

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 185/09  
5153623

BETWEEN                      BRENDAN BURNS  
   Applicant  
  
AND                                MEDIA DESIGN SCHOOL  
   LIMITED  
   Respondent

Member of Authority:        R A Monaghan  
  
Representatives:              K Nicolson, counsel for applicant  
   S Langton, counsel for respondent  
  
Investigation meeting:        On the papers  
  
Determination:                15 June 2009

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**DETERMINATION OF THE AUTHORITY ON APPLICATION FOR  
INTERIM REINSTATEMENT**

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**Employment relationship problem**

[1] Media Design School Limited (“MDSL”) is a private tertiary education provider. In 2006 it employed Brendan Burns to teach its Diploma of Interactive Gaming. Later he began teaching the Graduate Diploma in Games Development.

[2] Early in February 2009 concerns about the quality of Mr Burns’ curriculum content, and of his relationships with two staff members in particular, were drawn to MDSL’s attention. It commenced a review. Mr Burns says that subsequently, at a meeting on 23 February 2009, he was demoted from the position of faculty director to course leader. On 27 February 2009 he was suspended. He has raised personal grievances in respect of these actions.

[3] On 25 March 2009 Mr Burns was dismissed summarily for serious misconduct. He has raised a further personal grievance on the ground that the

dismissal was unjustified. He seeks reinstatement to the position of faculty director. The matter has been set down for an investigation meeting on 3, 4 and 5 August 2009.

[4] Mr Burns also seeks an order for interim reinstatement. The parties attended mediation, but were unable to resolve the substantive problem or reach an arrangement in respect of the application for an interim order. Accordingly this determination addresses the application for an order for interim reinstatement. By agreement, the application has been heard on the papers.

[5] The parties acknowledged that the issues to be addressed in determining the application are:

- a. whether there is an arguable case of unjustified dismissal;
- b. whether the balance of convenience favours Mr Burns or MDSL; and
- c. where overall justice lies.

### **Arguable case**

[6] From MDSL's point of view the concerns which led eventually to the dismissal centre on the Graduate Diploma in Games Development, including the structure and content of the course, levels of student satisfaction with its content and management, and disharmony in Mr Burns' relationship with two senior tutors in the gaming department.

[7] As MDSL's investigation into the concerns progressed, it also came to the view that Mr Burns was and had been attempting to prevent it from becoming fully informed of the nature of the difficulties. Elizabeth Valentine, the CEO of MDSL, deposed by way of summary that the most significant events in the decision to dismiss were Mr Burns':

- i. deleting from the record student feedback about him without authorisation;
- ii. failing to advise senior managers that his student feedback contained critical items which reflected on him and should have been addressed; and

- iii. failing to return curriculum materials to the school when instructed and after having agreed to do so.

[8] Ms Valintine also deposed that there were many instances of mismanagement and failure to undertake or adequately complete administrative and course leader duties, and that she considered there was irreparable conflict and disharmony between Mr Burns and his staff. Trust and confidence was lost. These matters were discussed in detail in the letter of dismissal, which was 18 pages long.

[9] Mr Burns denies all allegations, and raises a number of challenges to the procedure which led to the dismissal. In particular, there was a meeting on 13 February 2009 during which he was advised there were concerns about the curriculum, and was asked to provide his curriculum material for review. Mr Burns says this was a disciplinary meeting, and it suffered from a number of procedural deficiencies. He says that, at a further meeting on 23 February he provided the requested material, but as soon as the meeting began an attempt was made to demote him to course leader. Then, on his return from a week of 'special leave' on 24 February, he was subject to restrictions on his movements, duties, place of work and access to staff and students, as part of an attempt to keep him isolated until the employer could 'work out how to get rid of him.'

[10] MDSL denies that the 13 February meeting was a disciplinary meeting, and says the course material Mr Burns provided on 23 February was incomplete and unsatisfactory. There was no demotion, rather it had decided not implement a restructuring which would have seen Mr Burns take the position of faculty director. It had intended that Mr Burns continue to work on the curriculum when he returned to work on 24 February, and had hoped he would understand that the sensitivity of the circumstances made it preferable that he keep his distance from colleagues and students.

[11] I digress to say that Mr Burns may have valid concerns about the way in which the faculty director position was handled. The position was offered to him in late 2008, although it also appears that the associated restructuring did not proceed for unrelated reasons which were explained. The matters raised in that respect have not

affected the outcome of this application so I do not refer to them any further in this context.

[12] Mr Burns interacted with staff and students during his return to work on 24 and 25 February, and there were further complaints about his manner of doing so. Mr Burns says he acted appropriately and was simply carrying out his normal duties. However MDSL decided to suspend him while the investigation continued. It says it sought to prevent further difficulties. Mr Burns says the letter of suspension dated 27 February 2009 raised new allegations which did not warrant suspension, and significantly mis-stated the events beginning with his return to work on 24 February.

[13] I digress again to say there was a meeting between the parties on 25 February, at the offices of MDSL's then-solicitors. There is a dispute about the circumstances in which the meeting was tape recorded. Without Mr Burns' knowledge MDSL had a tape recorder recording during the meeting but the person responsible, the general manager Paul Millett, says the machine was recording by accident. The recording was destroyed. While the incident is unfortunate and may fall to be addressed in detail during the substantive investigation, it does not affect the outcome of this application and I do not refer to it further.

[14] In a letter dated 3 March 2009, MDSL put a number of detailed questions to Mr Burns for his response. Among other things the questions concerned: the alleged deletion of student feedback and the alleged failure to disclose adverse feedback; the failure to keep all course material on the school's server, and alleged failure to return all material when instructed; aspects of the management of the course; and Mr Burns' manner of communication with staff and students. On either 4 or 5 March there was a meeting during which Mr Burns read from prepared written responses to the questions. MDSL believed there were gaps in the responses and sought to investigate further. As part of that process it put a number of questions to various staff members and obtained their responses.

[15] At a further meeting on 11 or 12 March MDSL put these additional matters to Mr Burns. It says he either did not respond or repeated his earlier answers.

[16] Mr Burns maintains that he answered adequately, and in particular that he did return all course material. He says further that he was confused by what was being put to him, and by the inconsistencies and changes in the apparent direction of MDSL's investigation.

[17] Mr Langton conceded that at this interim stage Mr Burns has an arguable case that he was unjustifiably dismissed. Mr Langton has, however, commented on the relative strengths of the parties' cases in the context of where overall justice lies.

### **The balance of convenience**

[18] Mr Burns says the balance of convenience favours him because:

- i. he has no savings, but has outstanding loans;
- ii. he is an immigrant from Ireland, with restrictions on his work permit preventing him from working for any employer in New Zealand other than MDSL;
- iii. as a result of his dismissal his partner's work permit, which is dependent on the validity of his work permit, becomes invalid so that she is also restricted from working in New Zealand;
- iv. the viability of his relationships with his students, as their tutor, requires protection;
- v. he will continue to work hard and obey all instructions.

[19] Concerns have also been raised about the effect of the dismissal on Mr Burns' reputation.

[20] MDSL says the balance of convenience favours it because:

- i. it has lost trust and confidence in Mr Burns' ability to lead its curriculum development, teach students to the requisite standard, and behave with honesty and transparency; to the extent that both interim and permanent reinstatement would be impracticable as a result;

- ii. Mr Burns has not accepted any responsibility for any failings or misconduct on his part, and although it is open to him to take the confrontational approach to his personal grievance claims he has taken, this approach compromises the prospect of any successful reinstatement;
- iii. the interests of third parties, namely certain staff and students, will be adversely affected if Mr Burns is reinstated on either an interim or permanent basis;
- iv. further breaches - arising out of additional information about the way in which Mr Burns managed the course, complaints from students about course content and a concern that much of the content was plagiarised - have come to MDSL's attention since the dismissal; and
- v. damages are an adequate remedy in the event that Mr Burns is not reinstated on an interim basis but succeeds in his substantive claim.

[21] Of the matters raised by Mr Burns, Mr Burns deposed that he has no savings and some outstanding loans. He did not provide any further evidence in support, but to the extent that he has lost his employment there is an adverse financial effect on him. The provision of more fulsome information would have assisted an assessment of the weight to be given to this factor. Without such information I can give little weight to it.

[22] Potentially more significant of the matters raised in relation to the balance of convenience concerns Mr Burns' immigration status and his ability to continue to work in New Zealand. Mr Burns did not produce a copy of his work permit or any associated correspondence with the New Zealand Immigration Service ("NZIS"). The supporting material amounted to a copy of a document which appears to be a receipt for a payment Mr Burns made to the NZIS in or about August 2008, and a similar document in respect of a Bronagh McCauley. The document records in respect of Mr Burns that his 'application type' is a 'permit, work, work to residence, long term skill shortage list occupation', while Ms McCauley's 'application type' is 'permit, work, partner of a worker'.

[23] A letter from a registered immigration consultant was produced as an attachment to Mr Burns' affidavit in reply. The information in the letter should have been presented in the form of an affidavit from that person, but if I accept the information is correct then Mr Burns' options are at present to leave New Zealand, apply for a further permit or apply for a variation to his existing permit. A new offer of employment would be required in support of an application for a further permit or a variation to his permit.

[24] No comment was made on Mr Burns' occupation apparently being on the long term skill shortage list, nor of Ms Valentine's explanation of how that matter affects game development staff in her experience. Although an offer of alternative employment is necessary if Mr Burns is to obtain a work permit other than with reference to MDSL, there is a shortage of people with Mr Burns' skills and obtaining a new work visa is a simple process once alternative employment is obtained.

[25] Accordingly it is not accurate to say restrictions on Mr Burns' work permit prevent him from working for any employer other than MDSL. While the dismissal affects Mr Burns' immigration status and ability to work in his current position - and in turn his partner's ability to work - the effect is not as severe as some of the bare assertions made on his behalf indicate. For that reason, although the balance is tipped in favour of Mr Burns, I give the matter less weight than I would otherwise have done.

[26] There was no evidence of any loss of reputation. A generalised assertion from an observer that there have been 'whispers' does not suffice. If there is such loss, it can be remedied by a favourable outcome in the substantive determination.

[27] Both parties addressed aspects of Mr Burns' return to work in the context of the need for Mr Burns to maintain viable relationships with students on the one hand, and on the other the undesirability of his returning to work part of the way through a course. MDSL says further that the course was substantially redeveloped in late February and Mr Burns is not familiar with these developments. The senior tutors gave supporting evidence regarding their work on redeveloping the course.

[28] In that respect the balance of convenience favours MDSL. There has already been an interruption in Mr Burns' relationships with his students, but returning him to teaching duties on an interim basis, and on a course which he did not fully develop himself, is likely to be even more disruptive.

[29] An aspect on which MDSL relied strongly was its loss of trust and confidence in Mr Burns. It says the information it has produced to the Authority even in this interim application is compelling and supports the loss of trust. I understood that submission to refer to the concerns expressed by the senior tutors and in the extracts from the student feedback which were produced, to the extent that they bear on both Mr Burns' manner of treating staff and students and their doubts about his ability to put together and teach the course to the required level. I also understood it to refer to Mr Burns' alleged attempts to prevent MDSL from identifying the true nature and extent of the problem. In addition to the concerns to which the senior tutors deposed, Heather Rennie, the academic lead, deposed to the way in which Mr Burns failed to accurately advise her of the content of the student feedback received in November 2008.

[30] Further to the substantive allegations bearing the quality of the course content and Mr Burns' administrative practices, these are in dispute. If the allegations can be established they will paint a very serious picture, may jeopardise the viability of the course and are likely to jeopardise the reputations of those associated with it. MDSL also believes that, as a result of the information it has subsequently obtained, it may be at risk of more than just complaints from students.

[31] In that respect the balance of convenience also favours MDSL. In the absence of any satisfactory evidence of loss of reputation to date, a finding in Mr Burns' favour in the substantive matter should suffice to restore any loss to his reputation that may occur. On the other hand the allegations against him are so serious that, if they can be sustained, MDSL ought to have the opportunity to minimise the damage caused. The opportunity will be limited if Mr Burns is reinstated.

[32] Further to Mr Burns' relationships with members of the staff the two senior tutors also deposed that they would either leave, or consider leaving, their employment if Mr Burns were reinstated. Mr Burns says that both are setting out

deliberately to undermine him, and said in an affidavit in reply that he believes one has recently indicated an intention to resign in any event. Whatever the truth of that matter, the relationships between Mr Burns on the one hand and the senior tutors on the other are clearly dysfunctional.

[33] In the face of such dysfunction it is preferable to limit the parties' contact until the matter can be resolved. This aspect also tips the balance in favour of MDSL.

[34] Finally, for the reasons referred to above I find that damages will be an adequate remedy for Mr Burns if he is successful in his substantive claim but reinstatement is declined, but are unlikely to be an adequate remedy for MDSL if it is successful.

### **Overall justice**

[35] Assessing overall justice involves stepping back and assessing the relative strength of the parties' cases, as well as taking account of the matters just addressed and any other relevant matters.

#### **1. Relative strength of the parties' cases**

[36] Too many substantive allegations are in dispute to allow any preliminary assessment of the strength of the case of either party in that respect.

[37] While I doubt the merits of some of the challenges to procedure which Mr Burns has raised, this does not affect the above conclusion.

#### **2. Overall assessment**

[38] The outcome of a weighing of the balance of convenience has determined the outcome of the application overall. For the reasons discussed above, the balance tips in favour of MDSL.

### **Conclusion**

[39] For the above reasons the application for an order for interim reinstatement is declined.

[40] I have not been asked to consider reinstatement to the payroll only. Mr Burns has concentrated on a wish to return to the position of faculty director and resume his duties.

### **Additional comments**

[41] Certain additional aspects of this matter are of concern.

[42] The first is that Mr Nicolson is practising as a barrister, is acting as counsel for Mr Burns in this matter, and has sworn and filed an affidavit in reply in support of the application for interim reinstatement. His attention is drawn to rule 13.5 of the Rules of Conduct and Client Care for Lawyers in the Schedule to the [Lawyers and Conveyancers Act \(Lawyers: Conduct and Client Care\) Rules 2008 \(SR 2008/214\)](#). In the light of that provision, I give the affidavit no weight.

[43] The second is that Mr Burns' affidavit in support records at paragraphs 28 and 43 statements allegedly made during mediation. On its face such evidence is not admissible in terms of 148 of the Employment Relations Act 2000. Since the Authority has not been asked to rule on admissibility and has not heard argument on the matter, and this determination does not turn on the statements referred to, I merely draw attention to the concern and remind the parties of s 148.

[44] The third is that Mr Burns referred at para 41 of his affidavit in reply to conversations with Ms Valintine which occurred after the dismissal, and were apparently made in an attempt to resolve the problem. Mr Langton says these statements are inadmissible. I did not hear full argument on the matter, and doing so would have created further delay in the issuing of this determination, but it would appear that the reference was to a without prejudice discussion. The Authority does not take into account information about settlement discussions which should properly be treated as off the record.

[45] The fourth is that Mr Nicolson attached to submissions in reply documents which should have been produced as evidence. Mr Langton formally raised a concern. A practice of that kind does not assist in the speedy and efficient resolution of problems in the Authority and is not acceptable at all in other jurisdictions. Had anything turned on 'evidence' produced in that way, more delay would have been incurred while a further investigation proceeded.

### **Costs**

[46] Costs are reserved pending a determination of the substantive matter or a resolution between the parties.

R A Monaghan

Member of the Employment Relations Authority