

NOTE: An order prohibiting publication
of identifying details appears on p 9

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michael Peter James (Applicant)

AND John Webster, Chief Executive Officer Unitec Institute of Technology
(Respondent)

REPRESENTATIVES Leola Goffin, Counsel for Applicant
Rachel Steel, Counsel for Respondent

MEMBER OF AUTHORITY R A Monaghan

INVESTIGATION MEETING 11, 12 and 20 April 2006

SUBMISSIONS RECEIVED 9, 15 and 22 May 2006

DATE OF DETERMINATION 4 August 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Unitec employed Michael James as head of the School of Design, commencing in 1994. In 2003 it dismissed him for serious misconduct. Mr James says the dismissal was unjustified.

[2] Mr James has also raised personal grievances on the ground that his employment was affected to his disadvantage by various unjustified actions of Unitec's. Specific actions included:

- (a) suspending him on 8 October 2003; and
- (b) continuing the suspension on 30 October 2003.

Events leading to the dismissal

[3] 2003 was a traumatic year for Mr James. During the first quarter he prepared and presented a proposal for the restructuring of the school of design's key Bachelor of Design programme, including a plan for retaining the course but developing a new Bachelor of Photography programme as well. Certain tutors in the school were deeply opposed to the proposal. In June and July 2003 they formed a group, known as the 'Dolce Vita group' to voice their concerns about that as well as wider concerns about Mr James' bullying or intimidating behaviour.

[4] Mr James was aware of the resistance and experienced some stress over it. Then, on 1 August 2003, he met with Unitec's conciliator, Glenda Grant, to discuss concerns members of the Dolce Vita group had raised with her. During the meeting Mr James became distressed and had what he described as a 'cathartic' experience. Ms Grant responded by raising the possibility of

assistance under the Employee Assistance Programme (“EAP”) and gave Mr James some information about the programme. She decided not to pursue matters with him in the meantime.

[5] Only a few days later, on or about 8 August 2003, Unitec’s Chief Executive Officer, John Webster, received an unsigned ‘Get Well’ card. Mr Webster subsequently learned that copies of the card had been distributed elsewhere in the academic community as well as in the design industry. Indeed the card was distributed so widely that Mr James himself received a copy while acting in another capacity. The theme of the card was that Unitec was a sick institution because it continued to employ Mr James despite numerous complaints about him which were then listed. The card went on to state that Mr Webster plainly found ‘such ‘professional’ (!! performance satisfactory’.

[6] Mr James and his supporters suspect the card was sent by a member or members of the Dolce Vita group. However there was no evidence of who sent it, and its authorship was not part of the investigation Unitec commenced, or of the Authority’s investigation. Instead the card prompted an investigation which led to the raising of disciplinary concerns about Mr James and eventually to his dismissal. Mr James believes Unitec’s focus should have been on the activities of the Dolce Vita group.

1. Unitec’s response to the Get Well card

[7] Mr Webster was distrustful of anonymous allegations, but concluded the risk to Unitec’s reputation, as well as that of the design school, meant he should at least seek Mr James’ response. He would then decide what to do about the card. Mr James and Mr Webster agreed to meet to discuss the matter on 13 August 2003.

[8] There was a conflict in the evidence over who initiated the meeting, but it is not necessary to resolve that conflict. This is particularly so because I am satisfied the purpose of the meeting was to discuss the receipt of the card, and what should be done in response. The meeting was not intended to be, and did not become, a disciplinary meeting. It was merely a meeting. I do not accept that the fact Mr Webster asked Mr James questions about the allegations, as well as other aspects of Mr James’ behaviour, meant the meeting amounted in reality to an investigation of a disciplinary nature. Nor do I accept any of the several additional attempts to portray the meeting as something other than it really was. There were no breaches of university policy in respect of the meeting.

[9] The meeting was attended by Messrs Webster and James, as well as Bev Cullen, Director of People Capability, John Boon, Dean of the Faculty of Architecture and Design (to whom Mr James reported), and Annabelle Pretty, one of three associate heads of the design school (and a supporter of Mr James who also reported to Mr James). Mr James denied all of the allegations in the card, but Mr Webster wanted to make a strong and positive response on behalf of Unitec so sought more detailed information to support the denials. To that end he suggested an investigation, to enable an objective demonstration that the allegations were false.

[10] Mr James became very upset. I regard that reaction, and Mr James’ conclusions about the purpose and conduct of the meeting, as a reflection of his vulnerable state of mind. The reaction prompted Ms Cullen, too, to offer Mr James access to the EAP. Mr Webster offered to waive the normal limits on access.

[11] Mr James then took some two weeks’ sick leave because of stress and depression, although the medical certificate he provided at the time made no mention of these factors. Mr James also took the opportunity to see a counsellor under the EAP, receiving one counselling session. It was open to him to make fuller use than he did of his access to counselling under the EAP, and I do not consider his failure to do so was Unitec’s responsibility.

2. Mr Webster delegates the authority to conduct an investigation

[12] Since the card included an implied criticism of him, Mr Webster appointed Richard Smyth, then the Dean of the Faculty of Arts and Sciences and Unitec's most senior dean, to carry out the investigation. This was an appropriate choice because, in addition to his qualifications and seniority, Mr Smyth was not connected with the school of design or with Mr James. By letter dated 20 August 2003 Mr Webster formally delegated to Mr Smyth authority under the Unitec disciplinary policy to:

‘... deal with all or any allegations of misconduct that have been or may be made against Michael James

This delegation includes, but is not limited to, authority to suspend ... to determine whether any matter should be investigated and, if so, to investigate any allegation and determine what action, if any, should be taken.’

[13] Although the delegation was expressed to be under Unitec's disciplinary policy, Mr Smyth planned to conduct a preliminary investigation into whether the allegations in the card were so lacking in substance the matter could be disposed of without further enquiry. He did not embark immediately on a disciplinary investigation. That came later.

[14] Part of Mr James' claim of unfair treatment concerns the apparent breadth of the delegation to Mr Smyth. That, coupled with the numerous and very wide-ranging allegations made against Mr James by some of the people Mr Smyth interviewed, led to complaints that the investigation was a fishing expedition and at least in part caused Mr James to say he did not know what was being alleged against him. However there was no legal argument about the nature and status of the delegated authority, and the issue was not developed beyond the complaints just set out. To address those complaints, I make the following points.

[15] First, I accept Mr Webster's evidence that he sought to address whether there was anything of substance in the allegations in the Get Well card, and to place Unitec in a strong and informed position when it came to denying the allegations as it expected to do. The delegated authority to investigate was worded broadly so that, should Mr Smyth come across a related concern of substance, he could pursue it even if it was not expressly referred to in the card. If necessary he could pursue disciplinary action. That does not mean Mr Smyth set out to search for complaints or allegations in addition to those set out in the card.

[16] Second, the fact that some interviewees chose to make numerous additional allegations does not turn Mr Smyth's investigation into a fishing expedition. Nor does the fact that Mr Smyth conducted a very diligent investigation, following up on some of those additional allegations. In many cases Mr Smyth decided there was no need even to put the allegations to Mr James. However Mr James became aware of them and sought to answer them anyway - as he also did in the Authority - and it is unfortunate that caused him confusion and distress. As far as the disciplinary procedure is concerned he should have distinguished between allegations not proceeded with - thus not held against him and not requiring an answer - and those formally put to him for answer.

[17] Finally, it is not unusual for an investigation into a matter involving an employee to uncover other information which eventually forms the basis for a dismissal. That does not mean it is unfair to the employee to use the additional information in that way, provided the information warrants a finding of misconduct and the requirements of a fair procedure are otherwise followed. Having said that, I find the allegations relied on in support of Mr James' dismissal were related to certain allegations in the card.

3. Mr Smyth begins the investigation

[18] Mr Smyth began by identifying relevant individuals and relevant documentary material in respect of each of the allegations in the card. During September 2003 he spoke to the individuals and considered the documents. Some allegations were more specific than others. As a result of his preliminary investigation Mr Smyth decided all but one of the more specific allegations could be taken no further. The remaining specific allegation concerned fee waivers given to students in the school's Master of Design Management ("MDM") programme.

[19] The card also contained a generalised allegation that Mr James was given to temper tantrums and staff abuse. Mr Smyth was concerned about the suggestion of staff abuse and wanted to ensure no staff members were being subject to abuse, so decided to raise the issue during his interviews. From those interviews he ascertained that Mr James had been accused in the past of being overbearing and bullying, and that concerns had recently been raised with Ms Grant. Mr Smyth was surprised and concerned at the level of anxiety expressed, as well as other matters raised with him in the discussions. He concluded that a careful consideration of these matters was necessary and the preliminary investigation would take longer than he expected.

[20] Although he had not completed his preliminary investigation, Mr Smyth sought a meeting with Mr James on 30 September 2003 on an interim basis. Because of the passage of time he intended to indicate progress to date, as well as to discuss the possibility of suspension in the light of the anxiety he had identified in some interviewees. He advised Mr James of his intentions in a letter dated 26 September 2003, and invoked section 6.1 of Unitec's disciplinary policy.

[21] The policy provided in part:

"6.1 Suspension is to be used in cases where it would be, in the opinion of Unitec, inappropriate for the staff member to remain on duty in the circumstances.

Such circumstances may include [the need to]:

- ...
- (iv) take the heat out of a situation where other staff members were involved in the matter under investigation;
- (v) reduce the emotive element;
- (vi) allow for an unhindered investigation.'

[22] Mr Smyth expressly relied on (iv), (v) and (vi) in support of the proposed suspension.

[23] Mr James did not recognise the intended interim nature of the meeting, and sought to prepare a full response to what he thought was being alleged against him. In response to queries and requests from counsel, in a letter dated 30 September 2003 Mr Smyth said: no written statements had been taken and no conclusions had been drawn; he was investigating allegations of misconduct including the fee waivers and Mr James' alleged behaviour towards staff and/or students; and written statements of significance (if any) would be provided to Mr James for his explanation as a final part of the investigation.

4. The decision to suspend

[24] The requested meeting went ahead on 2 October 2003. Mr James attended with counsel. Mr Smyth advised that he had spoken to a number of staff and students, and spoke of the perception that they did not feel safe in expressing their views. He spoke of his awareness of concerns about the academic direction of the school and Mr James' leadership style, and that conflict was emerging between the resolution of those concerns and the completion of his own investigation. Those were the reasons why he considered it better for all concerned if Mr James was not present on campus while the preliminary investigation was completed.

[25] In response counsel argued against suspension, and sought to discuss concerns about the Dolce Vita group. It was said the group's sole purpose was to undermine Mr James' leadership. That was said to be at the heart of the complaints about Mr James, including the Get Well card. Mr James also said he had received no support from Unitec, and that Unitec had not addressed his complaint that it had provided the Dolce Vita group with an email group address. In fact his original complaint was: "I am dismayed that a group of BDes staff [who met] with the sole intention of undermining what I am trying to do as head of school should set up a Unitec website for that purpose. I need to know if this has been sanctioned by UNITEC". There was no such website, and when the complaint as it related to the email address was expressed more accurately in October, Unitec addressed it.

[26] After discussion of those and other matters, counsel and Mr James suggested some alternatives to suspension. The suggestions involved withdrawal of most of Mr James' contact with staff, although Mr James would remain on campus. After considering the suggestions Mr Smyth decided to go ahead with a suspension on pay because of the heat and emotion, and apparent fear and intimidation, being expressed by the staff. He believed Mr James' reputation could be protected if the suspension was portrayed as an absence on leave. Mr Smyth confirmed his decision in a letter dated 8 October 2003. The suspension was to continue until 24 October.

[27] Unfortunately, in the meantime it had come to Mr James' attention that Mr Boon had allegedly made comments to the effect that Mr James 'would not be in that position for long', and had advised Mr James' personal assistant of Mr James' suspension. Mr Smyth investigated those allegations. Mr Boon's response was to say he did not recall making the comment about how long Mr James would be in his position, and to admit to advising Mr James' personal assistant of the possibility of Mr James' suspension. I accept that Mr Boon acted as he did independently of Mr Smyth who, I also accept, was attempting to conduct a full and fair enquiry. Mr Boon spoke out of turn.

5. 'Creative Futures', the Dolce Vita Group and the involvement of Unitec's conciliator

[28] The document embodying Mr James' proposals for the restructuring of the Bachelor of Design programme was entitled 'Creative Futures'. Mr James argued strongly to Mr Smyth that the Dolce Vita group's opposition to it, and the associated purpose of securing his dismissal, should be taken into account in Mr Smyth's investigation. Mr Smyth did consider those matters.

[29] Mr James considered he had consulted appropriately about Creative Futures, but tutors in the school of design did not agree. They adopted the name 'the Dolce Vita group' because that was the name of the local café where they met. They sought the group email address referred to in [25] to facilitate communication. Unfortunately, in doing so one of the members described the group as a 'legally constituted staff association' when it was merely an informal association of tutors. Although Mr James knew in July 2003 that the group had no official status, his position since then seems to rely on that request, with its accompanying description, in attributing more formality and status to the group than was really the case.

[30] The members who gave evidence said the group was formed because the tutors did not feel heard, and had a range of concerns they wanted to present formally. The group's formation began with an email message to Bachelor of Design teaching staff, dated 25 June 2003, inviting recipients to a meeting at the café on 1 July 2003 and saying the meeting was to:

"... talk about issues common to all of us who teach on the degree. The agenda is to allow staff to put their concerns on the table and to discuss initiatives we might take to enhance the teaching and culture of the BDes. Please note this meeting is not linked to the recent School briefings. It is a meeting initiated by and for teaching staff to discuss professional concerns independent of management...."

[31] As planned, the group had its first meeting on 1 July. One of the things it did either during or immediately afterwards was draft a letter of the same date to the Bachelor of Design programme committee. The committee was a representative body formally constituted to address the content and operation of the programme.

[32] The letter was presented to the committee at a meeting of 3 July 2003. It detailed concerns about the proposed development of a Bachelor of Photography programme, and the feeling that the proposal conflicted with the integrity of the existing Bachelor of Design programme. It made no mention of Mr James. The letter is not inconsistent with the purpose expressed in the 25 June email, and the existence of genuine, deeply-felt concerns of the kind set out was confirmed in the evidence.

[33] Bill McKay, another of the associate heads of the school of design, was invited to attend the 1 July meeting of the Dolce Vita group to give a brief presentation on interior design. In a written statement he described the meeting and commented that: "... it soon became apparent that the aim of the meeting and the group was to seek the dismissal of Michael James" and "I believe the meetings were chaired or led by Marcus Williams (certainly Marcus and Anna [Miles] were leading members) and that a few staff with a grudge were conducting a vendetta against Mike James and trying to involve others." I am afraid Mr McKay's oral account of what actually transpired during the meeting fell far short of supporting his conclusions about the group's purpose, and nor was there any other reliable evidence to support them.

[34] This does not mean I discount evidence such as the proposal, made during the 1 July meeting, that there be a motion of no confidence in Mr James. Even so, the proposal was not discussed or pursued and there was no mention of Mr James' ongoing employment at all. Nor do I disregard the fact that at least some of the members had strong views about Mr James' plans for the school's academic direction, and his behaviour. That does not mean the group met with the purpose of securing a dismissal, or was part of a 'vendetta' mounted by 'staff with a grudge'. I accept the group met for reasons of the kind set out in the 25 June email message and the 1 July letter.

[35] It was later in July that some members of the group approached Ms Grant, leading to her approach to Mr James. The conciliator's role was formally established within Unitec as being neutral and independent, for the purpose of working with the parties to a dispute and assisting them to resolve their issues. Consistently with that role Ms Grant sought the discussion with Mr James which went ahead on 1 August, and advised Mr Boon of the existence of the conflict.

[36] The approach to Ms Grant was made to raise concerns about Creative Futures, and what the complainants said was Mr James' threatening and abusive style of management. The group planned to follow up by preparing a document setting out its concerns for the purpose of making a formal and coherent presentation to Ms Grant. Again, I do not discount the probability that Mr James would feature in such a document, but calling it a dossier prepared for the purpose of securing his dismissal is going too far. Obviously, too, the concerns being raised with Ms Grant overlapped with Mr Smyth's investigation, in particular as they related to the generalised allegation about Mr James' behaviour contained in the Get Well card. The degree of overlap has added to the complexity of this employment relationship problem.

[37] This is even more so because, during August and September 2003, Mr Boon had responded to the growing conflict by speaking to the three associate heads of school and some staff members as part of a strategy of building bridges and promoting dialogue and communication. He said he told Mr James he would do so - although Mr James denied this - and liaised with Ms Grant on how to manage the conflict.

[38] I consider it likely that Mr Boon did advise Mr James he would be conducting discussions as he said. Mr James' evidence relied overwhelmingly on accounts of his feelings, and on opinions reported to him by certain colleagues. When he was asked to provide details of facts in support he tended not to remember, offer facts that did not support his conclusions, or refer to minor incidents which were given a significance they did not deserve. Although Mr James did deny Mr Boon's statement on this point, I prefer Mr Boon's account of his recollection. In turn I accept that the discussions were prompted by the conflict about academic direction that had been raised independently of the investigation concerning the Get Well card. Mr Boon's evidence was that he proceeded because there was a need to address the conflict, and since the allegations in the card may well not go anywhere there was no need to delay on that account.

[39] Unfortunately at least some of Mr Boon's discussions occurred in a meeting room across from Mr James' office. It is likely some occurred while Mr James was in his office, he observed participants coming and going, and tension resulted. Mr James also spoke in a general way of how the contents of these discussions were reported to him by some of his supporters. The reports were emotive and upset him. However the evidence produced in support of the allegedly undermining nature of the discussions did not support the conclusions that were drawn from it.

[40] The result of the discussions was a suggestion that staff meet off-campus in a retreat assisted by an independent facilitator. In what was intended as a symbolic reaffirmation of his position, Mr James was to front the retreat. It was to be held on 1 and 2 October 2003, but Mr Boon advised Mr James of its postponement by letter dated 26 September 2003, citing 'some developments that are occurring within Unitec'.

[41] Mr Boon acted as he did because he had seen Mr Smyth's letter to Mr James of 26 September, where the possibility of suspension was raised. Accordingly he anticipated the suspension would be imposed on 30 September, so the retreat could not go ahead. There was an unfortunate clash of dates which was not well-handled, but I remain persuaded that the decision about suspension was Mr Smyth's. Moreover Mr Smyth was a very credible witness, and I accept that he considered the representations made on behalf of Mr James before finalising his decision on the matter.

5. Mr Smyth completes his preliminary investigation

[42] During October 2003 Mr Smyth conducted several follow up discussions to further his investigation, incorporating matters raised by Mr James. Because of those, and earlier discussions, Mr Smyth concluded the following should be investigated as part of a formal disciplinary process:

- (a) the award of fee waivers for the MDM programme;
- (b) Mr James' behaviour in 2002 towards a student named C, following the offer to her of a fee waiver;
- (c) Mr James' allegedly threatening behaviour towards Marcus Williams, a tutor in the school of design;
- (d) Mr James' allegedly threatening behaviour towards Anna Miles, also a tutor in the school of design;
- (e) Mr James' treatment of staff in the school of design; and
- (f) comments Mr James allegedly made at a meeting of the Auckland Secondary Art Teachers Association in 2000.

[43] By letter to Mr James dated 30 October 2003 Mr Smyth provided details of these allegations, formally invoked the disciplinary process, referred to the possibility of dismissal, and sought a meeting on 6 November 2003 to obtain Mr James' response.

[44] In the same letter Mr Smyth listed the allegations in the Get Well card that would not be pursued, and detailed why. Mr James was already aware of the content of the card, and that Mr Smyth's investigation was prompted and informed by the allegations in it. The allegations he was required to answer in a disciplinary context were identified clearly in the 30 October letter, as were the allegations not being pursued. I do not accept there were reasonable grounds for uncertainty about that.

[45] Mr James also says Mr Smyth was biased in his selection of people interviewed during the investigation. I do not agree. Mr Smyth sought to speak to people who had or may have direct knowledge of the allegations against Mr James as they appeared in the Get Well card, and to follow up as necessary. Some interviewees were supporters of Mr James. Other supporters who expressed a concern about bias in the selection of interviewees, or a concern that they were not interviewed themselves, did not for the most part have direct knowledge of the allegations. Nor did they even purport to have such knowledge. They had opinions, particularly about members of the Dolce Vita group, and were given some opportunity to express them when Mr Smyth responded to their and Mr James' concerns. Those opinions provided another perspective on the conflict in the school of design, but otherwise shed little light on the factual basis for the allegations under investigation.

6. The suspension is continued

[46] In a second letter dated 30 October 2003, Mr Smyth purported to continue Mr James' suspension on pay until 6 November. According to the letter the suspension was to allow Mr James to prepare his response to the allegations, and it was still considered necessary to take the heat out of the situation and ensure an unhindered investigation.

[47] The letter also referred to clause 6.1 (ii) of the disciplinary policy, without commenting on its content. The provision says suspension may be appropriate:

“(ii) where it appears that the staff member is engaged in misconduct or serious misconduct.”

[48] Meanwhile Mr James had been back at work for a week following the expiry of the earlier suspension.

7. The disciplinary meeting

[49] The 6 November meeting went ahead with the parties and their lawyers in attendance. The detail of the allegations Mr James had been asked to address was:

- (a) on MDM fee waivers for two students, C and J, that: no criteria for eligibility for waivers had been set; waivers were not offered through a contestable, transparent process; the offers were made without Mr James disclosing that he knew the women; and Mr James signed an internal requisition for the fees in a sum exceeding his financial delegation limit as head of school;
- (b) on behaviour towards C after the award of her waiver, that Mr James continued to make contact and to pursue a possible relationship with her;
- (c) on threatening behaviour towards Marcus Williams, that in the school of design staffroom on 15 July 2003, Mr James stood over Mr Williams and two of his colleagues saying loudly and threateningly ‘Marcus’ cards are marked’;
- (d) on threatening behaviour towards Anna Miles, that on 24 June 2003, in a corridor, Mr James shouted at and threatened Ms Miles in a manner that frightened her and left her feeling she could attend meetings with Mr James only if a support person was present;

- (e) on the treatment of staff, several named people made allegations to the effect that Mr James was a bully who had a negative effect on staff morale;
- (f) on the meeting in 2000, that, in response to a question about criteria for selection for enrolment in a course, Mr James said students should 'come to see me with a twinkle in their eye'.

[50] I now order that neither the names nor any details identifying C and J be published.

[51] Mr James had prepared a written response, from which he read. His replies to the above allegations were, in summary:

- (a) there had never been any criteria for fee waivers in the school of design or at Unitec, and other students had received waivers; there had never been a contestable process for fee waivers, rather there was a practice of offering waivers to attract funding, obtain enrolments and recruit suitable students; Pradeep Sharma (previously a programme director who reported to Mr James) was aware that Mr James knew both of the students referred to; and Mr James did not knowingly exceed his financial delegation limit;
- (b) Mr James did not have a relationship with C and had no intention of starting one, although the two met socially;
- (c) no threat was made to Marcus Williams, and the allegation was contrived by the Dolce Vita group to discredit Mr James;
- (d) the same applied to Anna Miles, although there was an encounter during which Mr James asked for a meeting and Ms Miles reacted badly to the request;
- (e) other specific allegations about bullying behaviour were denied, and the circumstances were explained;
- (f) the statement made at the meeting in 2000 was misreported, and the actual statement was explained.

[52] By letter dated 7 November Mr Smyth extended Mr James' suspension to 14 November. That extension, too, expired without being renewed, although Mr James took the opportunity to visit a family member in Australia and did not return to New Zealand until a day or two before his dismissal.

[53] The 7 November suspension has not expressly been made the subject of a further personal grievance. It is apparent, however, that the additional time was taken to complete the disciplinary investigation, and in that sense the suspension was justified. In addition, having viewed the evidence overall I do not believe Mr James suffered any, or any further, disadvantage as a result of it.

[54] Mr Smyth conducted more follow up discussions, addressing matters arising out of the November meeting. In submissions counsel for Mr James alleged that these were new matters, but I do not accept that Mr Smyth's discussions amounted to any more than thorough attempts to address matters raised on behalf of Mr James and clarify anything outstanding. Mr Smyth spoke to: Mr Sharma, seeking further information about the fee waivers; Ms Pretty regarding Marcus' Williams' temperament; Mr Boon regarding delegated financial authorities; Douglas Lloyd-Jenkins, the third associate head of school, who commented on Ms Miles' general behaviour but had no knowledge of anything relevant to the allegations against Mr James; and John Malcolm, a programme leader in the school, concerning the incident involving Marcus Williams.

[55] The submissions for Mr James also addressed the provision of information in the course of Unitec's investigation. I return to that matter later in this determination.

[56] After considering all of the material then available to him, Mr Smyth concluded that Mr James had explained allegations (e) and (f). He did not rely further on those allegations.

[57] As for the remaining allegations:

- (a) Fee waivers. Mr Smyth considered it was Mr James' responsibility as head of school to ensure there were criteria for eligibility for fee waivers. The failure to set such criteria, or make clear from the outset the duration of the waivers, was a failure to discharge responsible stewardship of Unitec's resources. Mr Smyth also found that Mr James' failure to disclose his personal relationships with C and J, and the failure to provide a contestable and transparent process for the offer of waivers, was behaviour likely to bring the standing of Unitec into disrepute. Exceeding the limit on financial delegation also constituted a failure to follow Unitec procedures. All of this amounted to serious neglect and incompetent behaviour.
- (b) The approach to C. Mr Smyth preferred C's account of events. He also believed that Mr James approached C after the grant of a fee waiver with the intent of pursuing a personal relationship with her. This was unreasonable behaviour, and likely to bring Unitec into disrepute.
- (c) Marcus Williams. Although the statement that Mr Williams' cards were marked was not made directly to Mr Williams the statement was made, and in an angry and threatening manner. It was unacceptable for a head of school to behave in that way.
- (d) Anna Miles. Mr Smyth accepted the statements on behalf of Ms Miles, finding the incident in the corridor was intimidating, and was also unacceptable on the part of a head of school.

[58] In making his decision Mr Smyth took into account Mr James' length of service and positive performance reviews. I do not accept the submission that Mr Smyth failed to take those matters into account, although I understand the real complaint to be that the positive aspects of Mr James' history meant he should not have been dismissed. However Mr Smyth also noted there had been informal warnings and counselling about inappropriate behaviour. He considered Mr James' overall employment history. He concluded that the four remaining allegations amounted cumulatively to serious misconduct, and that allegations (a) and (b) both amounted to serious misconduct in their own right. It was also relevant that, as head of school, Mr James had leadership responsibilities which he was failing to exercise. Overall, summary dismissal for serious misconduct was appropriate.

[59] Mr Smyth conveyed his decision in writing in a letter dated 21 November 2003. The letter was left on Mr James' desk and copied to counsel.

[60] Ms Grant chose the same day to attempt follow-up contact with Mr James. I accept her evidence that her approach was coincidental, but unfortunately Mr James believed the two events were connected and this added to his view that Ms Grant had an inappropriate involvement in the disciplinary process. As I will discuss later, that was not the case.

The justification for the dismissal

1. The grounds for dismissal

[61] I comment on the substantive grounds for the dismissal as follows.

(a) Fee waivers

Depending on how individual courses were structured, completion of the MDM programme could take up to three years' full time study or more for part time study. Annual programme fees could vary similarly, with the fee for a full-time year being in excess of \$4,000. Mr James waived these fees for both C and J from the beginning of their programmes, and without any conditions or limit on duration except that at the beginning of their second years both were told their waiver would continue only to the end of that year. There was no associated application or interview process, although there was a meeting with C during which details of her waiver were discussed.

Mr James said that, in the year the waivers were first offered to C and J, there was a crisis in recruitment for the MDM programme. That was the reason for the waivers. It was common ground that waivers could be used to assist in recruitment, and students could be shoulder-tapped for that purpose (as C and J were), but that was not the problem with the waivers issued to C and J. The problem concerned the lax procedure and potential conflict of interest associated with the waivers.

The waivers for C and J were not the only waivers ever offered in the school. Mr Smyth investigated the circumstances of several others, but found none was offered without conditions and for the full term of the enrolment in the programme. One of the waivers was made for the balance of a student's course of study, with the rest being less than a full waiver for the first year and requiring certain standards to be met before being available in any subsequent year. Even those criteria appear to have had a relatively informal status, and Mr James did not apply them to C and J.

Mr James was not directly involved in the additional waivers, except to the extent he signed them off as head of school. He sought to raise a disparity of treatment argument in respect of them, but I do not accept the argument. The waivers are distinguishable because they were not as extensive as the ones he issued directly, they did not involve a friendship between the student and the staff member seeking to issue them, and because he signed them off himself. Further to the latter, the waivers for C and J were not referred for consideration or sign off to anyone senior to Mr James, and his explanation that Mr Sharma and another programme director knew about them is not adequate. Moreover, even that history illustrates the lack of standard criteria or contestable process.

Finally, Unitec's internal financial reporting system required written requisitions in respect of the fees. As head of school, Mr James had delegated financial authority to sign off amounts up to \$5,000. In or about February 2003 he signed a single requisition form for the waivers for both C and J, in the sum of \$10,874. He said he did not do so deliberately, and suggested that the requisitions should have been put to him separately. Even so, both were in the sum of \$5,437.44 and signing them would still have required him to exceed his authority. At the investigation meeting he did not seem to consider that significant, but I do not agree.

Overall I find Mr Smyth had reasonable grounds for reaching the conclusions he did.

(b) The approach to C

Mr James and C had known each other for some three years prior to the offer of a fee waiver. Mr James, who is married, had invited C on outings. C told Mr Smyth that at the time she did not know Mr James was married, and he had represented to her that he was not. Most of the invitations were declined, and C issued some of her own. Even when invitations were accepted some of the outings did not go ahead, although a few did. There was no sexual relationship and no accusation amounting to sexual harassment, but I find Mr James' behaviour towards C had the appearance of courting behaviour. I would even be prepared to accept that C sent mixed messages to Mr James as to her response. Nevertheless it was unwise of Mr James to have indulged in such behaviour, and even more unwise to have offered C a fee waiver during the period in which it was occurring.

As for the approach after the grant of the waiver, according to C Mr James telephoned her while he was out of Auckland and told her he would 'give everything up to be with me if I said the word'. Mr James denied saying that. He agreed he had contacted C at the alleged time, but said he was lonely and merely sought a conversation.

Mr Smyth did not accept Mr James' denial. He found C to be a more credible witness, and I find he had reasonable grounds for that conclusion.

Against that background Mr Smyth reached the conclusion he did about the seriousness of the further approach to C after the waiver had been granted. He had reasonable grounds for that conclusion too.

(c) Marcus Williams

The original allegation was that Mr James' statement about Mr Williams' cards being marked was made directly to Mr Williams. That was not correct and Mr Smyth identified the error in the course of his investigation. He advised counsel of the error and sought further comments on the matter before making his final decision.

Mr James denied making the statement, but the two people present (including one supporter of Mr James') told Mr Smyth that he did. Mr Smyth reached the correct conclusion about what happened.

I agree that the incident concerning Marcus Williams does not amount to serious misconduct in its own right.

(d) Anna Miles

Similarly, I agree that the incident involving Anna Miles does not amount to serious misconduct in its own right.

According to Ms Miles there was an encounter outside an office she shared, in which Mr James sought an immediate discussion about a report containing student feedback on the poor performance of a staff member. Ms Miles had a particular responsibility in the relevant area. However she was not available to discuss the matter there and then, and sought to make another arrangement. Mr James continued to press her, and when she maintained that she was unavailable at the time he said he would speak to Ms Pretty (the programme leader for the course in question) instead. Ms Miles felt this was a threat to circumvent her own involvement in the matter, and said she was intimidated by the pressure Mr James placed on her. She described Mr James as being angry and agitated.

According to Mr James, almost immediately on his request for a meeting Ms Miles (who was in her office) fled saying 'don't threaten me'. There had been no such threat, and Mr James believed Ms Miles was embarrassed as the staff member was a friend of hers.

Two other people who witnessed the incident provided Mr Smyth with accounts which effectively supported Ms Miles' version. Mr James provided a statement from Mr Lloyd-Jenkins in which Mr Lloyd-Jenkins reported the account Mr James gave him after the incident. That kind of statement must be viewed with some caution, and Mr Smyth was entitled to prefer the accounts on behalf of Ms Miles.

2. Other challenges to the decision-making process

[62] There were extensive challenges to the procedure leading to the decision to dismiss. I have already addressed several of them.

[63] Of those remaining, the first was directed at Mr Smyth's noting that Mr James' employment history included warnings and counselling about inappropriate behaviour. It was said that the warnings were imposed in breach of Unitec's disciplinary policies, and that because the relevant matters had already been dealt with Mr Smyth was estopped from addressing them again.

[64] However the 'warnings' Mr Smyth noted were not formal disciplinary warnings, rather they were informal indications that the conduct in question was not acceptable. I do not accept they were imposed in breach of the disciplinary policies, since they were not and did not purport to be disciplinary acts. More importantly, this was not a case in which the existence of prior disciplinary warnings was directly invoked to support a decision to dismiss. Mr Smyth did no more than 'note' certain matters in Mr James' employment history. Since employers are expected at least to consider an employee's record when making a decision to dismiss, there is nothing wrong with his noting the matters and I do not accept the submission that he was estopped from doing so.

[65] Ironically, though, some of those historical matters were raised in the Get Well card. For that reason they were revisited in the early stages of Mr Smyth's investigation, although the relevant allegations never became part of the disciplinary process.

[66] Second, I do not accept there was a failure to properly investigate the actions of the Dolce Vita group. In the context of the disciplinary process Mr Smyth did follow up on Mr James' view that the allegations against him were the work of a group set on undermining him or securing his dismissal. There was no reliable evidence supporting that view of the group's purpose. I do not accept that the group's active opposition to Mr James' proposals on academic direction, and certain members' complaints about his behaviour, lead necessarily to the conclusions Mr James and some of his supporters expressed.

[67] Third, it was submitted that Unitec failed to provide documents sought on behalf of Mr James, and breached the Privacy Act 1993 in that respect. The Employment Relations Authority has no jurisdiction to determine alleged breaches of the Privacy Act, although it is open to Mr James to submit that he was not provided with full information about the allegations against him and did not receive an adequate opportunity to respond to them.

[68] Regarding that matter, in the parties' correspondence over the course of the disciplinary investigation there was discussion about the provision of documents. Again, some of it concerned allegations that were not proceeded with, or was premature in the sense that no decision had yet been made about the allegations to be put to Mr James for a response.

[69] As for the six allegations formally put, Mr James was provided in advance of the 6 November meeting with: a copy of the requisition form in respect of the fee waivers for C and J; correspondence concerning the waivers for C and J; an account of the complaint from Mr Williams dated 16 October 2003 (which was subsequently found to be inaccurate); Ms Miles' account of the incident in which she was involved, together with a subsequent email exchange between herself and Mr James; and C's account of her association with Mr James, and the approach to her following the grant of the fee waiver. The 30 October letter itself also contained a full summary of the relevant allegations.

[70] The 30 October letter did not attach copies of the notes of interviews which led to the allegation concerning the bullying of staff - although the letter identified those who felt bullied - or the allegation about the meeting in 2000. This was discussed at the 6 November meeting, and

counsel requested copies of that and other material. I would accept the material should have been provided before the 6 November meeting, but it was provided under cover of a letter dated 7 November. The letter also forwarded Mr Smyth's notes of interviews which variously covered aspects of all six allegations. That material, too, should have been provided prior to the 6 November meeting.

[71] Counsel for Mr James responded to this provision of information in a letter dated 13 November 2003. The letter raised several concerns about Unitec's investigation, including the one that 'new allegations' had been raised. I assume that concern was a reference to the contents of the interview notes, and have already found there were no 'new allegations'. There was no need to address parts of the notes which had nothing to do with the six allegations put to Mr James. The letter also said:

"Mr James denies the allegations and submits the further documents attached as evidence of his relationships and adherence to Unitec's rules and policies where these rules and policies actually exist. He is disadvantaged in gathering more information to defend himself from these spiralling allegations by being suspended ..."

[72] The 'further documents' amounted to an extensive set of email messages addressing aspects of the allegations put to Mr James, as well as aspects of the activities of the Dolce Vita group. Another letter from counsel dated 19 November 2003 provided additional responses on behalf of Mr James. In response to all of that, Mr Smyth wrote a letter dated 19 November 2003 in which he provided notes of further follow up discussions he had conducted and asked if there was any further comment. He had earlier provided notes of other follow up interviews conducted since 6 November.

[73] I was not pointed to anything in that information, and nor could I see anything, which was relevant to a material allegation and was not put to Mr James. Nor was there any precision about exactly how Mr James was prevented from obtaining more information to defend himself against the six allegations put to him. He did obtain more information, and it was raised on his behalf.

3. Conclusion concerning the justification for the dismissal

[74] I focus on the four grounds given as the basis of the decision to dismiss, and take into account Mr Smyth's acknowledgement that two of them do not amount to serious misconduct in their own right. I take into account, too, the following statement of the approach to be taken where multiple grounds are relied on in support of a summary dismissal:

"[225] ... the Court must also determine which of the multiple grounds relied on to support the dismissal could justifiably have constituted the serious misconduct necessary for summary dismissal and then whether it was open to the employer, acting fairly and reasonably, to have determined that summary dismissal was open to it in all the circumstances of the case."¹

[75] As for the other two grounds, and all grounds cumulatively, the test of whether they amount to serious misconduct has been stated as follows:

"Definition [of the kind of conduct that will justify summary dismissal] is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship."²

[76] Finally, the disciplinary policy apparently in force at the time of dismissal included the following examples of 'behaviour that will result in instant dismissal':

¹ **Poole v Horticulture & Food Research Institute of NZ Limited** [2002] 2 ERNZ 869

² **Northern Distribution Union v BP Oil NZ Limited** [1992] 3 ERNZ 483, 487 ("the second **BP Oil** case")

“17. Conduct or behaviour that may bring the standing of his/her profession and/or Unitec into disrepute.

...

19. Failing to follow Unitec procedures which has a detrimental effect on Unitec, a student or a third party.

[77] According to Unitec’s Code of Conduct, there was also an obligation to discharge responsible stewardship of Unitec’s resources.

[78] For the reasons he gave, Mr Smyth concluded that Mr James’ handling of the fee waivers was not just inappropriate in itself, but fell short of the standard expected in someone in Mr James’ position of leadership. Even at the investigation meeting Mr James did not seem to think so, and took no responsibility for the shortcomings Mr Smyth had identified. Mr James attempted to cast blame elsewhere, minimise his role by saying administration was known not to be a strength of his, and minimise the implications of his actions by minimising their financial effect. He also seemed to think it was someone else’s responsibility to ensure criteria for waivers were in place.

[79] I consider it apparent that an institution like Unitec cannot be seen to be waiving duly-set course fees without a robust and transparent process for justifying such action. That the fees waived for C and J were significant brings into sharp relief the risk to Unitec’s reputation and to the integrity of its courses if there is no such process. That Mr James had friendships with C and J made matters worse, and the circumstances of his subsequent approach to C made matters worse still.

[80] Accordingly Mr Smyth had reasonable grounds for concluding that Mr James’ action in respect of the fee waivers was conduct that deeply impaired or was destructive of the basic confidence and trust essential in an employment relationship. As Mr Smyth found, it also amounted to a failure to follow procedure with a detrimental effect on Unitec, and conduct that may bring the standing of Unitec into disrepute.

[81] I also find that Mr James’ approach to C, while not being the subject of a complaint from her, was particularly unwise. It may be arguable that, in isolation, the approach did not amount to serious misconduct. However it came at the end of a course of conduct which amounted to courting of C, and after C’s fees had been waived. That is not to suggest the two were connected, rather it illustrates the lack of judgment Mr James exhibited when behaving as he did. The conduct was capable of bringing Unitec into disrepute in terms of Unitec’s disciplinary policy. Accordingly it was capable of amounting to serious misconduct under the policy and Mr Smyth had reasonable grounds for reaching that conclusion too.

[82] Thus grounds (a) and (b) constitute the serious misconduct necessary to justify a summary dismissal. Grounds (c) and (d) amount to less than satisfactory conduct - although not to serious misconduct - and reinforce the reasonableness of Unitec’s overall loss of trust and confidence in Mr James. I find Mr Smyth acted fairly and reasonably in the conduct of his investigation and had reasonable grounds for reaching the conclusions he did. In all of the circumstances dismissal was open to Unitec, and I find its decision was justified.

The disadvantage grievances

1. The suspensions

[83] The parties’ individual employment agreement provided at clause 10 for suspension on pay when the employer believed the employee may be guilty of serious misconduct warranting suspension. However I did not understand the suspensions to have been imposed in reliance on that provision, although it could apply to the 30 October suspension, and no issue has been raised in respect of it.

[84] Instead, clause 6 of Unitec's disciplinary policy - as it applied at the material time - provided for suspension where it would, in the opinion of Unitec, be inappropriate for a staff member to remain on duty in the circumstances. Three of the circumstances listed were set out in Mr Smyth's letter of 30 September. Clause 6.1 also required suspensions to be confirmed in writing and outline: the dates and duration of the suspension; the reasons for the suspension; and any reporting requirement. Clause 6.4 required oral advice of a suspension to be followed by written confirmation, and that staff members on suspension remain available and contactable.

[85] Recent decisions of the Employment Court have said this about suspensions:

"[104] Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. ... Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct."³

"[93] ... a decision to suspend an employee will normally only be justifiable if it is made as a result of a fair process. The minimum requirement for a fair process is that the employee be told that suspension is being considered and the reasons why, and then given a proper opportunity to be heard on that issue before a decision is made."⁴

[86] The first of these sets out a broader statement of the applicable test. With reference to the second, here I would find a fair process was followed when imposing the 2 October suspension in that there was warning of the possibility of suspension with reasons given, and Mr James was heard on the matter before the decision was made.

[87] As to the wider question of the circumstances of Mr James' employment and the consequences of suspension, Mr Smyth was influenced by the level of anxiety and conflict he was identifying in the course of his interviews. The practical purpose of the suspension was to separate Mr James from the school environment for a period so that the investigation could proceed without the aggravating influence of the ongoing conflict. The suspension was not indefinite, and Mr Smyth was willing to call it a period of leave. In the circumstances, I consider Mr Smyth's approach was justified.

[88] As I understand the submissions on behalf of Mr James, one of the concerns about the 2 October suspension was that the written reasons for it differed from those advised to Mr James during the 2 October meeting. I do not accept that was the case. It was clear throughout that Mr Smyth sought overall to prevent any aggravation of the concerns being expressed about Mr James and to limit the effect in the workplace of the negative feelings being expressed by staff members. During the 2 October meeting he sought to make the point that it may be in Mr James' interests to be absent from the workplace while the investigation proceeded. Portraying comments of that kind as amounting to inconsistent statements of the reason for the suspension is a misconstruction of the comments.

[89] There was also a submission that clause 6.4 of the disciplinary policy required oral notice of suspension to be followed by written confirmation. It was said that was not done, but I do not agree. I do not accept there was a breach of the disciplinary policy regarding notice and confirmation of suspension.

[90] The submissions on behalf of Mr James were on firmer ground when they pointed out that an alternative to suspension had been proposed, and the alternative would have allowed Mr James to continue working without impacting on the progress of the investigation. However Mr Smyth had

³ **Graham v Airways Corporation of New Zealand Limited** [2005] 1 ERNZ 587

⁴ **Singh v Sherildee Holdings Limited** (AC 53/05, 22 September 2005)

assessed the strength of feeling in the workplace and concluded suspension would be appropriate. He was entitled to make that assessment, and had reasonable grounds for it.

[91] I therefore conclude that the suspension of 2 October was justified.

[92] It is unfortunate that Mr James returned to work on the expiry of the 2 October suspension, only to be suspended again a week later on 30 October. It seems Unitec's failure to address Mr James' return to work was an oversight and that the 30 October suspension was intended as an extension of the 2 October suspension. It was imposed for similar reasons, except that now Mr Smyth had finalised the allegations to be put to Mr James and Mr James was to have an opportunity to prepare his response. Mr Smyth had also identified the possibility of misconduct or serious misconduct on Mr James' part.

[93] The submissions on behalf of Mr James did not focus on whether the 30 October suspension should properly be regarded as an extension of the 2 October suspension, whether the procedure used in imposing the 30 October suspension was fair in any event, and whether in all the circumstances the 30 October suspension was justified. Instead the submissions concentrated on concerns that new or changed allegations were being made against Mr James, as well as challenging aspects of Mr Smyth's indications that particular allegations in the Get Well card were not being proceeded with, and why. I do not accept the former, and the latter was misconceived in a disciplinary context.

[94] Unitec's oversight in failing to ensure the proper continuation of the suspension in accordance with its policy was not justified. Otherwise, however, in the light of the volatility within the school of design it was sensible that the suspension continue. Although Mr James complained that he would be unable to access information that might help his response to the allegations against him, there was no evidence that such inability eventuated. By then there were six outstanding allegations, several of which could be addressed with reference to interviewees' statements and personal recall. The allegation concerning fee waivers required more research, but there was nothing to indicate Mr James was unable to respond to it, and his explanation was not materially different from the one given in the Authority.

[95] I therefore find the 30 October suspension was justified.

2. Other disadvantageous actions

[96] The Employment Relations Act includes the following within its definition of 'personal grievance':

“103(1)

(a) ...

(b) that the employee's employment, or one or more conditions of the employee's employment ... is or are or was ... affected to the employee's disadvantage by some unjustifiable action by the employer;”

[97] To amount to a personal grievance, and attract a remedy, a complaint involving disadvantage must fit that definition. The discursive approach taken to Mr James' unhappiness with and complaints about events during 2003 meant that, with the exception of the suspensions, it was not clear which actions of Unitec's were relied on as falling within s 103(1)(b). I asked counsel to identify them during the investigation meeting, and she did so as follows:

- (a) the response to the debate about academic progress in the school of design (which I have taken as a reference to the Creative Futures document and the activities of the Dolce Vita group);

- (b) blocking Mr James' access to Unitec email from his home while he was suspended;
- (c) the failure to support Mr James;
- (d) undermining Mr James' position as head of school (with particular reference to Mr Boon's comments);
- (e) requiring Mr James to attend the meeting of 13 August without making him aware of the accusations against him;
- (f) approaching Mr James directly instead of through his representative, by way of the correspondence dated 29 and 30 October 2003;
- (g) continuing to publish the allegations in the Get Well card by showing the card to people being interviewed during the course of the disciplinary investigation;
- (h) conducting an open-ended fishing expedition.

[98] Most of these complaints do not fall within s 103(1)(b). Beginning with (b), above, I do not accept that the suspension of email access through Unitec's network was unjustified. Nor do I accept there was evidence Mr James suffered disadvantage as a result, particularly as he otherwise retained access to email in general through his own home email address.

[99] Regarding the complaint in (d), I have found Mr Boon spoke out of turn regarding Mr James' suspension. He did not recall commenting on the future of Mr James' employment, but did not dispute a third allegation that he said: 'Michael is **** awful at this sort of thing sometimes' when commenting on the tone of a memorandum of Mr James' concerning the 2 October retreat. Evidence of that kind falls far short of supporting an undermining of Mr James' position, although I would accept that Mr Boon was guilty of speaking too carelessly. If I assume Mr Boon's comments were actions of the employer's, there was nothing to indicate they actually undermined Mr James' position and no evidence they affected Mr James' employment to his disadvantage.

[100] For reasons indicated earlier in this determination I do not consider there is any merit in the complaints listed in (e) and (h) above. I doubt that the complaint in (f) can found any cause of action, but in any event there was nothing in the evidence to bring it within s 103(1)(b). Regarding the complaint in (g) it was inevitable that, in the process of investigating the allegations in the Get Well card, Mr Smyth would identify and discuss them as appropriate with interviewees. There was no evidence that he did any more than this, and his actions were not unjustified.

[101] Points (a) and (c) remain. Further to the alleged lack of support for the direction in which Mr James wished to take the school, it was difficult to identify what Mr James believed Unitec should have done to support him. There was conflict within the school, but Unitec had created the position of conciliator to assist with the resolution of conflicts and Ms Grant had become involved for that reason. There was also the arrangement that a retreat be held in order address the conflict over academic direction, a date was set for the retreat and preparations had begun.

[102] Moreover, academic freedom was staunchly guarded at Unitec and Mr James could not necessarily expect Unitec to put a stop to the discussion of any opposition to his proposals. I accept he could expect not to have his proposals undermined by his more senior managers, but do not accept that his complaints about aspects of Mr Boon's conduct amounted to evidence of such undermining. In many instances the complaints were not well-founded, and in others the behaviour in question was insensitive at worst. There was certainly nothing to suggest Mr Boon had undermined or failed to support Mr James in the discussions associated with the planning of the retreat. On the contrary, Mr Boon sought to support Mr James in that context.

[103] Mr James said he felt abandoned by the management in his attempts to deal with the Dolce Vita situation, but while I accept he felt that way there was little objective evidence of abandonment. If anything the evidence was that Mr Boon attempted to address the conflict in the

school when it was brought to his attention. The evidence as to Mr James' feelings was extensive, but did not amount to evidence of actual abandonment. Similarly, there was a submission that Mr Boon had done nothing to support or guide Mr James, but no indication of what Mr James thought Mr Boon should have done. Again, the evidence in support was strongly illustrative of Mr James' feelings rather than amounting to objective evidence of fact. What he really sought was reassurance, which he felt he did not receive.

[104] As to evidence of any express request for help, for example, Mr James seems to have relied on matters such as the complaint referred to at [25] of this determination. The problem with the formulation of the complaint is that the Dolce Vita group was not set up with the sole intention of undermining Mr James' efforts as head of school, although Mr Smyth did address its activities. Otherwise the focus at the time seemed to be on the complaint that a website had been set up, when there was no such website. There may have been a breach of Unitec policy regarding the use of email, but that is another matter. I do not consider Unitec's response to be abandonment.

[105] I accept there were obvious indicators that help of another kind might be needed, in the form of Mr James' distress on 1 and 13 August. However EAP help was offered on both occasions, but Mr James did not make proper use of it. In addition he took a period of sick leave, and medical help was available to him.

[106] The submissions for Mr James also contained a number of criticisms of Ms Grant. These included allegations that Ms Grant did not assist Mr James, which I do not accept, and that she otherwise misled him in a number of specified ways which were not supported by the evidence.

[107] There were also allegations of breach of trust and confidence on Ms Grant's part, which I do not accept either. In particular, Ms Grant did not disclose the detail of her 1 August conversation with Mr James. In the course of Unitec's disciplinary investigation she did little more than advise Mr Smyth of the nature and existence of the conflict involving the Dolce Vita group, giving information which was not confidential. She also referred Mr Smyth to her predecessor and another person if he sought more information. There was a submission that by her actions she was a 'conduit' in Mr Smyth's investigation, but I do not consider that an apt description of her role.

[108] For all of these reasons I do not accept that any of the complaints addressed in this section of the determination amount to a personal grievance under s 103(1)(b).

Costs

[109] The parties are invited to agree on costs. If they are unable to do so they shall have 28 days from the date of this determination in which to file and serve memoranda on the matter.

R A Monaghan
Member, Employment Relations Authority