

factor outweighed concerns about his relationship management skills when, in only February 2009, he was promoted to Head of Department.

[3] The recent history of plumbing and gasfitting training in New Zealand has been marked by division and conflict between key stakeholders. In particular, the relationship between the Plumbing, Gasfitting, Drainlaying and Roofing Industry Training Organisation (the PGDRITO) and Unitec (the country's single biggest training provider) has been so dysfunctional that the two organisations have found it very difficult to work constructively together. Although not a training provider,¹ this ITO (like those in other industries) had developed a series of short courses to be offered by both public and private training providers around the country. To that extent, it could be seen as a competitor to Unitec, which had developed a longer, potentially more expensive course, which (so Mr Cruikshank and others maintained) set higher standards for students to reach. Mr Cruikshank had made no secret of the fact that he saw Unitec, and to some extent himself, as the guardians of training standards against what he perceived as a tendency by the PGDRITO towards "dumbing down" the level of plumbing and gasfitting education.

[4] On 7 July 2009 the Chief Executives of Unitec and the PGDRITO, along with a representative of the Apprentice Training Trust (direct employer of many of the apprentices in Auckland)² and the Co-Executive Dean of the Faculty of Technology & Built Environment met and reached an agreement to explore ways of working more closely together. It was proposed that Unitec would begin offering courses that had been developed by the PGDRITO. This decision was a pragmatic one: the Apprentice Training Trust (ATT) had decided that in future it would put its apprentices through the PGDRITO courses instead of Unitec's alternative programme. If Unitec did not offer PGDRITO courses other training providers who did would pick up those students.

[5] Mr Cruikshank was not invited to attend the meeting but was alerted to the fact that it was taking place by his immediate manager, Laurie Richardson, Co-

¹ ITOs are established under the Industry Training Act with responsibility for setting standards, arranging for the delivery of training and monitoring its quality. To preserve the independence of their role they may not offer training directly.

² Some Auckland plumbers employ apprentices themselves while others accept placements of apprentices employed by the Auckland Training Trust.

Executive Dean of the Faculty of Technology & Built Environment (the Faculty). Immediately after the meeting Mr Richardson telephoned Mr Cruikshank to advise of the discussions and the outcome: that Unitec was intending to work with the PGDRITO towards offering PGDRITO courses. Mr Cruikshank asked who would be making the final decision on this. Mr Richardson said it would be made at Faculty level, but consistent with Unitec direction, and noted that Unitec's Chief Executive, Dr Ede, fully supported the proposal. Moments later Mr Cruikshank called back to ask "...am I being set up?" He did not elaborate on what he meant by this, and Mr Richardson did not ask. Instead, he suggested that he and Mr Cruikshank meet the following day to talk over the proposal.

[6] They did meet on 8 July, and although there is some dispute between the two men about the detail of that conversation, much of it is agreed. Mr Richardson clarified that the initial proposal was to offer short courses on behalf of the PGDRITO and that in the meantime Unitec's programme would continue, with both current and future students having a choice between the two.

[7] Mr Cruikshank had serious misgivings about the proposal. He was aware that revenue per student would be lower on the PGDRITO courses and foresaw that, longer term, Unitec's own programme would be undermined. In the short term, he would have to deal with staffing and other logistical problems arising out of running two forms of training concurrently.

[8] Perceiving that the change in direction need not be irrevocable and being anxious to avoid losing students to the short courses, Mr Cruikshank suggested writing to plumbing firms which used ATT apprentices, and to the students themselves, explaining that they could remain on the Unitec programme. Mr Richardson replied it was "*not a good idea*" (to quote Mr Cruikshank) to contact those plumbing firms because they did not actually employ the apprentices and there was no direct relationship between them and Unitec. As for current students, Mr Richardson suggested that, instead of writing, he speak with each group of students when they were on campus to explain that they had the option of continuing with the Unitec course.

[9] Despite having had this conversation, Mr Cruikshank decided to go ahead and write to both plumbing firms and students in the hope (as he has subsequently said) of informing them about the benefits of the Unitec programme. Mr Cruikshank sent out his letters, in his capacity as HOD for Plumbing and Gasfitting, on 9 and 10 July. He did not tell Mr Richardson what he was doing. He later said that he believed that if he had shown Mr Richardson the letters in draft form they would never have gone out. He sought to explain this comment by saying that his experience had previously been that Mr Richardson failed to act quickly on matters that were referred to him, and he believed there was a need for prompt action in this case. However I note that the evidence I have does not indicate any need for hasty action at that point. I accept Mr Richardson's assertion that it would have sufficed to talk to existing students when they were next on campus.

[10] Neither Mr Richardson, David Nummy, (the other Co-Executive Dean of the Faculty) nor the Chief Executive, Dr Ede, knew anything about Mr Cruikshank's letters until 16 July, when the PGDRITO's lawyers wrote to Unitec alleging that the letters were defamatory, threatening legal action, and demanding an immediate retraction. Almost immediately, Mr Cruikshank was suspended, the letters were retracted and a disciplinary inquiry was launched into his conduct in sending them out.

[11] The inquiry took six weeks, partly in order to address Mr Cruikshank's protests that additional allegations had been made against him as the investigation unfolded. Once he had advised that he had nothing more to present, Unitec proceeded to make its final decision. Mr Cruikshank was told that the tone and content of his letters were inconsistent with Unitec's proposed change of direction, and potentially damaging to the fledgling new relationship with the PGDRITO. Mr Cruikshank's conduct in sending them out was found to be improper, to have brought the standing of both his profession and of Unitec into disrepute, and to amount to serious misconduct warranting dismissal.

Issues

[12] The first issue relates to the dismissal itself. Mr Cruikshank says that to dismiss Mr Cruikshank summarily was not a decision which a fair and reasonable employer would have made in all the circumstances.

[13] The second issue is with the suspension which Mr Cruikshank says was both procedurally and substantively unfair. Unitec accepts that the lack of consultation with Mr Cruikshank rendered the suspension procedurally unfair. However, notwithstanding this concession, it relies on the employment agreement and the disciplinary policy in saying that the suspension was substantively justified.

[14] Mr Cruikshank's third issue is a disadvantage grievance. He says he was marginalised by being improperly excluded from the Chief Executives' meeting out of which came the decision that Unitec would work towards offering PGDRITO courses.

(i) Dismissal

[15] The suspension letter identifies the conduct under scrutiny as “...*unacceptable and unprofessional behaviour*” specifically that Mr Cruikshank “...*sent two letters as a representative of Unitec... [which] contain false statements and are highly misleading in a number of material aspects.*” It advised that :

...your alleged behaviour may constitute serious misconduct ... namely...

- 1. Improper conduct in a staff member's official capacity*
- 2. Conduct or behaviour that may bring the standing of his/her profession and/or Unitec into disrepute...*

[16] Unitec undertook the following disciplinary process:

- i. In order to ensure impartiality in the investigation and decision making processes, Dr Ede appointed Dr Leon de Wet Fourie, Executive Dean of the Faculty of Creative Industries and Business (who had no prior knowledge of the background to these events) to conduct the inquiry;

- ii. Dr Fourie and Mr Wulff (Unitec's human resources manager) met with Mr Cruikshank and his support person on 23 July 2009. Mr Cruikshank tabled a 19 page written response and responded to a lengthy list of questions;
- iii. Dr Fourie obtained information from the Academic Service Centre Manager and the Executive Director of Marketing, and passed it on to Mr Cruikshank;
- iv. Dr Fourie and Mr Wulff had a further meeting with Mr Cruikshank and his support person on 5 August 2009. Dr Fourie presented written preliminary findings in which he determined that Mr Cruikshank's conduct was improper and that his behaviour did bring the standing of his profession and Unitec into disrepute. Dr Fourie identified immediate dismissal as appropriate but asked Mr Cruikshank for his response;
- v. On 24 August Mr Cruikshank submitted a 41 page response which included concerns about aspects of the inquiry process; most importantly a concern that new allegations were being considered which had not been put at the outset. Attached was an extensive file of appendices relating to the history of plumbing and gasfitting training over previous years.
- vi. In a letter dated 8 September Dr Fourie responded to Mr Cruikshank's concerns about new matters being raised by offering Mr Cruikshank an opportunity to respond to the matters he considered new (although without conceding that any fresh matters had been introduced after the suspension letter.)
- vii. On 16 September Mr Cruikshank tabled a further 4 page document.

- viii. Dr Fourie then offered Mr Cruikshank opportunities to meet with him in the weeks beginning 11 September and 21 September however on 24 September, by email from his support person, Mr Cruikshank advised that he had addressed all issues and wanted a decision to be made without a further meeting.
- ix. On 28 September Dr Fourie responded in a 14 page letter which began by addressing Mr Cruikshank's concerns about the process before going on to summarise his findings about Mr Cruikshank's conduct, confirming his preliminary view that the sending of the letters amounted to serious misconduct, and recommending immediate dismissal.
- x. Also on 28 September Mr Wulff wrote to Mr Cruikshank "*to confirm that your employment with Unitec will terminate with immediate effect on 28 September 2008.*"

[17] Mr Cruikshank makes a number of criticisms of both the disciplinary process and of the substantive reasons given for dismissal. He argues that sending letters to apprentices and employers would normally be within his role as Head of Department. He says that no question of serious misconduct could arise unless the letters contained false and misleading statements or he was directed not to send them. Both of these assertions he denies.

[18] He says that the only allegations which could be said to have been properly put to him were those in the suspension letter, and that those allegations question only the content of the letters. He says that that the inquiry subsequently widened in scope beyond that issue. Specifically he says that he was surprised by an extensive list of questions at the meeting of 23 July, and that the preliminary findings included fresh allegations (that the letters were unauthorised and contrary to instructions from Mr Richardson.) Mr Cruikshank says that issue of authorisation had not been put to him properly (or at all) prior to this.

The scope of the inquiry

[19] I begin by addressing Mr Cruikshank's concerns about the scope of the inquiry. In the opening page of his letter of 28 September 2008, Dr Fourie states that the allegations against Mr Cruikshank were that:

“you made false and misleading statements in what appeared to be unauthorised letters to the Apprentice Training Trust (ATT) employers and ATT apprentices.”

[20] The original suspension letter had not mentioned the letters being unauthorised or that this was a matter of concern to Unitec. However Dr Fourie saw this issue as relevant and believed it fell within the parameters of the suspension letter. At page four of his letter of 28 September, he noted that:

“as the allegations included that you had sent out the letters in your capacity as Head of the Plumbing and Gasfitting Department, this needed to be investigated in order to determine if it was true. Also requiring investigation was your knowledge of Unitec's interactions with the PGDRITO³ ...

[21] He reminded Mr Cruikshank, that it was he (in his 23 July response) who had explicitly raised the issue of authorisation when he asserted that he sent the letters:

“with the knowledge and permission of my line manager, Mr Richardson...”

[22] In any event, Dr Fourie said that on 8 September, to ensure Mr Cruikshank was treated fairly before a final decision was made, he was given a further opportunity to respond to the areas he regarded as new, namely:

- a. *“you sent the letters in the knowledge that Unitec was engaging the PGDRITO in talks regarding the possibility of delivering programmes leading to the National Certificate in Plumbing and Gasfitting on block courses, and this was approved by Dr Rick Ede as Chief Executive;*
 - b. *Mr Richardson did not approve of sending a letter to ATT employers and cautioned against sending letters to students, and there was no*
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requirement to send the letters. Therefore against the background of Unitec's engagement with the PGDRITO, you did not have authorisation to send the letters; and

- c. *your personal views of the PGDRITO are in conflict with your overriding obligations as a senior employee of Unitec and you have allowed these to guide your actions as Head of Plumbing and Gasfitting department in sending the letters."*

[23] As noted above, Mr Cruikshank gave a four page response. Most of it is devoted to renewed criticisms of Dr Fourie's process. No new comment is made in relation to the three points on which a response was sought.

[24] Overall, Dr Fourie said he was satisfied that what Mr Cruikshank had construed as new allegations were in fact factual determinations that from the outset needed to be made to determine whether Mr Cruikshank was justified in sending out the letters.

[25] I am satisfied that Dr Fourie is correct on this point, especially given that Mr Cruikshank had himself raised these matters in his own defence. Even if that were not the case however it remains that what Mr Cruikshank calls new matters were properly put to him for comment on 8 September. No unfairness arises out of the scope of the investigation, which properly included Mr Cruikshank's knowledge of Unitec's engagement with PGDRITO, Mr Cruikshank's authority and responsibilities as HOD, and whether the letter was sent with the knowledge and permission of Mr Richardson. I turn to those issues (under the general heading of the background to the sending of the letters) next.

The background to the sending of the letters

[26] Dr Fourie noted (at page 6 of the letter of 28 September) that Mr Cruikshank's authority as HOD was being recognised in terms of the HOD position description which provided that he must:

“work in accordance with Unitec’s objectives and strategic plans... [and]...ensure the Department’s operational plans are aligned with Faculty strategy” ...

and required the HOD to:

“achieve other task/project related goals and performance objectives as assigned by and agreed with your Manager.”

[27] Mr Cruikshank’s manager was, of course, Mr Richardson. Dr Fourie goes on to say:

“the issue is not so much whether a person holding an HOD position could send letters to stakeholders relevant to their department, but rather than you sent letters to ATT employers and apprentices knowing, at the very least, that discussions had been taking place between Unitec and the PGDRITO in order to mend and build a relationship that had over many years broken down...”

[28] Dr Fourie reviewed the information available to him and noted that on three occasions (twice on the phone, on 7 July, and face to face on 8 July) Mr Richardson advised Mr Cruikshank that a change in direction had been agreed in principle. Even by Mr Cruikshank’s own account, Mr Richardson had told him that this change was supported by the Chief Executive. At page 8 Mr Fourie concluded:

“I find that you were clear on Unitec’s official position to engage the PGDRITO in talks to determine opportunities to work together...”

[29] Mr Cruikshank had also conceded that Mr Richardson had told him it would not be appropriate to write to employers. Dr Fourie went on to find that Mr Richardson had indicated to Mr Cruikshank that in the context on Unitec’s official position, he did not approve of any letters being sent to ATT employers and cautioned against letters being sent to students. Dr Fourie concluded:

“In knowing Unitec’s official position regarding engagement talks with the PGDRITO, and your line manager’s request not to send the letters, you still went ahead in sending them and expressing your personal opinion and position under the

auspices of being a spokesperson for Unitec. This has brought Unitec into disrepute with the PGDRITO and was improper conduct on your behalf.”

[30] Mr Cruikshank has still given no satisfactory explanation of why he chose to send out these letters in the face of what Mr Richardson had told him. He plainly knew what was proposed, but for his own reasons, went ahead anyway.

[31] I accept that Dr Fourie’s conclusions are fair and reasonable.

The content of the letters

[32] Dr Fourie’s letter of 28 September (at page 6) concludes that:

...you took it upon yourself to send letters that in effect sought to criticise the PGDRITO’s programme by comparing it to Unitec’s programme. That to my mind was improper conduct in your capacity as HOD...”

[33] After considering whether Mr Cruikshank’s statements were false and misleading Dr Fourie also concluded that several statements in the letters were misleading in as much as they were made without relevant context.

[34] Mr Cruikshank says that Unitec’s immediate retraction of his letters had the effect of predetermining the question of whether the letters contained false or misleading statements. He says that there is no basis to the assertion that the letters brought Unitec into disrepute and that matters of tone and style, being subjective, cannot (without more) amount to serious misconduct. Mr Cruikshank says that any issues in the relationship with the PGDRITO were resolved by the retraction letter.

[35] A very large part of the written material he presented to Dr Fourie (and to the Authority) related to Mr Cruikshank’s justification for sending out the letters and the reasons why he says statements in the letters were not false. Mr Cruikshank still stands by what he said in those letters and believes he did the right thing sending them out. He argues that the investigation was flawed by the failure of the investigator to interview members of industry to determine whether they believed the letters to be false or misleading or brought Unitec into disrepute.

[36] I cannot accept that the retraction letter had the effect of predetermining issues about the content of the letter. Unitec was entitled to retract a letter which it considered inconsistent with the position it wished to take.

[37] As for the content of the letters, the full text of the letter to employers is attached as an appendix to this determination. I consider that it speaks largely for itself. I am left in no doubt that it makes an unfavourable comparison between the PGDRITO courses and the Unitec programme. It does, also, contain statements that appear calculated to create a misleading impression. By way of example it states, with reference to the block courses developed by the PGDRITO:

“This programme has not been subjected to the approval process required for delivery under NZQA guidelines...”

[38] The letter omits to say that NZQA approves qualifications, not courses per se. The National Certificate in Plumbing and Gasfitting is one such approved qualification. As the Standard Setting Body, the PGDRITO (like all others) may develop, but not deliver training packages. Delivery is the province of accredited training providers. In this case the PGDRITO had developed short courses leading to the National Certificate. Nothing prevented those courses from being delivered by any accredited provider. The most charitable interpretation of this sentence is that it is confused and effectively meaningless. However it was written by someone with unparalleled knowledge of the processes involved in all aspects of training accreditation. I am satisfied that it was no accident.

[39] Later in the letter, Mr Cruikshank continues:

Current fees for the ITO course are \$2,000.00 per year, but as their programme is not approved under NZQA guidelines, student loans are not available.”

[40] It is correct that there are issues around access to student loans. These are not however, a function of NZQA approval, as this sentence implies. Rather they arise because there are two separate tracks for the funding of tertiary training. One channels funds directly to universities, polytechnics and similar providers which may also

charge students a fee to supplement that funding. Students may obtain a loan to cover such fees. The other track funds ITOs for training which they then purchase from providers. Those providers bill the ITO, not the students, so the question of a student loan does not arise. This does create what some might see as an anomaly: should an ITO find it necessary to supplement its funding by charging students a fee (perhaps because the purchase price exceeds its funding), those students cannot access a loan to cover it.

[41] Overall, both the content and the tone of the letters served to promote Unitec's courses at the expense of block courses developed by the ITO. I agree with Dr Fourie's assessment that:

"...the letters were directly contradictory to both the spirit and intent of Unitec's official position to engage with the PGDRITO..."

Circumstances

[42] Mr Cruikshank asserts that a number of material factors in this case were not given sufficient weight when the decision was made to dismiss him. These include his work record, the history between the PGDRITO and Unitec, the fact that Unitec's direction had been changed very suddenly and he did not fully understand that change, and the lack of training given to him in his very new role as Head of Department. Most importantly, he says that it should have weighed heavily in his favour that he had acted in best interests of his students and the industry as a whole.

[43] I do not accept that these factors were not taken into consideration. All the relevant information was supplied to Dr Fourie. He took the time to weigh it before coming to his final decision. Unfortunately, it was far outweighed by Mr Cruikshank's intransigence about whether the letters were a good idea in the first place. Even at his meeting with the Authority he remained of the firm view that he did the right thing in writing them.

[44] As well, although he did say that he was open to engagement with the PGDRITO, he placed conditions on that (saying, for example, that he would talk to them only if they first provided him with all their course materials.) After considering

everything Mr Cruikshank has said and written about the PGDRITO, I formed a view that he remained very resistant to engagement with them unless it was totally on his terms.

Who had the power to dismiss?

[45] Finally, Mr Cruikshank notes that although the Chief Executive purports to have delegated the decision-making role in Mr Cruikshank's case to Dr Fourie, Dr Fourie's final letter of 28 September expresses only a "recommendation" to dismiss. The letter of dismissal was signed by Mr Wulff, who does not have delegated powers to hire and fire.

[46] The manner in which this dismissal was notified to Mr Cruikshank was indeed irregular. In the finish, however, I am unconvinced that this is a matter going to justification. In case I am wrong I note that I would in any event consider this a case where 100% contribution was warranted.

Summary

[47] This determination has dealt with only the main points of the evidence and arguments traversed in the witness statements and documents provided to the Authority. Because of the urgent nature of the proceedings, I have not incorporated all of it. I record however that in standing back from the detail of the case I found it to be very clear. As I have indicated elsewhere in this determination, Mr Cruikshank and his witnesses appeared to wish to litigate the wisdom and manner of the Chief Executive's decision to move towards a closer relationship with the PGDRITO. Dr Ede's decision was never an issue for the Authority, being something which falls squarely within the authority of the Chief Executive. Even if he had been successful with one of the many detailed criticisms he made of Dr Fourie's process, Mr Cruikshank's continuing belief that he "*did what needed to be done*" (as he told me) and intractability about what he saw as the right direction for the Department, demonstrated how impossible it would have been for him to remain in the role of Head of Department.

[48] The claim of unjustified dismissal therefore fails.

Suspension

[49] As soon as it became aware of its legal obligations the respondent lifted the suspension and invited Mr Cruikshank to a meeting to discuss whether continued suspension was appropriate. Mr Cruikshank declined, electing to remain on leave in order to prepare his response to the investigation.

[50] Clause 14.1 of the Employment Agreement provides for suspension “*where the employer is of the opinion that the employee may be guilty of serious misconduct of a nature that warrants immediate suspension.*”

[51] Clause 7 of the disciplinary policy allows for suspension: “*In order to facilitate further investigation of the matter*” while the disciplinary policy sets out four factors that are to be taken into consideration in making the decision to suspend:

- i. the continued presence of the staff member is likely to cause concern to Unitec staff, students and/or members of the public;*
- ii. it appears desirable to take the heat out of the situation where other staff members are involved in the matter to be investigated;*
- iii. there is a significant possibility of the investigation being hindered if the staff member remains at work while it is undertaken; and/or*
- iv. the allegation is such that work cannot continue until the allegation is investigated and/or rebutted.”*

[52] The respondent does not concede that one of these four factors must necessarily be present to justify a suspension. However it says that in this case, several of the factors are present. It says that Mr Cruikshank’s presence would have caused concern to the ATT and the PGDRITO, damaged Unitec’s relationship with them and inflamed existing tensions between management and staff. It says that it

would have been impractical for Mr Cruikshank to continue in his role until it had established whether the allegation had been made out.

[53] All these arguments are accepted. The suspension was substantively justified. In the circumstances, all that is required is a modest level of compensation to remedy the defective process which led to the suspension.

[54] **I therefore order the respondent to pay to the applicant the sum of \$1,000.00 pursuant to s.123 of the Employment Relations Act.**

Disadvantage grievance: marginalisation

[55] It is argued for Mr Cruikshank that not having been invited to the meeting disadvantaged him because he missed out on first hand knowledge of the talks between his employer, ATT and the PGDRITO. This is not accepted. The meeting in question (which was at the initiative of the PGDRITO) was a small one at Chief Executive level. It was Mr Ede's prerogative to invite whom he chose to that meeting; neither Mr Cruikshank nor any other staff member was entitled as of right to attend.

Costs

[56] Costs are reserved. If a determination on that issue is required any application should be lodged within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority