

**Attention is drawn to the order
prohibiting publication of certain
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 42A/07
File No: 5053076

BETWEEN STUART SELWOOD
 Applicant

AND QUEEN MARGARET
 COLLEGE INCORPORATED
 Respondent

Member of Authority: R A Monaghan

Representatives: P Churchman, counsel for Applicant
 P Kiely, J Tait (6 and 7 March) and M Patterson (28 and
 29 May) counsel for Respondent

Investigation Meeting: 6 and 7 March, 28 and 29 May 2007 at Wellington

Determination: 23 August 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Stuart Selwood has raised personal grievances in which he says his former employer, Queen Margaret College Incorporated (the legal entity operating Queen Margaret College, and to which in turn I refer as ‘the college’):

- (a) disadvantaged him in his employment by various unjustifiable actions; and
- (b) constructively dismissed him.

[2] The primary disadvantage grievance was raised in February 2006. It was concerned with Dr Selwood’s view that certain of his responsibilities were removed

from him, that he was forced to sign a job description embodying the removal, and that he was threatened with redundancy if he did not sign the job description.

[3] A second disadvantage grievance was raised in June 2006. It concerned Dr Selwood's objection to an instruction that he move to an office he considered unfit for human habitation, in circumstances where he considered any move was unnecessary.

[4] Dr Selwood resigned shortly afterwards, and has raised a further personal grievance on the ground that the resignation amounted to an unjustified constructive dismissal. He says his resignation was the result of a deliberate campaign on the part of the college to get rid of him. He says further that the college breached its obligations to:

- . provide a safe place of work;
- . treat him fairly and reasonably;
- . behave in a way that promoted trust and confidence; and
- . display good faith.

[5] Those broadly-stated concerns appeared arose out of the specific matters raised as disadvantage grievances, as well as other matters touched on in correspondence between the parties and in Dr Selwood's letter of resignation. Matters associated with the disadvantage grievances were also cited as grounds for further or alternative claims for damages for breach of contract, as were the following:

- . unsatisfactory handling of an incident involving a deputy principal;
- . unfair handling of an incident involving a student,
- . denying Dr Selwood the assistance of a support person in important meetings.

[6] This determination will deal in one section with the issues as they developed in respect of Dr Selwood's job description and job content. Further sections deal on a chronological basis with the remainder of the allegations of unjustified and disadvantageous action or unfair treatment.

[7] The question of whether there was a dismissal will be addressed in a further separate section.

[8] An allegation that Dr Selwood was discriminated against on the ground of his union involvement was very properly withdrawn at the end of the investigation meeting. There was no foundation for the allegation.

The job description

1. Early job descriptions

[9] Dr Selwood holds the degrees of BEd and Master of Educational Administration (Hons), and graduated in 2001 with a PhD in the Leadership and Management of Information and Communications Technologies (“ICTs”) in schools. He had a 35-year career as a teacher, having taught first in primary and intermediate schools, before spending a long period in lecturing positions of increasing seniority at the Central Institute of Technology (as it then was). After a period of teaching in a secondary school, Dr Selwood returned to the tertiary sector, holding a Head of School position at the Wellington Institute of Technology.

[10] However Dr Selwood had been out of employment for some months when, in or about June 2003, Queen Margaret College offered him a vacant fixed term relieving position as a teacher of information technology for Term 3 of that year. In September 2003 the college offered Dr Selwood a permanent position as a teacher and ICT manager. The accompanying job description addressed two broad areas of responsibility - ICT administration, and teaching.

[11] The teaching load was slightly less than the average load carried by a full time teacher. Initially it consisted of four senior classes, and no form class. The principal, Carol Craymer, estimated that Dr Selwood’s teaching load at the time would have been about 22 periods over the college’s cycle of 6 working days with 6 periods in each.

[12] Dr Selwood was to report to the head of science and technology in respect of his teaching duties.

[13] The ICT administration duties involved supporting and assisting other teachers regarding the use of IT, for example by providing them with information and training, as well as developing up to date computing courses for students. The role was concerned with the college’s educational computing resources. Dr Selwood asserted at the investigation meeting

that the term 'ICT' encompasses IT networks as well as educational resources including professional development. While that might in general be true, I do not accept the position for which Dr Selwood was recruited encompassed the management of the college's IT network and infrastructure. The duties listed in the job description clearly did not extend that far.

[14] Dr Selwood was to report to the deputy principal – curriculum in respect of his ICT administration duties.

[15] ICT administration also involved Dr Selwood in liaising with a company named LANtech Limited ("LANtech"). LANtech had for some 10 years held a contract with the college for the supply of computer equipment and support, as well as providing the services of an on-site engineer. Its sales and marketing director was Rex Bullard. Mr Bullard had known Dr Selwood since 1981.

[16] It is logical to expect Dr Selwood to liaise with LANtech in respect of the ICT administration aspect of his duties, but as far as the written job description is concerned those duties did not extend to liaising in respect of overall college network or infrastructure. If Dr Selwood and Mr Bullard regularly discussed the network and various technical matters, I would regard that as arising at least in part out of their personal connection and mutual interest in those matters, and not out of a requirement under Dr Selwood's job description.

[17] In May 2004 the job description was amended slightly. One change was that, instead of reporting to the deputy principal – curriculum on ICT administration matters, Dr Selwood was to liaise with Annette Lendrum, the business manager at the college. Mrs Lendrum was responsible for the financial as well as the business management of the college. Her role included managing the IT infrastructure, and she was the point of contact with LANtech. She acknowledged, however, that her IT knowledge was obtained from 'on the job' experience and that she and the former deputy principal – curriculum had 'limitations in the technical aspects'. Thus although its IT needs grew and developed, the college had not employed its own IT professional to manage its needs (other than those associated with teaching and teacher support) but relied variously on the services of Mrs Lendrum and contracted

providers.¹ It is not surprising that someone like Dr Selwood began informally to take an interest in those matters.

[18] Even so, such additional activities did not necessarily amount to an appointment to a broader IT management position. Dr Selwood said in his written brief of evidence that in addition to his teaching workload he liaised with LANtech (as he was obliged to in terms of his job description), but he went much further and said:

“ ... I ... had responsibility for the school’s IT budget and for generally overseeing the school’s IT services. The management of the school’s IT services took considerable time - ...”

[19] The first sentence quoted above overstates the true extent of Dr Selwood’s responsibilities. Indeed when he was questioned about these matters during the investigation meeting, his responses were consistent with the more limited role set out in his job description. That is, his budget and oversight activities were concerned with providing support and assistance to teachers in IT matters. They did not extend to the management of the college’s IT services overall. Even if Dr Selwood’s informal activities extended to discussions about the network and infrastructure, and took up a great deal of time, there was no evidence that he acquired budgetary or oversight activities of the kind suggested.

[20] Nor do I accept Dr Selwood’s account of a conversation which he construed as an invitation from Miss Craymer to lead a new department and have a more strategic role within the school. According to Dr Selwood, on a date not specified Miss Craymer commented that she wanted to take IT from being part of the science and technology department and set it up as a separate department. Dr Selwood went further and said his appointment (as leader of the new department) was well-received, although there was no evidence of the kind of preparatory work or announcement one would expect if such an appointment had been made.

[21] Miss Craymer denied having any such conversation, or any such intention. I consider it likely that, if Dr Selwood was being appointed to a position of the kind he described, the college would have embarked on a significantly more extensive and formal process than the one Dr Selwood described. Accordingly I found Miss Craymer’s denials credible.

¹ In an audit report presented to the college the witness Suzanne Stew characterised the IT&T strategy as “one of ad hoc development through the reactive deployment of tactical projects” and said that had led to “voice and data requirements ... having been assessed, managed and developed without an overarching strategic vision to ensure alignment.”

[22] Finally, I accept Dr Selwood's account of his activities in curriculum and professional development, and that his efforts were well received. To a large degree those activities were consistent with the terms of his written job description. They did not mean an essentially new and more broadly-scoped position was being created.

2. Removal of responsibilities/ICT Audit

[23] In or about mid-2005 the college approached Suzanne Stew, who was then a self-employed management consultant, about the possibility of an audit of the college's IT system. Ms Stew has tertiary qualifications in electronic engineering and in management, and extensive management experience. According to Miss Craymer, the college had experienced problems with its IT infrastructure, including problems with the internet connection, servers, email access and network performance. There was poor documentation in respect of policies and procedures. It was time to upgrade existing hardware and put in place more effective management systems. In October 2005 Ms Stew's engagement was confirmed. Ms Stew was to review the entire IT system with reference to its infrastructure and management, and her report was to incorporate recommendations for improvement. Appropriately, the review did not extend to the way in which computing was taught.

[24] Ms Stew provided her written findings on 1 December 2005. The findings included a number of recommendations regarding documentation, and the development of particular policies and procedures. They also addressed LANtech's role, raising a concern about LANtech's ability to increase its rates on notice and the lack of any cap on such increases. She recommended that the college issue a Request For Proposal ("RFP") from a number of providers, to ensure the college was getting value for money. Finally she noted that a full technical analysis had not been carried out, and that such an analysis was required before the RFP was developed and issued (among other things).

[25] It seems a technical analysis was subsequently carried out, because Ms Stew referred to it in a letter to Miss Craymer dated 23 February 2006. The letter criticised LANtech again, and recorded that an opportunity had been given to it to 'remediate the environment'. It also referred to Dr Selwood as 'Director of ICT' and said of him:

“The Director of ICT did not have the requisite technical IT skills to assess the level of support being provided by LANtech, or any other third party service providers. The skills base of the Director of ICT is in the use of ICT to support learning, not in the maintenance and management of a Microsoft IT environment and its associated service requirements.”

[26] In a similar vein, she said in an email message to Miss Craymer dated 1 December 2005 that Dr Selwood: “... is very theoretical and interested in new technology, but that the operational management of your IT environment is outside his capabilities.”

[27] The context in which those comments were made included identified shortcomings in backing up and user account administration and management, as well as a wide range of system security concerns and concerns about hardware purchasing and management procedures. Not only that, concerns were identified regarding the use of servers, including their configuration, the software installed on them, and the tasks to which they were assigned. I consider it abundantly clear that responsibility for matters such as those was not within Dr Selwood’s written job description, although there was scope for some overlap in respect of the teaching and educational support activities that were within his job description.

[28] Dr Selwood asserted in evidence that the audit process was seriously deficient. He said he was marginalised by the investigation, and that Ms Stew was looking for fault whether there was any or not. He asserted further that a security issue Ms Stew had identified was given a construction that reflected adversely on his performance. Finally he complained that he was given no hearing on the report or its conclusion, and was not asked for his views on it.

[29] However the college was entitled to seek the audit, and it engaged a suitably qualified person to undertake it. The audit was not intended as, and was not, an investigation of Dr Selwood’s performance in any capacity, nor was it embarked upon in an attempt to find fault with and criticise him. Further, the conduct of the audit was for Ms Stew to determine. It was for her to consult with college staff as she saw fit, and she was answerable to the college in a commercial sense for the outcome of the audit and its quality. She consulted with Dr Selwood to the extent that she had discussions with and sought information from him, but she was not obliged to consult with him over the content of her report or her conclusions to the extent he has argued she should have.

[30] Secondly, Dr Selwood asserted that the findings in the report were wrong. Again, it was open to him to disagree with the report if he wished, but Ms Stew was answerable to the college regarding its quality. Similarly, it is not for the Employment Relations Authority to embark on an investigation into that matter. Despite this, much of the evidence of Rex Bullard disagreed with aspects of the report, and some appeared to be an attempt to cast doubt on the college's motives in seeking it. I understood the evidence to have been presented in support of Dr Selwood's view of the audit, but it fails to take proper account of the above matters. Mr Bullard went so far as to express the view that the report was more critical of LANtech than any individual, and that the criticisms were unfair, revealing a degree of self-interest that tainted his evidence.

[31] Dr Selwood asserted that, as a result of the report, his network responsibilities were given to Mrs Lendrum. He said he was not consulted about this. However Mrs Lendrum already had overall responsibility for the network. I have referred to the fact that her acknowledgement of her technical limitations provides some explanation of how Dr Selwood's activities could move beyond the scope of his job description, as well as underscoring the need for the audit and the need to appoint a dedicated IT manager. Not to put too fine a point on it, as Ms Stew said, "... the technical environment at QMC is not being 'managed' it is merely being allowed to 'evolve'." On the basis of the limited evidence I heard I agree with her comments about the way the college's IT needs were addressed and managed. I do not accept that the comments were intended as a personal criticism of Dr Selwood, and it is unfortunate if he took them that way.

[32] Moreover it is over-simplifying matters to say that Dr Selwood's network responsibilities were given to Mrs Lendrum as a result of the report. In fact the college identified a need to put in place an IT management structure, and confirmed that Mrs Lendrum was to be responsible for the network and infrastructure on an interim basis until the new management structure was in place. Subsequently a dedicated IT manager was appointed.

[33] Although some of Dr Selwood's activities attracted comment in the report, the audit would have been less than complete if it ignored material aspects involving him. Overall, however, the report highlighted shortcomings in the way the college's IT needs were being managed and provided a basis for considering how these matters should be addressed. The

college was entitled to tact to address them. The shortcomings were not Dr Selwood's fault, and nor was such fault attributed to him.

3. The negotiations of 2005 – 2006

[34] Miss Craymer and Dr Selwood met on 14 December 2005 to discuss the implications of Ms Stew's audit, as well as Dr Selwood's teaching duties for 2006. Regarding the former, Miss Craymer had signalled to Dr Selwood in a letter dated 9 December 2005 that there was a need for clear job descriptions for both Dr Selwood and Mrs Lendrum. That would be discussed at the meeting. Regarding the teaching duties, the implications of a drop in the number of students indicating an interest in computing courses for the following year had already been raised with Dr Selwood but the year's duties had not been finalised.

[35] Dr Neil Bechervaise attended as Dr Selwood's support person. Dr Bechervaise was not a member of the college staff. Miss Craymer found out in mid-2006 that he was married to the principal of another private girls' school in the Wellington area. She was concerned about a conflict of interest and advised the other principal of her concern by letter dated 2 June 2006. I return to that matter later in this determination.

[36] It was common ground that, during the 14 December meeting, there was agreement that Dr Selwood would focus on ICT development. However Dr Selwood asserted in evidence that the job description that was 'forced on' him did no such thing. The assertion appears to be concerned with the subsequent disagreement over the inclusion of provisions conferring on Dr Selwood responsibility for the college's network and infrastructure, and Dr Selwood's assertion that 'ICT' encompasses network and infrastructure. However, given the recent discussions about the outcome of the audit and the nature of Mrs Lendrum's responsibilities, I do not see how the college's intentions regarding scope of the 'ICT development' in question could have been unclear. Indeed it was Miss Craymer's evidence that she believed Dr Selwood accepted the position would focus on teaching and professional development.

[37] Miss Craymer said in evidence that during the meeting there was also agreement on the classes Dr Selwood would teach. Dr Selwood disputed this. However the classes he would teach the following year had already been the subject of discussion over the preceding 2 – 3 months and there was no suggestion of any developing dispute in that respect. Dr

Selwood did not say to Miss Craymer at the December meeting that he did not agree to teach those classes, or otherwise indicate that he did not agree.

[38] One unclear aspect concerned whether there was express discussion and agreement regarding the splitting of Dr Selwood's single senior computer class into two smaller classes. The proposal was certainly expressed in a letter from Miss Craymer dated 19 December, and it appeared in a draft job description which Dr Selwood prepared in January 2006. Thus, although in evidence Dr Selwood variously denied or did not recall discussion about the matter, I consider it likely there was such discussion and agreement.

[39] Dr Selwood subsequently alleged Miss Craymer proposed to split the senior computing class in order to make timetabling easier for the college. Miss Craymer said the proposal was intended to provide Dr Selwood with a full time teaching position. Dr Selwood's allegation was unfounded and I do not accept it.

[40] As for the teaching load overall, Dr Selwood asserted in evidence that the college was seeking to remove his non-teaching duties, contrary to his experience and qualifications for the position. He felt that a major reason why he had been recruited to the college was his special interest and qualification in ICT management in schools. He alleged that the school was removing those responsibilities and replacing them with class teaching time for which he was less qualified.

[41] However Dr Selwood had been in teaching for 35 years. The college employed had him firstly as a relief teacher and then permanently, albeit with a less than full time teaching load. His additional qualifications and expertise were recognised. However the recognition took the form of the educational support role which made up the remainder of his job description. That role was not taken away. By December 2005 the college was merely attempting to address the wider IT management shortcomings whose existence was confirmed in the audit.

[42] By email message dated 15 December 2005, Dr Selwood forwarded a proposed job description under the job title 'Director Applications and Development (ICTs)', and a 'support document'. The latter addressed a number of matters which appear to be a mixture of the teaching and staff support activities that were always part of Dr Selwood's job description, and infrastructure matters that at least arguably were not. Further, under the

heading ‘some matters that may need consideration’, the support document raised the question:

“1. To what extent is should (sic) the Director Applications and Development be involved in the overall management:

- a. Of the School Management System (SMS) ie MUSAC
- b. Of the network and the oversight of its operational policies
- c. The management of the School’s computer network and the oversight of its operational policies.”

[43] The college was seeking to better define and allocate duties associated with that overall management role, and had made its intentions quite clear during the discussions about the audit and its aftermath. An IT manager was to be appointed. Dr Selwood’s proposed job descriptions suggested a greater degree of involvement in overall management of areas such as those listed above than the college sought from him.

[44] Dr Selwood said in evidence that his proposed job description included what had been discussed on 14 December, and he did not understand that anything in it was to form part of Mrs Lendrum’s duties. However some of the items listed under the heading ‘ICTs administration’ did go beyond activities associated with professional development and teacher support, and extended into management and administration of the overall infrastructure. I do not accept that Miss Craymer indicated his role was to extend that far.

[45] By letter dated 19 December 2005 Miss Craymer replied to Dr Selwood’s proposed job description, forwarding the college’s own proposal. The job title in the college’s draft was ‘Manager of ICT Learning Programmes.’ Miss Craymer said in the letter that she had drawn from Dr Selwood’s proposal, and explained: “your individual job is as I described – a job that focuses more on ICT professional development which is your specialty and which is the focus of your original contract.”

[46] Miss Craymer was also concerned because in her view Dr Selwood’s proposal under-recorded the agreed teaching duties. In Dr Selwood’s version he would be teaching one senior ICTs class and two year 10 business studies classes, and would have responsibility for one year 12 form class. In Miss Craymer’s version Dr Selwood would be teaching two senior computing classes and two year 10 business studies classes, would carry out some ICDL teaching, and have responsibility for one year 12 form class.

[47] Because of the holiday period, Dr Selwood did not receive the letter and its attachment until mid-January 2006.

[48] He replied by letter dated 18 January 2006. In it he remarked that the 14 December meeting was 'cordial and positive', but did not comment further on the job description or sign the version the college had forwarded to him. Instead he sought further information about the extent of the 'guidance and assistance' the college had said it would be providing. I return to that matter later in this determination.

[49] In a further letter dated 30 January 2006, Dr Selwood thanked Miss Craymer for "the opportunity to develop what I saw as an optimal description of the role of Director – Applications and Development (ICTs)." Dr Selwood went on in the letter to indicate his approach was to work towards refining the description of the Director's position. He referred to areas he believed were either omitted or required clarification, including the relationship with outside providers such as LANtech, the division of responsibilities between the business manager and the position holder, and the linkage between the position and the strategic planning of ICTs development.

[50] The response also attached Dr Selwood's further revised proposed job description. This time - presumably as part of the attempt to develop an 'optimal description' of the role as Dr Selwood saw it - the document included a new section conferring on Dr Selwood responsibility for ICTs budgets including the capital expenditure budget, and another conferring on Dr Selwood the responsibility for managing the college's relationships with its ICTs suppliers.

[51] Miss Craymer was concerned to see Dr Selwood's further revised job description retained references to ICT infrastructure duties that were to be Mrs Lendrum's. There was not, and could not be, any suggestion that duties of the kind just set out had been agreed at the 14 December meeting.

[52] The list of teaching duties, too, were not those Miss Craymer understood had been agreed. They omitted reference to ICDL teaching and to a form class.

[53] By further letter dated 1 February 2006 Miss Craymer attached the position description the college was offering, and asked that the document be signed and returned by 4 pm on 3 February 2006. The letter also said:

“In the event that you are not prepared to sign the Job Description enclosed within the time period specified, then in light of the fact that your previous position has significantly changed, you will be entitled to a redundancy compensation payment ... In the present circumstances, it does not appear to me that a question of notice arises given that we have been addressing the change in your role since October last year.

... in the light of the forthcoming start of the School year, no further time can be afforded to you in relation to this matter that in the event that I have not received the signed documentation from you by 4 pm on Friday, it will be necessary to make other arrangements as regards filling the position of ‘Manager of ICT Learning Programmes.’”

[54] Dr Selwood saw this as a threat, and was very angry about it.

[55] Miss Craymer saw the passage as setting out the reality of the situation in good faith. She referred in evidence to the parties’ discussions over the previous three months about the need for Dr Selwood to take on a full teaching load. She said that if Dr Selwood did not take up the duties requested by the college he would be left with only a part time position. That is why the prospect of redundancy was raised.

[56] By letter dated 4 February 2006 Dr Selwood forwarded a signed copy of the College’s job description, but his signature was accompanied by the annotation ‘signed under duress.’ The letter also contained a statement that “I believe we are now clearly in dispute over the Job Description you have imposed on me and I regard this as not necessarily being the end of the matter.”

[57] Miss Craymer responded by letter dated 7 February 2006, seeking certain assurances from Dr Selwood, advising that she believed there was an employment relationship problem, and advising further that an approach had been made to the mediation service.

[58] A mediation date of 14 February 2006 was mentioned, although mediation eventually went ahead on 2 March 2006. With reference to the confidentiality provisions in s 148 of the Employment Relations Act 2000 it was not appropriate for the Authority to seek details of what happened during mediation. However the employment relationship continued, and I was told Dr Selwood performed the duties set out in the college’s job description.

[59] By letter dated 15 February 2006 Dr Selwood's solicitor set out an account of the above matters, and sought remedies for 'multiple grievances'. Although it focussed on the issues arising out of the job description and the threat of redundancy, the letter also referred briefly to some of the additional matters which I now turn.

Other incidents to the end of 2005

1. Incident involving a deputy principal

[60] In an email message dated 7 March 2005 Dr Selwood complained to Rosey Mabin, the deputy principal – curriculum, about the way in which she had raised issues about a course outline with him. She made a comment to the effect that it was 'not bloody good enough'. Dr Selwood believed she had been condescending, and was concerned about the way she had apparently interrupted him in order to discuss a non-urgent matter while students were around. He said such inappropriate behaviour would justify a personal grievance.

[61] Miss Mabin's point of view was that she was expressing a concern to Dr Selwood about the clarity of his instructions to students in respect of the outline. There was some history to the matter in that, about three weeks earlier, she had asked Dr Selwood for the outline and indicated that some of the students were concerned about their progress and sense of direction. Apparently the outline was provided. By March Miss Mabin sought merely to address the need for clear instructions, since there had been complaints about lack of clarity in that respect. On receipt of Dr Selwood's message Miss Mabin responded promptly, apologising for causing disquiet and suggesting a meeting to address Dr Selwood's concerns.

[62] A meeting went ahead on 11 March 2005. Those attending were Miss Craymer, Miss Mabin, Dr Selwood, and Dr Selwood's support person. The support person was Ken Edgecombe, the college chaplain.

[63] In his statement of evidence Dr Selwood said that during the meeting he agreed to put the matter behind him, but in hindsight he concluded that thereafter Miss Craymer saw him as trouble and wanted to get rid of him. However it was common ground that, during the meeting, Miss Mabin again apologised if anything she said had caused offence. She also

acknowledged that her manner is sometimes blunt and may create an impression that is not intended. She said she would attempt to address this.

[64] I did not understand there to be any dispute that her apology was genuine. It is therefore unfortunate this matter has been resurrected. The incident was relatively minor, was addressed, and was the subject of a genuine attempt at reconciliation. I do not accept that the matter was dealt with unsatisfactorily or that the circumstances gave rise to a wish on Miss Craymer's part to get rid of Dr Selwood.

[65] An unfortunate aftermath concerned Mr Edgecombe's involvement. According to Mr Edgecombe, he encountered Miss Craymer in a corridor one morning. She referred to 'my role with Stuart' and advised that she 'did not want to see me in that role any more'.

[66] Miss Craymer did not recall the exchange. I consider it likely something of that kind occurred, but in the following context. Miss Craymer had considered Mr Edgecombe's provision of general support to Dr Selwood a good idea. However the parties' engagement regarding a suitable way forward arguably involved Mr Edgecombe in more than that. In particular Dr Selwood, through Mr Edgecombe, was pressing for the inclusion in a formal meeting note of a provision permitting Dr Selwood to point out to Miss Mabin further behavioural shortcomings on her part as he saw necessary. More broadly, Mr Edgecombe was being drawn into what amounted to negotiations over what the meeting note should include, extending beyond a mere record of the discussion at the meeting. Miss Craymer said in evidence that she considered Mr Edgecombe would be placing himself in an invidious position as chaplain if he were also seen to be supporting staff or students against the college. Mr Edgecombe said in evidence he accepted that, and considered Miss Craymer's comments appropriate.

2. The incident involving a student

[67] I confirm the order prohibiting the publication of the names or details identifying the students who were involved in the following complaint.

[68] On or about 23 August 2005 Dr Selwood was in the computer room teaching one of his senior IT classes when a student, X, entered the room. X was not a member of the class. She went and sat at a computer, began listening to her iPod, and commenced a conversation

with another student. Dr Selwood found her conduct disruptive and approached her to ask why she was in the room. When she did not respond, he removed the iPod from her ear. According to Dr Selwood X swore, threw a tantrum and elbowed him in the stomach. He asked her to leave the room.

[69] X left the room, and shortly afterwards was found outside in the corridor by the deputy principal – pastoral, Milada Pivac. By then X's dean was also present. According to Miss Pivac X was in tears. Although X admitted swearing at Dr Selwood she also said he had 'yelled' and 'grabbed' at her, had stood very close and had 'ripped' the iPod out of her ear.

[70] The same afternoon Dr Selwood communicated with Miss Pivac by email about the matter, setting out a brief account of his view of X's behaviour. He said the behaviour required 'drastic action'.

[71] Miss Pivac obtained a written account from X, which X concluded by saying she felt 'violated'. Miss Pivac understood this to be an expression of the shock and fright X felt. The next day Miss Pivac met with Miss Craymer and Dr Selwood to discuss strategies for dealing with the situation and prevent any recurrence. There was a discussion about the disciplinary action to be taken against X in respect of her conduct, but Miss Pivac also said that because X said she felt 'violated' Miss Pivac would find out 'the facts'. Disciplinary action was subsequently taken against X, who also apologised to Dr Selwood.

[72] On or about 25 August Miss Pivac spoke to the class concerned regarding expected standards of behaviour, addressing in particular the use of iPods in the classroom. She was essentially supportive of Dr Selwood's authority as teacher. During the investigation meeting Dr Selwood objected to the class being spoken to in his absence, but I see nothing inappropriate about Miss Pivac's decision to proceed as she did.

[73] Meanwhile, during the last week in August other students provided written accounts of the incident in the computer room. At least one further account was obtained as late as 16 September 2005. The accounts were written from varying viewpoints, but they did not differ as to the core facts and it was reasonable for the college to seek to address Dr Selwood's management of the incident. Dr Selwood was not entitled to consider the matter closed, and expect it to be closed, upon the taking of action against the student.

3. Concerns about Dr Selwood's performance and behaviour

[74] By letter dated 16 September 2005 Miss Craymer advised Dr Selwood that she wished to address a number of issues regarding his behaviour and performance. One of these was X's complaint, and Miss Craymer attached the students' written accounts to the letter. There was also a concern about Dr Selwood's conduct during an ICT meeting on 13 September, and a concern about Dr Selwood's classroom management. The latter went beyond issues arising out of X's complaint, and Miss Craymer proposed that classroom observations be undertaken by a senior manager. She said: "You will be aware that this is part of the standard performance appraisal system." The final concern related to a discussion about staff internet usage.

[75] Last, the letter offered access to counselling. Dr Selwood took up that offer, and took a period off work on stress leave commencing 17 September 2005. He alleged in evidence that he was 'hounded' by the school during his absence. The allegation seriously overstated matters and was supported by very little detail. Broadly speaking it appears Dr Selwood was contacted by email on an unspecified number of occasions by staff members who sought to discuss their IT issues in terms that were not specified either. When asked to provide more information Dr Selwood could say only that Miss Mabin was one of the people who contacted him, but gave no further detail. If Dr Selwood did not wish to be contacted he could have advised his colleagues of that himself, or asked the acting principal or a deputy principal to do so. However there was no suggestion that he did either of those things, or raised any concern at the time.

[76] Miss Craymer herself was absent overseas in late September. When she returned she sought to arrange a meeting to address the matters raised in her 16 September letter. By then she also sought to address the subjects Dr Selwood would teach the following year.

[77] There was an abortive attempt on 12 October to discuss these matters. Dr Selwood had been invited to attend with a support person, but by then the suitability of the chaplain's attendance had been questioned and Dr Selwood attended alone. The meeting was rescheduled so that Dr Selwood could attend with a support person. Miss Craymer subsequently reconfirmed the matters to be discussed, in a letter dated 13 October 2005.

[78] The meeting went ahead on 26 October. Those attending were: Miss Craymer, Miss Pivac, Dr Selwood, and Dr Neil Bechervaise as Dr Selwood's support person. Each of the issues was discussed in some detail. Dr Selwood's workload for the following year was also raised and Dr Selwood was asked to indicate his own intentions again. The low number of students indicating an interest in computing was mentioned, as was the prospect of Dr Selwood teaching business studies classes. Dr Selwood's response to that prospect was positive.

[79] Miss Craymer followed up with a letter dated 4 November 2005, to which notes of the meeting were attached.

[80] The letter confirmed there were enough students for only one senior computing class, and discussed arrangements for Dr Selwood to upskill so he could teach business studies. It said further that Dr Selwood would have the overview of ICDL ('International Computer Driver's Licence') and a form class.

[81] The letter also referred to aspects of Dr Selwood's conduct which were considered unacceptable, including Dr Selwood's conduct in the incident involving X and concerns arising out of the content of student surveys.

[82] Regarding Dr Selwood's performance as a classroom teacher, Miss Craymer referred to this material and said:

"It is my view that these show your performance as a classroom teacher falls below what is expected of a teacher at this college. So that you can provide quality teaching I am putting in place a programme of guidance and assistance for 2006 ... This will be composed of classroom observations and feedback. I will review your progress in term one next year."

[83] The 'guidance and assistance' to be provided to Dr Selwood was referred to in the 14 December meeting discussed in the previous section of this determination. I have also mentioned Dr Selwood's letter to Miss Craymer dated 18 January 2006, and the request for further information about the 'guidance and assistance' the college would be providing. The letter ended by asking whether the 'guidance and assistance' should be regarded as the formal 'advice and guidance' programme required in respect of teacher competency proceedings.²

[84] Miss Craymer's response, in a letter dated 26 January 2006, was that the counselling still under discussion should not be regarded as part of the competency proceedings. She commented separately on the fact that teachers are assessed annually within the school's appraisal system. I take that as meaning the 'guidance and assistance' were being offered in association with the internal appraisal process only. So did Dr Selwood, because in his 30 January letter he expressed his gratitude for the clarification and indicated an understanding that "there is no intention nor need to regard any of this process as part of the formal 'advice and guidance' programme for the competency proceedings."

[85] Dr Selwood subsequently accused the college of holding the spectre of competency proceedings over his head. That is not a fair accusation. While Dr Selwood may have feared the commencement of competency proceedings, Miss Craymer had expressly referred to the internal appraisal process in September 2005 and confirmed the position when requested to in January 2006.

Incidents in 2006

1. Office accommodation

[86] During 2005 the college's Tower building, which the local council lists as a heritage building, was undergoing comprehensive refurbishment. The refurbishment was completed at the end of 2005. Inevitably the process was disruptive for a number of teachers and students, including Dr Selwood. Pursuant to an associated rearrangement of classrooms and offices located in or annexed to the building, by email message of 13 June 2006 the college's property manager advised Dr Selwood of a move to a room 'upstairs in Craven which currently holds the Social Science resources.' That move was to be temporary and there was shortly afterwards to be a further move to the room which was the subject of Dr Selwood's most strenuous objection.

[87] By letter dated 16 June 2006 he expressed his objections, and complained that the scenario appeared to be "another part of the School's campaign to drive me from my employment." The response was that Miss Craymer was prepared to look at alternative accommodation. She requested a meeting.

² Formal competency proceedings are associated with the retention of registration as a teacher.

[88] The meeting went ahead on 16 June. By then, Miss Craymer had expressed her concern about the involvement as a support person of Dr Neil Bechervaise. Dr Selwood attended without a support person.

[89] During the meeting Dr Selwood raised concerns about the size of the rooms in question, their lighting and ventilation, and the presence of school bells in one of them. He further disputed the need to move at all, and made suggestions regarding an alternative reorganisation.

[90] According to Dr Selwood's note of the meeting, Miss Craymer asked him to choose between an upstairs space and the room to which he now particularly objects. At the time he said that, although neither room was suitable, on balance he would choose the latter provided there were no bells. The property manager undertook to investigate whether the bells could be relocated. The bell located inside the office was subsequently disconnected, but one in the corridor outside was neither disconnected nor relocated. There was no further discussion about a temporary move.

[91] Dr Selwood's solicitors raised a personal grievance in respect of the matter, in a letter dated 20 June 2006. To the extent that the grievance is founded on the repeated allegations that the move amounted to vindictive conduct aimed at ensuring Dr Selwood's departure from the college, it is unfortunate Dr Selwood felt that way about it. Indeed the strength of his feeling was very apparent at the investigation meeting. It is particularly unfortunate that he felt that way because I do not accept at all that the college was being vindictive or was motivated as alleged, yet the matter has apparently caused considerable distress to Dr Selwood.

[92] Miss Craymer replied by letter dated 21 June 2006, in which she recorded that three alternatives had been 'discussed'. She identified the three alternatives, one of which was the office in question. Another alternative involved sharing space with the drama teacher - which had also been discussed - and the third was a move to space in the commerce department resource room.

[93] There was a conflict in the evidence regarding how many alternatives were discussed at the meeting. However I am afraid Dr Selwood's subsequent accusation to the effect that Miss Craymer had 'doctored the record' to indicate three alternatives were offered instead of

two is another example of a significant mis-statement or overstatement on his part. If he disagreed with the account in Miss Craymer's 21 June letter he could have said so at the time. Moreover, even if only two alternatives were 'offered' it is clear that more than two were discussed. Finally, even if Miss Craymer's letter raised an alternative not discussed, Dr Selwood could have taken the opportunity to consider and respond to it.

[94] To the extent that the grievance relies on a failure to provide Dr Selwood with a safe place of work, and the intended reference was to the office, it is necessary to address the nature of the space in question.

[95] The office was originally a projection room. While it is not particularly large, nor is it cramped and it easily accommodates one person. Not only that, other teachers have used it as an office both before it was allocated to Dr Selwood and since.

[96] What was formerly the projection window, and has now been covered over, opens onto what is now the computer room. The stud is very high and the office door, opening onto a corridor, has above it a large window with louvres. Thus there is some natural light and ventilation, and of course there is artificial lighting. There was no evidence to allow an assessment of whether the lighting and ventilation would be acceptable from an occupational safety and health point of view, for example, but when I saw it the quality of the lighting and ventilation did not strike me as being obviously substandard. Nor were those matters Dr Selwood's principal concern. He was exercised most by the presence of the school bells and his sense that he was being targeted by being required to move to what is apparently not a particularly popular office space.

[97] However the office is not the only small, internal room in the building, and Dr Selwood even said he would have been satisfied with another of the small, internal offices nearby. That office was not offered to him because it opened off the drama room and was allocated to the drama teacher. Indeed proximity to the computer room was one of the reasons why Dr Selwood was asked to move to the office in question. Moreover in 2004 he had himself identified the office as possibly being suitable for an ICT office, while noting the possibility that additional lighting might be needed and querying the need for air conditioning.

2. ICT meetings

[98] Dr Selwood alleged that he was deliberately excluded from various ICT-related meetings. His proposed job descriptions of late 2005 – early 2006 included references to participation in such meetings. The college’s January 2006 description which he signed included:

“4. Attendance at, and membership of, ICT meetings as Manager of ICT Learning Programmes.
5. Attendance at and membership of Cluster ICT Lead Group meetings as Manager of ICT Learning Programmes.”

[99] Dr Selwood says he was excluded from these meetings in particular. I understood his concern to relate to the year 2006.

[100] Prior to 2006 the college had from time to time conducted ICT meetings in order to address what Miss Craymer described as ICT ‘housekeeping’ matters. These meetings continued and various agendas and minutes for meetings held in 2006 were produced. Those for the early part of the year indicated Dr Selwood was at least on the list of recipients of the agendas and minutes. When I sought from him further details of the concern about exclusion from meetings, Dr Selwood said those ICT meetings were not the ones he was ‘talking about’. For that reason I focus on the concern arising out of point (5) in the extract from the job description quoted above.

[101] The background to the cluster group meetings is that Dr Selwood was a member of a committee that had, in 2005, put to the Ministry of Education a proposal for funding for an ICT professional development project. The proposal was made jointly by Queen Margaret College and Newlands College, and was accepted.

[102] Dr Selwood said he expected to be on the lead committee responsible for the overall implementation of the project. He also said that when the project got underway meetings were held to discuss matters such as: how the project would be launched, run and monitored; reporting to the Ministry of Education; budgeting; and the selection of people to attend conferences and workshops.

[103] Dr Selwood obtained much of his information about the nature and content of the meetings of concern to him from John Barrow, who works as an ICT Professional Development Facilitator. Mr Barrow is an IT practitioner with some 10 years’ experience,

and has qualifications in the use of Microsoft technology. He went to teachers training college in 2004, so is a very inexperienced teacher. In or about late 2005 he was engaged directly by Newlands College to teach IT to teachers at both colleges, as part of the professional development project. He began his association with Queen Margaret College at the start of the school year in 2006, spending about half of his working week there.

[104] Mr Barrow struck me as an honest and genuine person, but his statement of evidence did not properly take into account his very limited exposure to and direct knowledge of the administration and management of Queen Margaret College – or for that matter the facts underlying the issues between the college and Dr Selwood. He commented, for example, on the previous year's ICT audit, but he was not qualified to pass such comment and the matter was not within his direct knowledge. Unfortunately, too, he began his association with the college when the problem between the college and Dr Selwood was at its height. Inevitably Mr Barrow detected the tension, and I am prepared to accept that unwise comments were passed about the problem in his presence. However he was not in a position to place those comments in their proper context. I do not regard the comments Mr Barrow recorded in his written statement as evidence of a desire on the part of the college to induce Dr Selwood to resign.

[105] Returning to the cluster group meetings, no formal lead committee was established. The proposal was that the two principals and their deputies constitute a 'lead group', with two departmental subgroups to be established as well. Dr Selwood was to be a member of both subgroups. As his evidence developed, it appeared those were the groups from which he believed he was excluded. He said Mr Barrow and 'other staff' attended those meetings but he was not involved.

[106] Miss Craymer said that in late 2005 and early 2006 there were principal-led implementation meetings, and possibly some meetings with Mr Barrow about ICT infrastructure. When Mr Barrow provided further detail of the meetings he attended, it became clear that the meetings he had in the very early part of the year were with the principals and the deputy principals. Newlands College employed a dedicated IT specialist, and that person attended one or two of the meetings. In or about March and April there was a further series of meetings to discuss ideas arising out of a conference in mid-March which Mr Barrow and the principals had attended. Over the same period there was also a series of meetings convened by the deputy principals to discuss plans for a WELnet launch. Miss

Mabin, who participated in those planning meetings, said they covered matters such as sponsorship bags for the launch.

[107] While Dr Selwood might have wished to be involved in meetings of the above kind, I see nothing inappropriate in the fact that he was not involved.

[108] Otherwise the ICT meetings continued, and I have no reason to doubt Miss Craymer's evidence that the associated activities were subsumed in those of the subgroups established under the cluster group project. Dr Selwood was not excluded.

Dr Selwood resigns

[109] Dr Selwood said the incident regarding the office was the last straw for him. He said it caused him terrible distress, as it clearly did. He also said he had been looking for other work from about May 2006, and had received a tentative offer of employment in or about mid-June.

[110] By letter dated 8 July 2006, he resigned with immediate effect. He listed a number of concerns, being primarily the matters addressed in this determination, and concluded:

“Covert and underhanded methods have been employed to make my life at Queen Margaret College so uncomfortable that I would be forced to leave. Your strategy has been victorious. I can tolerate the intolerable no more and I therefore resign from my position at Queen Margaret College with immediate effect.”

[111] Shortly after his resignation Dr Selwood's offer of new employment was confirmed, and he accepted the offer. His personal grievance alleging unjustified constructive dismissal was raised in August 2006.

Determination – the disadvantage grievances

[112] The type of personal grievance which is often loosely referred to as a ‘disadvantage’ grievance is defined in the Employment Relations Act as follows:

“103 Personal grievance

(1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim -

(a) ...

(b) that the employee's employment, or 1 or more conditions of the employee's employment is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

(c) ...”

[113] I apply that framework when analysing Dr Selwood's disadvantage grievances.

1. The job description

[114] Further to Dr Selwood's allegation that certain of his responsibilities were removed from him, I have accepted in a general way that Dr Selwood's activities in 2004 and 2005 extended in practice beyond teaching and providing educational or professional development support, but there was limited detail about how far that went. I bear in mind, too, that Dr Selwood was employed as a teacher, albeit one with a special area of expertise. That expertise was acknowledged from the outset by allocating a slightly less than full time teaching load to Dr Selwood, with the remaining time being allocated to educational support activities in the ICT area. There was no express allegation that responsibilities of that type were removed.

[115] Regarding the wider responsibilities Dr Selwood says were removed from him, if these included the budgeting responsibilities which he included in his proposed job description of January 2006 then those responsibilities were never his. They were Mrs Lendrum's. That is not to say Dr Selwood had no role in such matters. However there was no evidence that even in practice he had responsibility for ICT budgeting and capital expenditure outside the parameters of his educational support and professional development role. Accordingly there is no basis for a conclusion that overall budgeting and management responsibilities were taken away from Dr Selwood.

[116] A greyer area concerns the extent to which, aside from the above, Dr Selwood became involved in an overall management role or other activities outside the scope of the educational support role. Regarding his association with LANtec, it was always a requirement that he liaise with that company within the scope of his role. Because of his existing relationship with Mr Bullard, and Mrs Lendrum's lack of technical knowledge, I

have been prepared to accept that the liaison role went beyond that. The liaison requirement was removed entirely from the college's job description.

[117] Other liaising activities were also absent from the college's job description, but present in Dr Selwood's. One involved liaising with the ICTs technician, which I assume was a reference to the on-site LANtec technician. It is likely that in practice Dr Selwood had liaised with the technician both within the scope of his role and outside it, although there was no evidence as to the extent of this. Another activity involved liaison with suppliers and contractors in respect of quotes and estimates. There was no evidence Dr Selwood had carried out such a role even in practice. If I accept in a general way and for present purposes that he did, the college recognised a role for him in that area in that its job description included obtaining quotes or estimates for the school as a member of the ICT committee. To the extent that Dr Selwood had previously carried out such a role, a reasonable part of it remained.

[118] Dr Selwood included provision in his proposed job description of January 2006 for the management of the college's relationships with its ICTs suppliers. I take that as a reference to organisations like LANtech. However that overall management responsibility had always been Mrs Lendrum's. Moreover the January 2006 provision appears to me to be an elevation of the provision regarding suppliers which Dr Selwood had proposed in his December 2005 description, despite Miss Craymer having explained the essential nature of his position in her 19 December letter. It may be that these kinds of provisions were included only because - as he put it in his 30 January letter - Dr Selwood saw them as 'optimal' for his role as he saw it rather than reflecting his existing responsibilities. If that is the case then there is even less basis for saying such responsibilities were removed from him.

[119] As for classroom work, the college was within its rights in seeking to have Dr Selwood take as near to a full time teaching load as it reasonably could, while allocating time for his specialised skills as well. There was only a small increase in the classroom work required of him in 2006, and he had never expressly declined to take on any of the duties in question. On the contrary, with the possible exception of the creation of two senior computing classes having reduced student numbers, he had expressly agreed to the teaching duties. Not only that, he had been teaching four senior classes anyway. The problem for Dr Selwood was that he sought a reduction in his teaching hours, so he would have time for an expanded range of IT management duties.

[120] Overall, while having a wider involvement in the management of the college's ICT system was clearly important to Dr Selwood, I do not accept that the college's attempt to define or even limit that involvement amounted to a significant change to his terms and conditions of employment. The essence of the job he was employed to do remained the same. What he lost was the scope to involve himself in wider IT-related activities that the college had previously managed on an ad hoc basis. Otherwise he lost few, if any, real responsibilities.

[121] The next question is whether Dr Selwood was disadvantaged as a result. The disadvantage identified in the evidence concerned Dr Selwood's sense of injustice because of his view that his high educational qualifications were not being appropriately recognised or used. However to the extent that his specialty was education-based, not technical or engineering-based, I do not accept the college was failing to acknowledge his specialist skills. I do not accept there was a disadvantage in that respect.

[122] I do not accept there is any disadvantage in respect of the required teaching load.

[123] Any remaining disadvantage arises out of the fact that certain additional duties Dr Selwood wished to perform, and may in practice have been performing, were to be Mrs Lendrum's responsibility until a new IT manager was appointed. The essence of the disadvantage lies in the blow to Dr Selwood's self-esteem and sense of worth.

[124] I turn to the justification for the college's actions.

[125] To the extent that any responsibilities had been removed from Dr Selwood, the removal occurred because the responsibilities had become part of his role on an informal basis only. The need for better overall IT management had been highlighted by the 2005 audit. As I have said, the audit was conducted by a suitably qualified and experienced person and it is not open to Dr Selwood to impugn the outcome in the Employment Relations Authority. As a result of the audit the college decided, as it was entitled to, to introduce a structured and defined IT management system and create an IT manager's position. There were genuine grounds for that decision and for the resulting removal of Dr Selwood's informally-acquired duties. In that sense the removal was justified.

[126] At the same time Dr Selwood was entitled to be treated fairly in respect of the removal. For example he was entitled to be consulted, not only in principle but also in accordance with the following provision in his employment agreement:

“19. CONSULTATION

19.1 The Board recognises that both the Board and the Teacher have a mutual interest in ensuring an effective and efficient workplace and that both parties to this agreement have an important contribution to make to achieve this outcome.

19.2 The teacher recognises the right of the Board to manage, organise and make decisions on the procedures and policies of the College.

19.3 The Board agrees that, where changes are required to its operational structure, work practices or employment conditions which will significantly affect the Teacher’s terms and conditions of employment, it will consult with the Teacher and/or her/his representative prior to the implementation of any such change.

19.4 The consultation process shall include the following elements:

19.4.1 The changes being consulted about should be presented by either party as a proposal or plan, the details of which have not been finalised.

19.4.2 Such relevant information as is available (subject to privacy and commercial sensitivity) will be provided by the initiating party to enable the other party to develop an informed response.

19.4.3 Reasonable time will be allowed for the parties to assess the information, seek assistance from their authorised representative, and make such a response. Such time allowed shall not unduly delay the implementation of initiatives.

19.4.4 Genuine consideration will be given to initiatives raised in consultation, but the Board reserves the right to make the final decisions.”

[127] With reference to clause 19.3, when viewed objectively in terms of the job Dr Selwood was employed for and had been doing I do not accept that limiting Dr Selwood’s role in wider network and infrastructure matters ‘significantly’ affected his terms and conditions of employment. The significance lay in his personal or subjective view of the change. If the test of ‘significance’ is objective, I would not find it was met here, and hence clause 19 would not apply.

[128] If the test is subjective, and for present purposes I accept that it is, then clause 19.4 sets out the requirements of the consultation process. I have no hesitation in finding Dr Selwood was consulted appropriately about the teaching components of his job description. The contentious matter concerns his activities in IT management.

[129] When the college obtained Ms Stew's audit and decided to implement a formal IT management structure, it was acting as it was entitled to do. Dr Selwood was employed as a teacher and educator, and there was no plan to change that. While his input into the IT management structure could be sought Dr Selwood could not expect to exercise significant influence on a decision of that kind. However he was entitled to be consulted about what the decision meant for him.

[130] Such a process began in December 2005, and was a purpose of the 14 December meeting. It continued in the exchanges of correspondence later in December and in January.

[131] However two difficulties became obstacles that could not be overcome. One is that, although there was nothing to suggest he articulated this at the 14 December meeting, Dr Selwood did not accept the implications of the decision to introduce a formal IT management structure. His proposed job description contemplated a role that was unlikely to be appropriate in that kind of structure, and in the face of what he knew was to be Mrs Lendrum's interim role. The second is that the need to finalise his teaching load before the beginning of the school year in February spilled into a pressure to finalise the entire job description before then.

[132] To a limited extent I accept Dr Selwood's questioning of the hurry to finalise the job description, but only as it related to his participation in the IT management structure. It does not affect the need to finalise the teaching load, which was pressing. Dr Selwood was not entitled to delay resolution of the matter by continuing to press for the inclusion of management responsibilities that were not his, and associated lightening of the teaching load. At best, the nature of his participation in overall IT management at the college could have been the subject of ongoing discussions once the teaching load had been finalised.

[133] All of this was brought to a head when Miss Craymer wrote her letter of 1 February, and included reference to redundancy. In the circumstances she was entitled to make clear to Dr Selwood what might happen if agreement on the job description could not

be reached. She was also entitled to exert some pressure on Dr Selwood to accept the job description the college was proposing.³ She was not obliged to accede to Dr Selwood's wishes and it was becoming clear that there was a divergence in the parties' intentions regarding his role. Miss Craymer was entitled to consider that the consultation process had gone as far as it could, and assert the college's position regarding the job description.

[134] The question is whether there was any breach of duty in her reference to redundancy.

[135] The redundancy clause in the parties' agreement read:

“16.1 Redundancy procedures: Where the college is required to reduce staff or alter the status of a position because of a re-organisational change, or a reduction of the school roll the following procedures will apply:

- . an analysis of the current curriculum and pastoral needs of the pupils will take place and the projected needs of the next year will be undertaken.
- . the completed analysis will be made available to the staff.
- . the Principal will identify the teaching positions to be disestablished following these guidelines ...

16.2 Redundancy Notice: If circumstances arise that require a reduction in the number of teachers on the staff of the College, the Board will, after taking into account the Principal's recommendations regarding departmental staffing requirements, give any teachers so affected two month's notice of termination or salary in lieu of such notice ...

16.3 Redundancy payment: ...”

[136] The basis of the possible redundancy was that, if Dr Selwood did not agree to the job description the college was proposing, his position would become something other than the full time teaching position the college required. It would not itself be a position the college required. Clause 16 does not comfortably fit such circumstances. For example curriculum and pastoral needs had been assessed and discussed during the last quarter of 2005, but had not led to a conclusion that Dr Selwood's position was to be disestablished. Nor was there to be a reduction in the number of teachers on the staff in terms of clause 16.2, because the teaching position would have to be filled.

³ See **Business Distributors Limited v Patel** [2001] ERNZ 124 (CA) at [26]

[137] I doubt that a redundancy situation had arisen. The teaching and educational support position existed. Dr Selwood did not wish to agree to the associated terms and conditions and instead wanted to create another position.

[138] Whether or not that is correct, I find the reference in the letter to the need for notice is at best confusing. The letter reads as if the need for notice is being dispensed with. However the provision of notice could not be discounted merely because a consultation process had commenced several months earlier. If there was a real possibility of redundancy, it had only just crystallised and notice of termination would be necessary. Since it seemed none was to be given, and alternative arrangements were contemplated in respect of Dr Selwood's position as the college described it, it was reasonable to read the letter as indicating that the termination of Dr Selwood's employment was imminent if he did not sign the job description. If the intention was merely to advise Dr Selwood of the possibility of redundancy, the intention was not expressed clearly in the letter.

[139] I therefore conclude there was a breach of the obligation to give notice.

[140] Dr Selwood signed the job description, and his employment continued. The only disadvantage I can see is the loss of an opportunity to continue to seek a consensus about the duties outside his teaching role, or for Dr Selwood to take more time to choose whether to stay and perform the role being offered, or leave. The threat of the imminent termination of employment arising out of the breach of the notice obligation caused that disadvantage, and the action was not justified.

[141] In that respect Dr Selwood has established a personal grievance.

[142] The remedies for personal grievances are statutory. Here the available remedy is compensation for injury to Dr Selwood's feelings arising out of the grievance. The amount must compensate for the injury flowing from the action that gave rise to the grievance – here the failure to give notice.

[143] The evidence suggested it was very unlikely that consensus would be reached, further limiting the extent of any loss suffered as a result of the curtailing of efforts to achieve that end. Moreover had the stand off in respect of Dr Selwood's role in IT management continued, the college could have had grounds for a justified dismissal.

[144] Dr Selwood sought \$10,000 as compensation for the ‘threatened redundancy’. Despite his anger and upset, his entitlement to compensation must be assessed with reference to the above factors. Taking them into account, I order the college to compensate him for the injury to his feelings in the sum of \$5,000.

2. The incidents involving the deputy principal and the student

[145] Although the letter dated 15 February 2005, raising Dr Selwood’s personal grievances, referred to the incident with Miss Mabin as well as X’s complaint, Dr Selwood said at the investigation meeting that he was not seeking to raise a grievance in respect of the incident with Miss Mabin. He said the matter was referred to in support of his view that the college wanted him to leave. Accordingly I do not treat the matter as a discrete grievance.

[146] The incident regarding X was not raised as a personal grievance within the 90-day period required under s 114 of the Employment Relations Act. No application for leave to raise it has been made or granted under that section.

[147] Accordingly the matter cannot be addressed as a discrete grievance. Again, however, it can be considered as part of Dr Selwood’s view that the college wanted him to leave and I treat it accordingly.

[148] Later in this determination I address whether there was a breach of contract in respect of these matters.

3. Office accommodation

[149] Dr Selwood never completed the move to the office in question, so in this section I address only the justification for the college’s action in respect of the office allocation.

[150] First, the requirement that Dr Selwood move was justified in the overall context of the reallocation of space both during and on completion of the refurbishment of the Tower building. In principle the requirement was within the scope of the college’s right to manage its affairs. Dr Selwood was not the only person affected by the reallocation of space, and he was not being targeted or victimised.

[151] More particularly although the relevant space was less than perfect, I find it was by no means as imperfect as Dr Selwood's emotive descriptions would have it. I do not consider it unsafe or unfit for human habitation. Moreover, although Dr Selwood objected to the proximity of the school bells, there were bells throughout the building and it is unlikely that any teacher could be located very far from them. In disconnecting the bell located inside the office, the college made a reasonable attempt to address Dr Selwood's concern.

[152] Secondly, Dr Selwood was consulted about where he would move, and alternatives were discussed. The college was not obliged to accede to Dr Selwood's wish to remain where he was.

[153] In conclusion, I do not accept the college's actions were unjustified or that they amounted to a breach of the employment agreement. There are no grounds for any remedy in respect of the office space.

Determination – whether there was a constructive dismissal

[154] A termination of employment brought about by a resignation can amount to a constructive dismissal if it falls within one or more of the following categories:

- (a) the employee is told to resign or be dismissed; or
- (b) the employer follows a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or
- (c) a breach of duty on the part of the employer caused the resignation, and the breach was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing.⁴

[155] Dr Selwood asserted repeatedly that the college was acting in terms of (b) above. I do not accept the evidence supports those assertions to any degree. On the contrary Miss Craymer went to considerable effort to discuss Dr Selwood's concerns and attempt to resolve them with him, while at the same time attempting (as she was entitled, and even obliged to do) to raise and address with Dr Selwood certain concerns the college had. I do not accept

the generalised allegations that her conduct was bullying, nor that she bullied Dr Selwood when attempting to address the more specific matters covered in this determination. Moreover, as the investigation meeting proceeded increasingly unreasonable accusations were put to her, yet she maintained her dignity in responding to them. That is not the mark of a bully.

[156] As for a breach of duty in terms of (c) above, I accept the principle that the cumulative effect of an employer's conduct towards an employee may amount to a breach of duty founding a constructive dismissal even if one or more of the component incidents relied on does not amount to a breach.

[157] In considering Dr Selwood's disadvantage grievances I have already addressed many of the component incidents, and found a breach of agreement in a limited respect. The remaining matters concerned the incidents involving the deputy principal and the student respectively, and the alleged denial of a support person.

[158] There was no breach of duty in respect of the incident involving the deputy principal and I do not accept that the college handled the matter unsatisfactorily. Nor was there any breach of duty in relation to the incident involving the student. Dr Selwood was never disciplined in respect of it, although the college addressed a concern, as it was entitled to, about Dr Selwood's handling of the matter. I do not accept that the college handled that matter unsatisfactorily or unfairly either.

[159] The matter of the support person should be addressed in its proper context. That is while it may be a general requirement of fairness, or even an express obligation in an employment agreement, to have a support person available for an employee facing disciplinary action, such availability is a less fundamental requirement when addressing non-disciplinary matters.

[160] Secondly, the only occasion on which Dr Selwood did not have a support person when he might have wanted one (although he did not allege that he required assistance) was during the discussion about the office space. I have considerable difficulty with the proposition that an employee should, in fairness, be accompanied by a support person for that

⁴ See: **Auckland Shop Employees IUOW v Woolworths (NZ) Limited** [1985] 2 NZLR 372 and **Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW** [1994] 2 NZLR

sort of discussion. Moreover Dr Selwood was, and always had been, able to express his concerns for himself and without assistance. Finally as far as the discussion about office space was concerned, other possible supporters were available to Dr Selwood if he had wished to ask.

[161] There was no breach of duty in relation to the availability of a support person.

[162] Standing back and taking an overall view, I do not accept that the cumulative effect of the college's conduct amounted to a breach of duty. Dr Selwood was not constructively dismissed.

Allegations regarding retribution against witnesses

[163] Much of the evidence on behalf of Dr Selwood was highly emotive and frequently not well-founded in fact. Such an approach risks diverting attention from the true merits of a claim.

[164] The emotive nature of many of the matters raised was never more apparent than in very serious allegations that, after the first two days of the investigation meeting, the college had engaged in retributive action against witnesses. The seriousness of the allegations meant I took the time to investigate them fully before resuming the investigation of the employment relationship problem.

[165] The allegations were based on concerns expressed by Messrs Barrow, Edgecombe and Bullard. It could not have been plainer that Messrs Barrow and Edgecombe had based their concerns on nothing more than their own fear of retributive action, rather than any act or threat of retribution on the part of the college. In Mr Barrow's case, that fear led to his decision to resign from his position, at least to the extent that it involved work at the college. I believe both men were influenced by the emotion involved in this investigation, not to mention their loyalty to Dr Selwood, and that affected their judgment. Unfortunately, while it was abundantly clear that there was no reasonable foundation for allegations of retributive conduct towards those two witnesses, Dr Selwood's bitterness was such that he maintained vehemently that the college had indeed taken retributive action against them.

[166] Mr Bullard's concern was with LANtec's ongoing commercial relationship with the college. However the outcome of Ms Stew's audit meant he was already not well-disposed towards the college and the relationship was already under some strain. Then LANtec submitted to the college a quote for a new server several days after the commencement of the investigation meeting. Another company's quote was accepted. The quote was much lower than the one LANtec submitted. There is no need to address the reason for the difference in the quotes. I am satisfied the college made a decision on commercial grounds that were reasonably open to it.

[167] Shortly afterwards LANtec informed the college that it would be instructing its technician to cease providing services at the college. Those services duly ceased, arguably amounting to a breach of the contract between LANtec and the college. Mr Bullard said in evidence the withdrawal was temporary, and because he did not want LANtec to have to 'clean up the mess' if there were difficulties with the new server.

[168] At the time, Mrs Lendrum sought to clarify the reason for the withdrawal, and was concerned about Mr Bullard's challenging of her decision regarding the quote. She spoke to Paul McQuillan, LANtec's managing director, about whether someone else could be appointed as LANtec's account manager for the college. In the circumstances I consider that a reasonable request. Mr McQuillan agreed to take the account manager's role on a short-lived interim basis. No long term resolution was achieved, and although the evidence was equivocal I consider it likely that at least at the time the parties contemplated addressing their continuing relationship once this determination is issued. Again, since emotions have been running as high as they are, that strikes me as a sensible approach.

[169] I do not believe any of this amounted to retributive action on the part of the college. Rather it was a reflection of the reality that the college's relationship with Mr Bullard was strained. This was not because of the fact that Mr Bullard had given evidence, but for the wider reasons to which I have referred.

[170] I now formally withdraw the order prohibiting the publication of these allegations.

Remedies

[171] It was submitted on behalf of Dr Selwood that any remedies awarded in his favour should take account of the sad fact that he was diagnosed with a terminal illness in December 2006. In what is probably a very human wish to find an answer to why that has happened, Dr Selwood and his family believe the illness was caused by the stress Dr Selwood experienced as a result of the college's conduct towards him, or that the illness could have been diagnosed earlier, when it was curable, but for the masking effect on its symptoms of that stress.

[172] Evidence is necessary to support a finding to that effect, but the evidence with which I was provided was sparse. Moreover Dr Selwood's oncologist's review of research into the link between stress and Dr Selwood's illness showed recent results establish at best no more than a weak correlation between stress and that particular illness, and even then the correlation has occurred only in women. There was certainly no evidence of a correlation in Dr Selwood's case. As for the possibility of earlier diagnosis leading to a better prognosis, it was not possible to identify the window of time in which the illness had become detectable and remained curable. Accordingly the possibility could not be any more than speculative, even without turning to the complex evidence that would have been required to support that kind of allegation.

[173] I have awarded Dr Selwood \$5,000 in respect of his grievance arising out of the threat of redundancy. I set out in the relevant paragraph the basis for that award. There were no grounds on which to award anything more.

Costs

[174] Costs are reserved. If the parties are unable to agree on the matter and seek a determination from the Authority, they are to file and serve memoranda setting out their positions within 28 days of the date of this determination.

R A Monaghan

Member of the Employment Relations Authority