in July 2007. He had been granted paid research leave for the first semester of 2008 and he was planning on taking unpaid leave for the second semester to work at the National University of Singapore (NUS). However, Dr Buchanan had not applied for or had any leave without pay approved by the University.

[95] Associate Professor Raymond Miller, Head of Department for Political Studies told me that it would be unusual for a staff member to be granted 6 months research leave followed by 6 months leave without pay.

[96] I have assessed Dr Buchanan's lost remuneration as \$68,000 gross based on 8 months of a salary of \$102,000. Dr Buchanan has also sought reimbursement of S\$60,000 which he claims has been lost as a result of his dismissal. I do not accept Dr Buchanan has lost S\$60,000. The email from NUS indicates that the job has been held open for him pending the settlement of his grievance with Auckland University.

[97] Further, the evidence shows that the position at NUS was to be undertaken during Dr Buchanan's leave without pay (2<sup>nd</sup> semester, 2008). He had never applied for such leave, and the evidence strongly suggests he would not have been granted such leave.

[98] Dr Buchanan also seeks reimbursement of income lost from payment for media commentary and consulting fees. No documentary evidence has been provided to support his claim. Given the lack of evidence to support his claim I have declined to award any reimbursement for media commentary and consulting fees.

**Taking into account contribution the Vice-Chancellor University of Auckland is ordered to pay Dr Buchanan \$51,000 gross lost remuneration pursuant to section 123(1)(b) of the Employment Relations Act 2000.**

#### *Compensation*

[99] Dr Buchanan has produced little evidence to support his claims for compensation. However, I accept that Dr Buchanan suffered some distress as a result of his dismissal. He also seeks compensation for the psychological and physical toll on his partner and friends. The Authority has no jurisdiction to award remedies for hurt and humiliation to the partner and friends of an applicant.

[100] From August onwards, Dr Buchanan was undertaking interviews and appearing in the media on a regular basis, where he openly and frankly discussed his dismissal. This indicates that Dr Buchanan was dwelling on his dismissal and was finding it difficult to move on. I am satisfied this publicity also contributed to his sense of hurt and humiliation. However, the University can not be held responsible for that.

[101]Taking into account Dr Buchanan's tenure at Auckland University combined with the damage to his reputation I would in other circumstances order Auckland University to pay to Dr Buchanan the sum of \$20,000.

**Taking into account contribution, I order the Vice-Chancellor, University of Auckland to pay to Dr Buchanan \$15,000 in compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

### **Costs**

[102]Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority