

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 53
5429177

BETWEEN

ROBYN VOSS
Applicant

A N D

REGENT INTERNATIONAL
EDUCATION GROUP
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
E McWatt, Counsel for Respondent

Investigation Meeting: 30-31 January, 13 February 2014 at Auckland

Submissions received: 11 & 12 February 2014 from Applicant
12 February 2014 from Respondent

Date of Determination: 14 February 2014

DETERMINATION OF THE AUTHORITY

- A. Robyn Voss was unjustifiably dismissed by Regent International Education Group Limited.**
- B. The Authority dismisses the alternative cause of action for breach of good faith.**
- C. The Authority declines to award any remedy under s123(b) because Ms Voss has not proven to the required standard she has lost remuneration.**
- D. An order that Regent International Education Group Limited pay compensation of \$2,500 including a reduction of 50% for Robyn Voss' contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**

- E. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

- [1] Robyn Voss was employed as a Programme Leader on a fixed term contract by Regent International Education Group Limited (Regent). She was summarily dismissed on 9 August 2013 following allegations she gave answers to international students resitting an exam and was dishonest. Ms Voss denies the behaviour, and alleges procedural flaws leading to her unjustified dismissal.
- [2] Regent submits Ms Voss followed incorrect teaching practices, failed to secure confidential information and was dishonest. It denies any procedural flaws, and submits the dismissal was substantially justified. Even if the dismissal was unjustified, it points to contributory behaviour reducing remedies by 100%.

Facts leading to dismissal

- [3] On 24 July 2013, Ms Voss was teaching a 630 leadership paper to a class of 17 to 20 international students with mixed language and academic ability. All of the students had failed their first assessment exam (first exam). They were to re-sit the exam at a later date.
- [4] At the beginning of class, she handed back the student's first exam papers. She had the first exam marking schedule in class and spoke to the students about the first exam answers. She then collected the first exam papers back in and placed them together with the marking schedule on her desk. This took approximately 30 minutes.
- [5] Ms Voss was then called away from the classroom for 10 to 15 minutes. During her absence, students photographed the first exam marking schedule using their smart phones.

- [6] The re-sit exam was later arranged for 31 July 2013. Two days prior to the exam Ms Voss drafted the resit exam based upon the first exam.
- [7] On 6 August 2013, while marking four papers, Ms Voss noted two exams had answers which were very similar to the first exam marking schedule. She believed the students may have cheated.
- [8] On 7 August 2013, she told Dot Bach, Operations Director, students may have cheated and obtained the information from the schools computer system. There had been previous concerns about non-academic personnel accessing Regent's computer system. Ms Voss denied she had given or left information for students to access.
- [9] Ms Bach and Ms Voss then told Leo Lee, managing and sole director of Regent. He confirmed with the IT department no student had accessed the school's computer system.
- [10] A meeting was arranged with one of the students alleged to have cheated. The purpose of the meeting was to ascertain if cheating had occurred, how and the appropriate discipline for the students involved. Ms Voss, Ms Bach, and Mr Lee were at the meeting.
- [11] During the meeting, the student alleged Ms Voss had read out the answers to the first exam. Ms Bach then questioned how he could have recalled the answers if she had only read them out. The student then admitted photographing the first exam marking schedule on his smart phone, when she left the room.
- [12] Ms Voss dismissed this issue, stating she had revised the first exam, implying the re-sit exam questions (and answers) were different from the first exam. She made no comment about the allegation she read the first exam answers out in class. Mr Lee was angry and asked Ms Voss how she could provide the answers to her student and fail to mention this.¹ Ms Bach then interrupted Mr Lee and the meeting ended.

¹ Witness Statement (WS) Leo Lee para 8

- [13] Ms Voss gave Ms Bach the first exam marking schedule and the student's first exam papers. Ms Bach did a physical comparison between first and resit exam questions and the students resit exams and the first exam marking schedule. She detected 15 out of the 17 students had similar answers to the first exam marking schedule. She went to Ms Voss' office and told her 15 of 17 students had answers similar to the first exam schedule. Ms Voss did not wish to know. She was leaving to attend another class. Ms Bach and Mr Lee met during this period and determined this was a disciplinary matter and Ms Voss would be invited to a meeting. A text and email was sent to Ms Voss about meeting.
- [14] Ms Voss received an email from Mr Lee later that evening. It invited her to a disciplinary meeting the next morning as this was serious misconduct and that she could bring a support person. There was no detail in the text or email about what the serious misconduct entailed.
- [15] Ms Voss sent a reply email at 9.10am 8 August saying she did not believe "*having a student rifling through your papers while you are temporarily helping another student in a short break*" was serious misconduct. She quoted an extract from the serious misconduct from her employment agreement.
- [16] She then approached Ms Bach about what had happened the day before. She was told to wait until the afternoon meeting.
- [17] Ms Voss arranged for Patrick Fong, a colleague, to attend the meeting at 2.30pm. At the meeting Mr Lee set out various concerns. Ms Voss was asked to respond. The meeting took approximately 45 minutes. Ms Voss returned to work thereafter.
- [18] Following the meeting, Mr Lee made his decision to dismiss Ms Voss. She was advised the following day and asked to leave the premises.

Issues

- [19] The issues for the Authority to determine are:
- a) Could a fair and reasonable employer conclude Ms Voss' conduct was misconduct justifying dismissal?

- b) Did Regent breach its duty of good faith to the applicant?
- c) Was the process leading to the dismissal of Ms Voss what a fair and reasonable employer could have done in all the circumstances?
- d) If the Authority finds that the dismissal was unjustified, what remedies should be awarded?
- Has Ms Voss lost remuneration (s.123(1)(b))?
 - What award (if any) should be made under s.123(1)(c)(i)?
- e) Were Ms Voss' actions leading to dismissal causative and blameworthy requiring a reduction in compensation due to contributory conduct?

Legal framework

[20] The fact Ms Voss' employment was terminated is accepted. The onus falls upon Regent to justify whether its actions "*were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*" (s.103A(2)). In applying this test, the Authority must consider the matters set out in s.103A.

[21] The Authority must not determine the dismissal unjustifiable if the procedure or defects were minor or did not result in the employee being treated unfairly (s.103A(5)). A failure to meet any of these s.103A(3) tests is likely to result in a dismissal being found to be unjustified².

[22] This employment relationship was governed by a fixed term contract terminating 24 March 2014 (employment agreement).³ The employment agreement defined serious misconduct leading to immediate dismissal as including "*acting in a way which, in the reasonable opinion of the Employer, brings the Employer into disrepute.*"⁴

² *Angus v. Ports of Auckland Ltd* [2011] NZEmpC 160 at [26]

³ Joint bundle of documents (JBD) document 1 Independent employment agreement (fixed term) between Ms Voss and Regent dated 1 March 2013

⁴ JBD p.6

[23] Serious misconduct “... will generally involve deliberate action inimitable to the employer’s interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.”⁵ It is conduct which “deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.”⁶

Issue 1: Could a fair and reasonable employer conclude Ms Voss’ conduct was misconduct justifying dismissal?

[24] Ms Voss denies she gave the students the answers in class. She accepts she may have left the first exam marking schedule on her desk while absent from the room, but this was a mistake. She denies being dishonest saying she had forgotten she’d left the marking schedule when asked by Ms Bach. She denies the resit exam and first exam questions are similar. She refers to her years of experience and lack of previous disciplinary action. She does not believe her actions caused Regent any reputational damage justifying dismissal.

[25] The evidence substantiating the allegation Ms Voss gave students answers is equivocal. The student who made the allegation was not available for examination. His allegation “*she gave us the answers*” does not necessarily mean she read the answers verbatim. It was accepted teaching practice for teachers to bring in marking schedules to go over exams and discuss how to improve student answers. It is also consistent with Ms Voss’ evidence she gave broad outlines of how students should answer exam questions.

[26] Mr Lee found she had given answers based upon interviews with students who had been caught cheating and her failure to deny this allegation.⁷ These students, more probably than not, had a motivation to blame Ms Voss to deflect they had been caught cheating. Because Ms Voss did not deny the allegations at the meeting on 7 August 2013, Mr Lee concluded she accepted them.⁸ Given the purpose of the meeting was disciplining a student not Ms Voss, little weight should be given to Ms Voss’ responses or lack thereof. Mr

⁵ *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

⁶ *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

⁷ JBD p 49

⁸ WS L Lee para 9

Lee was aware Ms Voss had initially denied giving student's any answers. The evidence did not reasonably substantiate the allegation she had read answers verbatim to students.

[27] Mr Lee found Ms Voss was dishonest because she initially denied giving students answers then did not tell Regent she left the marking schedule in the class room. Ms Voss' explanation was she forgot because of work pressure and illness. It was also illogical for her to complain about cheating by students, if she had remembered leaving the marking schedule in her room. This risked exposure of her actions. This did not reasonably substantiate the allegation she was dishonest.

[28] Leaving the marking schedule in the classroom was a serious matter. She was aware there would be similarities between the first and resit exam. Her explanation it would have been awkward taking papers while absent from class⁹ was not reasonable in the circumstances.

[29] Ms Voss was responsible for teaching, writing and marking the resit exam. Regent would have to have a high level of trust and confidence she could ensure exam answers are not deliberately or negligently given to students.

[30] A single act of negligence, when sufficiently serious, can impair trust and confidence.¹⁰ Ms Voss' conduct would have fallen within that definition. This conduct was negligent. It would have impaired Regent's trust in Ms Voss to continue teaching in future. It caused Regent's reputation to be questioned with NZQA. At the time it made the decision to dismiss, the consequences for Regent with NZQA were unknown.

[31] The Authority determines a fair and reasonable employer could have concluded Ms Voss' conduct was misconduct justifying dismissal.

[32] However this was not the conduct she was dismissed for.

⁹ WS R Voss para 48

¹⁰ *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29, [2000] 2 ERNZ 448 (CA)

Issue 2: Was the process leading to the dismissal of Ms Voss what a fair and reasonable employer could have done in all the circumstances?

- [33] Regent submits it raised concerns organically over two meetings and assorted attendances. She did not deny some of the allegations raised. She should have known the concerns in the circumstances. It believes she had sufficient opportunity to respond and they genuinely considered her responses.
- [34] The first meeting was held on 7 August 2013. It did not sufficiently raise the employers concerns. Having a student partially raise the employers concerns does not meet the statutory requirements. The purpose was to investigate cheating by students, not discipline or investigate concerns about Ms Voss. The Authority accepts Ms Voss' evidence the meeting was confusing and did not provide reasonable opportunity for her to respond to concerns.
- [35] Concerns continued being raised with Ms Voss in an organic and ad hoc way. Ms Bach's attendances upon Ms Voss during work and without prior notice, does not meet the statutory criteria for raising concerns or reasonable opportunity to respond. The Authority accepts Ms Voss' evidence she was busy at work, inattentive and unaware the matter had become disciplinary. Her responses or lack thereof, are insufficient to show she had reasonable opportunity to respond in the circumstances.
- [36] Mr Lee's email and alleged text message inviting Ms Voss to a meeting to discuss serious misconduct did not discharge the statutory requirement of raising concerns.
- [37] Ms Voss' email to Mr Lee thought the serious misconduct was about a student rifling through her belongings.¹¹ This should have alerted him to the fact she may not understand the full extent of the concerns.
- [38] The first time the concerns were raised in a disciplinary process was at the meeting on 8 August 2013. Regent says it raised four concerns namely, dishonesty about her not telling them she took the marking schedule into the class room, similarities between the first exam and resit exam, the fact these events could be seen as assisting cheating and the risk for Regent of these

¹¹ JBD pp45 to 46

actions.¹² Ms Voss believed the concerns were she had told students verbatim answers the previous week and had left the marking schedule.¹³ Patrick Fong believed the concerns were the similarity of student answers to the first exam marking schedule and leaving the marking schedule which students photographed and used in the resit exam.¹⁴

[39] The impression from the evidence of all four attendees was it focused on showing how these students had cheated as a result of her leaving the marking schedule. It did not focus on her alleged dishonesty.

[40] Ms Voss believed there was sufficient dissimilarity between the first and resit exam for second language learners. Ms Bach disagreed. Ms Bach was asked by the Authority whether this was a performance issue, as opposed to dishonesty. She accepted it could have been but Regent “*did not wish to go down that alley.*”¹⁵ It appeared alternative explanations for Ms Voss’ behaviour were not considered by Regent.

[41] Ms Bach admitted the risk to Regent’s reputation was raised for the first time at the 8 August 2013 meeting. Neither Mr Fong nor Ms Voss recalled this as an issue for discussion.

[42] The ad hoc manner in which concerns were raised did not provide Ms Voss with a reasonable opportunity to respond prior to dismissal. Most, if not all of the concerns were raised on 8 August in a 45 minute meeting. She had no time to reasonably consider the concerns and respond before dismissal. There is concern they did not genuinely consider the responses she did give.

[43] Regent’s small business size does not justify its actions in the circumstances. It simply required more time to clarify and respond before dismissal took place. These defects were not minor and led to unfairness for Ms Voss.

[44] The Authority determines Regent’s actions leading to the dismissal of Ms Voss were not what a fair and reasonable employer could have done in all the

¹² Oral evidence D Bach hearing 31/01/2014

¹³ WS R Voss para 42 to 44

¹⁴ Oral evidence P Fong 30/01/14

¹⁵ Oral evidence D Bach 31/01/14

circumstances. Robyn Voss was unjustifiably dismissed by Regent International Education Group Limited.

Issue 3: Did the respondent breach its duty of good faith to the applicant?

[45] Ms Voss submits a breach of good faith by the failure to be responsive and communicative. This appeared directed at the process Regent followed prior to dismissal. This was an alternative cause of action to her personal grievance.

[46] Given she was successful in proving her personal grievance the Authority dismisses the alternative cause of action for breach of good faith.

Issue 4: If the Authority finds that the dismissal was unjustified, what remedies should be awarded?

[47] Regent submits if the dismissal was unjustified Ms Voss has not lost any remuneration because she chose not to work in order to complete her Masters degree. It seeks reduction of any compensation payable due to contribution below.

Has Ms Voss lost remuneration (s.123(1)(b))?

[48] Ms Voss' evidence was upon termination she decided to apply for a WINZ benefit and finish her studies. She did not start applying for jobs until September 2013. In closing submissions she alleged she had some casual work but had not provided evidence of this.

[49] Ms Voss has an obligation to mitigate loss by seeking alternative paid employment.¹⁶ An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.¹⁷

[50] There was a failure to mitigate lost remuneration. The Authority declines to award any remedy under s123(b) because Ms Voss has not proven to the required standard she has lost remuneration.

¹⁶ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

¹⁷ *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

What award (if any) should be made under s.123(1)(c)(i)?

[51] Given there was serious misconduct capable of dismissal, Ms Voss' claims for hurt and humiliation must be limited to the manner in which the dismissal was implemented. The process defects are detailed above.

[52] Ms Voss also alleges her departure from the business was undignified because she was hurried and there were hurtful comments by Ms Bach. She was told she was not welcome back at Regent so had better collect all her things. Ms Bach then told Mr Lee Ms Voss was leaving but needed to get information from the computer.¹⁸

[53] The evidence supports a modest award of compensation of \$5,000. This is subject to reduction for contributory behaviour which is considered below.

Issue 4: Were Ms Voss' actions leading to dismissal causative and blameworthy requiring a reduction in compensation due to contributory conduct?

[54] Regent raised an issue of subsequently discovered misconduct by Ms Voss taking on work for a competitor in breach of her contract. As indicated to the parties, the Authority was not persuaded upon the evidence of emails that Ms Voss was in fact engaged or employed in direct competition to Regent. It was inconclusive and Ms Voss disputed she was working. The Authority declined to accept further evidence sought to be filed by Regent during closing submissions.¹⁹

[55] Ms Voss conceded leaving the marking schedule in the classroom unattended was both causative and blameworthy. A reduction in compensation of 50% is warranted.

[56] There is an order that Regent International Education Group Limited pay compensation of \$2,500 including a reduction of 50% for Robyn Voss' contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

¹⁸ First Witness Statement R Voss paras 64 to 66.

¹⁹ See *Voss v Regent International Education Group Limited* [2014] NZERA 52.

[57] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority