IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 77
5423706

	BETWEEN	LISA TURNER Applicant
	AND	VICE-CHANCELLOR OF THE UNIVERSITY OF OTAGO Respondent

Member of Authority:	Christine Hickey
Representatives:	Warren Forster, Counsel for the Applicant Barry Dorking and Fiona McMillan, Counsel for the Respondent
Investigation Meeting:	16, 17, 18 and 19 February 2015
Submissions and Further Information Received:	From the Applicant on 23 March 2015; and 2, 8 and 15 April 2015 From the Respondent on 30 March 2015 and 13 April 2015.
Determination:	10 June 2015

DETERMINATION OF THE AUTHORITY

A. Lisa Turner was unjustifiably dismissed.

B. The Vice-Chancellor of the University of Otago must pay Lisa Turner:

(a) $3,717.00 gross in lost wages; and

(b) $5,000 compensation under s. 123(1)(c)(i).

C. Costs are reserved and, failing agreement, a timetable has been set.

Employment relationship problem

[1] In mid-2013 Dr Turner was dismissed from her position as a part-time Professional Practice Teaching Fellow in the Department of Psychological Medicine.

[2] Dr Turner claims:

- she was unjustifiably disadvantaged by the University adding what had previously been video-based "voluntary teaching" to her workload and threatening to reduce her FTE appointment unless she agreed to continue the video teaching, and
- she was unjustifiably dismissed and that part of the reason the dismissal was unjustifiable is that the University acted in breach of its duty of good faith under s.4(1A) of the Employment Relations Act 2000 (the Act) by failing to provide relevant information to her, and
- she was discriminated against by reason of her involvement in a union in breach of s.107(1)(e) of the Employment Relations Act 2000 (the Act).

[3] A claim that the parties were in a *dispute* about the meaning of Dr Turner's employment agreement when she was dismissed and that the University should not have made a decision to dismiss because of that, is not being pursued. The issue of a dispute will be examined as a part of the enquiry into whether there was any unjustified disadvantage and/or an unjustified dismissal.

[4] By way of remedy Dr Turner originally sought reinstatement but no longer does so. However, Dr Turner claims compensation for humiliation, loss of dignity and injury to her feelings, and reimbursement for loss of earnings and legal costs.

[5] Other remedies are sought some of which may have been obtained through mediation but are not within the Authority's power to order, such as an apology. Other matters were framed as remedies, such as *a decision that the voluntary teaching is not part of the employee's teaching obligations*. However, those issues will be dealt with as part of the consideration of the unjustified disadvantage and unjustified dismissal grievances and a consideration of good faith.

[6] The University resists all of Dr Turner's claims and says that Dr Turner made a unilateral decision to reduce course content and teaching hours which it did not accept. The University says it lawfully and reasonably instructed Dr Turner to teach the course as she had previously done and not to reduce the course content or class time.

[7] The University says on three occasions Dr Turner failed to comply with its instructions having been warned each time of the likely consequence; dismissal. The University did not consider Dr Turner had a reasonable explanation for her failure to follow instructions and so after the third occasion she was dismissed. The University considers that at all times and in all ways it acted in good faith and as a fair and reasonable employer could have acted.

Factual background

[8] By December 2012 Dr Turner had been working part-time at the University of Otago Medical School's Department of Psychological Medicine as a Professional Practice Teaching Fellow for a little over nine years. She held a .2 full time equivalent (FTE) position.

[9] In 2012 and 2013 the main aspect of Dr Turner's teaching was to examine fourth year students' case presentations[1]. The students undertook clinical placements in psychiatric medicine and were assessed on their case presentations.

[10] In 2006 and 2007 Dr Turner developed a method of leading discussion with the students and teaching them using the 'Maudsley neuropsychiatry videos' which contained *excellent clinical teaching material, including some rare conditions that the students would be unlikely to see on their placements.*[2] That teaching followed the student case based presentations and feedback.

[11] Only the students in Dunedin on their clinical placements attended the teaching based on the videos, although Dr Turner made the study guide she developed on the tapes and the tapes themselves available for students on placement out of Dunedin to use when

[1] She also set and marked examination questions and from time to time offered lectures, such as that on 21 February 2013. In 2012 she offered two workshops at a GP's conference and advised on clinical aspects of child health research.
[2] Dr Turner's witness statement, paragraph 15.

they came back to Dunedin. It is her belief that generally the students did not take advantage of that resource.

[12] In 2008 the period the room booking for Dr Turner's student case presentations and the Maudsley video-based teaching was increased from 9 am to 12 noon. It had previously been booked from 9-11.30 am. Dr Turner's evidence for the investigation meeting was that she had sometimes gone over time in 2006 and 2007 after she introduced the video-based teaching.

[13] Student case presentation sessions were scheduled for 5 Friday mornings per quarter. Dr Turner usually taught in room 119 and used the same video equipment for each session.

[14] On one occasion in 2012 room 119 was not available and Dr Turner's session was moved to a room inside the hospital. Despite her attempts and those of Anita Admiraal, the 4th year course co-ordinator, the supplied video equipment did not work and the video-based teaching was unable to be delivered that day. Dr Turner was concerned that her students had been disadvantaged by missing out on the video-based teaching. Another time in 2012 Dr Turner was asked to give up an hour of a Friday morning session to allow students to attend a lecture given by a visiting lecturer.

[15] After those two occasions Dr Turner asked Dr John Canton, the Course Convenor, to ensure that she was included in any discussion about any conflict over rooms in the future.

[16] In early November 2012 Professor Paul Glue carried out Dr Turner's annual performance appraisal, which I am satisfied was a positive one.

The beginning of the employment relationship problem

[17] On 27 November 2012 Dr Canton told Dr Turner that for two of the first quarter Friday mornings in 2013 Dr Turner's student case presentations would take place in room 120; next door to where she normally conducted them.

[18] On 3 December 2012 Dr Turner sent an email to Professor Glue, Dr Canton and Ms Admiraal:

> *I am writing because I have been informed that Room 119 will not be available on 8th and 15th March 2013 for the last two of the five Friday*

> *morning sessions that I run for the 4th year Medical students on the grounds that "second year teaching takes priority over fourth year teaching".*
> *The examination of students' case presentations on Friday mornings has taken place for many years. I have examined the students for the last eight years, initially in room 205, and for the last six years or so the sessions have been in Room 119. I think that this could therefore be regarded as a 'fixture'. Over this time the number of students has increased from groups of 14 up to 21 and I have introduced some teaching out of goodwill so that it fills five sessions from 9 am to noon.*
> *As it stands I will ask Anita to schedule the examination of all the case presentations over three sessions on 15th and 22nd February and 1st March, so there will be no need for sessions on the dates the room is unavailable.*

[19] Professor Glue replied on the same day and copied his reply to Dr Canton and Ms Admiraal:

> *Hi Lisa – apologies for these changes but we are having a few weeks early next year when space is very tight. Thanks for working around this.*

[20] Dr Turner took this to mean Professor Glue agreed with her plan for the first quarter. She then wrote to Ms Admiraal confirming that she would take three sessions in the first quarter only and none on 8 and 15 March. She also proposed that if there was to be any difficulty with rooms for the rest of the year she would do three, not five, sessions and signalled that she intended to be on leave on 26 July so would take only four sessions in that quarter.

[21] Professor Glue emailed Dr Turner on 13 December expressing concern that her proposed dates in the first quarter did not cater for the 6 students whose placements were out of Dunedin and asked her when those students could be examined.

[22] Dr Turner replied on the same day that she thought they would be back by the 3rd session but if not, she could examine them on:

> *… 8th March, in Room 119. These sessions have been a fixture in that room for many years now and should continue there until they have been completed. I have not been given any reason why I should change rooms.*

[23] Dr Turner got no response and on 17 December emailed to Professor Glue again:

> *Can you please confirm whether Room 119 is available to continue my session with the 4th years on 8th March.*
> *Would it be a good idea for us to talk about the situation?*

[24] On 19 December 2012 Dr Turner emailed Dr Canton and Ms Admiraal but did not copy in Professor Glue:

> *…. I have tried unsuccessfully to have a dialogue with Paul about the Friday morning sessions.*
> *Next year I will confine myself to examining the students on their case presentation and not the additional teaching I have done now for a number of years out of goodwill.*
> *…wish to take leave on Friday 26th July.*
> *My preference is to examine the students over three sessions as this would allow them the opportunity to have a couple of extra mornings on their placement (and some of them like to go to ECT on Friday mornings). I have realised that the fourth session is the one where all the students are present, not the third. If the sessions are spread over five mornings, I will be finished by about 10.30am, as I used to.*

[25] Dr Turner then went on to suggest the three dates in each quarter that she would examine the students.

[26] After returning from her Christmas break Ms Admiraal forwarded Dr Turner's email to Professor Glue on 31 January 2013. He emailed Dr Turner on the same day expressing his concern that her proposal seemed to be a substantial change in her teaching activities, that it would impact negatively on student learning opportunities and that the reduction in teaching was inconsistent with her .2 appointment. He wrote:

> *You have introduced the Maudsley tapes, which has had excellent feedback.*

[27] He concluded with:

> *I would request that your contributions to the 4th year teaching programme are not changed for this year. I am happy to meet with you to discuss this further, but I am not prepared to accept a reduction in your hours of teaching as proposed …*

[28] Prior to receiving that email Dr Turner had agreed to give a two hour lecture to a class arranged by Dr Steve Gallagher on 21 February 2013 and had arranged to meet Dr Gallagher to discuss the lecture on Friday, 15 February 2013. That meeting was at the time that the first student case presentation session would usually have been scheduled and was the date Dr Turner had first proposed she would examine the first student case presentations.

[29] On 1 February Dr Turner emailed Professor Glue that it would be helpful to meet to discuss the issue and wrote:

> *My decision to withhold the video-based teaching this year resulted from the decision to move me out of room 119 for the last two*

> *sessions of the first group of students. John Canton told me that you had decided that 'second year teaching takes priority over fourth year teaching". I found last year rather difficult and am feeling rather undervalued and a bit pushed around in my role in the department.*
>
> *I am surprised it has taken you so long to respond to this issue.*
> *…*
> *For this year I will continue to meet my commitments in examining the students on their case presentations, leading the discussion and providing individual feedback to them in the same way I have always done. However, I will not be doing the video-based teaching, which is not part of my job, not part of the curriculum and not something that the students in ChCh or Wellington receive! …*
> *It would therefore seem most economical for the examination of case presentations to take place over three mornings rather than five, to allow students to have extra time on their placements. …*

[30] Dr Turner and Professor Glue met on 8 February 2013. Professor Glue told Dr Turner that he thought what she was proposing amounted to a reduction in her student contact hours by a half. He told her that if she did not reinstate the teaching she had done in previous years he would *take the matter to HR*.

[31] Dr Turner took notes after the meeting which record[3]:

- Professor Glue made it clear the *sole agenda* of the meeting was to *inform me that what I was proposing constituted a reduction in my hours by half (a figure he gave no justification for) and that unless I reinstated the voluntary component of teaching (extended case-based teaching and the neuropsychiatry videos) then he would take the matter to HR. His manner … was threatening and irritable.*
- *I told him I was not changing my mind.*
- *I said I did not have fixed hours rather I had fixed commitments that I would continue to maintain.*
- *I tried to explain why I was feeling "pushed around" and asked to discuss some issues related to Room 119 he refused and snapped that the issue of the room was 'trivial". I forced him to listen to the reasons why I was concerned about the move of room.*
- When Dr Turner said the reason she had been given was that "second year teaching takes priority" *Paul shouted at me "I wasn't at the meeting".*
- Professor Glue *repeated his threats to go to HR… I said I was not reducing my hours but was very happy to meet with him and other psychiatrists in the Department to discuss workloads. He shouted at me, "That is not on the agenda at this time".*

[3] These were typed up by Dr Turner on 25 and 27 February and based on handwritten notes written after the 8 February meeting.

- When discussing how the Friday sessions would be covered Dr Turner pointed out to Professor Glue that *he had agreed to my arrangement of examining the students over three sessions (instead of five) in previous emails and that I had now booked a meeting … on the morning of 15th February … I asked Paul if he wanted me to pull out of the teaching which I had agreed to do. He did not reply*.

[32] Dr Turner wrote Professor Glue an email expressing her disappointment at the outcome of their meeting and stating that she found his manner *highly disagreeable*. She reiterated what she had said in the meeting about withdrawing the teaching she had done for some years and restated that she had fixed commitments she would continue to meet and her view that she was *not withdrawing from any of my responsibilities*.

[33] Professor Glue's recollection of the meeting is different. He denies he shouted at Dr Turner or threatened her with a reduction in her FTE hours. However, he agrees that he told Dr Turner that she was effectively proposing to reduce her teaching hours by half. Directly after the meeting Professor Glue contacted Lianne Smith of the University's HR department and asked to meet her to discuss the fact that Dr Turner was unwilling to go back to the hours she worked in 2012. He wrote that *John Adams is aware of this*. Dr John Adams was the Dean of the School of Medicine.

[34] On 11 February 2013 Dr Turner telephoned Lianne Smith, Health Sciences Human Resources Assistant, to check if Professor Glue had communicated with HR about her hours. She explained she was not seeking to reduce her FTE. Ms Smith said he had contacted her and she would call Professor Glue hoping the issue could be resolved if Dr Turner and Professor Glue spoke.

[35] Ms Smith phoned Dr Turner back and said that after speaking to Professor Glue she understood Dr Turner was requesting to reduce her own FTE. Dr Turner denied that. She asked for copies of correspondence sent to Ms Smith by Professor Glue.

[36] On 12 February Dr Turner forwarded to Ms Smith the email correspondence between her and Professor Glue on the issue and stated:

> *Yesterday I learned for the first time that the decision to move me out of Room 119 for those sessions was based on their* [sic] *being a greater number of 2nd year students. I am not convinced by this argument in relation to the allocation of the rooms. I understand that the other rooms that are available are the adjacent and comparable Room 120*[4] *and the Norma Restieux room*[5]*, which I believe is larger than Room 119.*

[37] Also on 12 February Professor Glue suggested a meeting between himself, Ms Smith and Dr Turner. Dr Turner suggested meeting on 22 March and reiterated her request for Professor Glue's correspondence with Ms Smith prior to a meeting.

[38] On 13 February Professor Glue emailed that 22 March was too far away because 4th year students were *in place and I do not want their teaching to be affected if Lisa is not willing to cover the full complement of Friday morning sessions.* He signalled that he hoped to meet with Dr Canton and Ms Admiraal the following day to *review the Year 4 teaching schedule*.

[39] Dr Turner responded on 14 February that she was *shocked by* [Professor Glue's] *continued heavy-handed approach to this matter.* She reiterated that she was meeting with Dr Gallagher on 15 February and wrote *I am willing to examine all the students on their case presentations, but if you schedule students on 15th February you will need to find somebody else to cover this*. She again said she did not want to meet until she had received a copy of the correspondence Professor Glue had sent Ms Smith.

[40] On 15 February Dr Turner emailed Ms Admiraal at 10.50 am that as the sessions had been scheduled over five weeks despite her unavailability *I assume that you have arranged for the sessions on 15th Feb. and 15th March to be covered by somebody else.*

[41] Professor Glue emailed Dr Turner on 15 February and expressed his disappointment that *you did not cover your scheduled teaching duties today.* He wrote that:

> *I do not agree with and do not approve this change in your teaching hours …It is my expectation that you will undertake your teaching duties as originally scheduled*.

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[4] Which is the room Dr Turner's two sessions had been allocated to.
[5] Which is the room in the hospital in which Dr Turner's video equipment did not work.

[42] Dr Turner replied on 18 February in a lengthy email that essentially reiterated her previous points made to Professor Glue. She said she had already told him she was not available on 15th February and she wrote that she was travelling to London on study leave on 15th March and would not be available that morning.

[43] Professor Glue forwarded that email to Dr Adams, who responded to Professor Glue and copied to Ms Smith that he thought he should be involved in any meeting and added:

> *She certainly seems to be digging in to a position of intransigence and I don't understand why.*

[44] Dr Adams accidentally copied Dr Turner into that email. Although he tried to recall it Dr Turner had already read it.

[45] On the morning of 22 February Dr Turner assessed the student case presentations, led discussion and gave individual feedback. She finished at about 11 am and did not offer the video-based teaching.

[46] At some point Dr Turner acknowledged that she would, apart from in the first quarter, undertake five sessions per quarter.

[47] On 22 February 2013 in advance of a meeting arranged for 26 February Dr Turner's lawyer, Mr Forster, sent an 11 page memorandum raising a number of issues including the assertion that Dr Turner's teaching of the video-based material was *voluntary* and alleging that Professor Glue had not acted in good faith. The memo stated that Dr Turner alleged there were four issues:

- *What process was followed by the employer in adding the extra teaching to the employee's obligations?*
- *Was the process in accordance with the principles of fairness and natural justice and the statutory good faith obligations?*
- *If the process was not in accordance with natural justice and good faith obligations, then what remedies are available to the employee?*
- *Was the employee unjustifiably disadvantaged?*

[48] By then Professor Glue's 8 February email to Ms Smith had been disclosed as it was annexed to the memorandum.

[49] The issue of *provision of relevant information* was raised by Mr Forster for the first time alleging that the University had not disclosed all relevant information

and that it had *a duty to keep proper records and has statutory obligations to provide these to the employee*. The memorandum included the assertion that if Dr Adams believed Dr Turner was "digging into a position of intransigence" he was either misinformed or was acting in bad faith.

The meeting

[50] The meeting took place on 26 February between Dr Turner and Mr Forster, Professor Glue, Dr Adams and Ms Smith. Nothing was resolved. During the meeting Professor Glue characterised Dr Turner's view that some of her teaching was voluntary as 'delusional'. He denied that initially he had agreed to Dr Turner completing the student assessments on three dates only in the first quarter of 2013. He also denied that he had *threatened* to reduce Dr Turner's hours to .1 FTE.

After the meeting

[51] On 4 March 2013 Mr Forster wrote to Dr Adams suggesting that the University repair its relationship with Dr Turner. He made a further request for information stating:

> *Information that is held in the mind of the people involved should be transferred to written form and printed out.*
> *…*
> *The employee is considering legal action. The employer is hereby given notice that destruction of records will amount to spoliation.*

[52] On 8 March Dr Adams replied underlining the University's expectations. He wrote that Dr Turner's apparent failure to attend work:

> *and perform the required duties on 15 February … is potentially a disciplinary matter. Dr Turner's teaching commitment for this day had to be re-allocated to another PPF for that session. Should you wish to provide further contextual information regarding the non-attendance that will be considered.*
> *…*
> *We do wish to have a constructive working relationship with Dr Turner and look forward to her ongoing contribution to the Department of Psychological Medicine. We have been communicative and have acted reasonably and are prepared to have a further discussion if necessary.*
> *At this stage we require an urgent response as to whether Dr Turner will resume teaching as the University requires.*

[53] Mr Forster wrote to the Pro Vice-Chancellor of the Health Sciences Division,

Dr Peter Crampton, complaining that Dr Adams had a conflict of interest because of his "intransigence' email. Dr Crampton expressed confidence in Dr Adams and declined to take over Dr Adams' role in resolving the matter.

[54] In a further letter to Dr Adams on 18 March 2013 Mr Forster denied that the issues were workload and room allocation and said that they were *fairness, communication and procedures within the department, and perhaps most importantly, valuing the contribution of staff.*

[55] In the 18 March letter Mr Forster also said he and Dr Turner were *not aware of any evidence* that she failed to attend work on 15 February and:

> *would be alarmed if someone has suggested this. ... It would be specious to suggest a disciplinary matter has arisen from failure to attend work and perform tasks that the employer had allocated to another person. Doing so in the circumstances of this situation may amount to bad faith.*
> *Please provide written evidence of when the employment tasks were reallocated, why they were reallocated and whom they were reallocated to. If no written documentation exists, then please ensure that written record is created.*

Further written documentation was also sought.

[56] Ms Admiraal and Dr Canton were asked to write statements of what happened on 15 February which documented that they had been made aware to be on stand-by in case Dr Turner did not attend to assess student case presentations on 15 February[6]. When she did not attend to do this Dr Canton took the session.

[57] At this stage the University sought legal advice and arranged a meeting between Dr Adams, Ms Smith and Simone McNichol, the Divisional Human Resources Manager of Health Sciences, to discuss how to respond.

[58] From this point on all the correspondence at least in part refers to documentation sought by Dr Turner and the University's response to these requests. Dr Turner's submissions about information issues are dealt with below.

[6] Instead she went to a meeting with Dr Gallagher that she had not tried to rearrange to allow her to undertake the teaching session.

[59] Dr Adams' response to the substantive issue was to inform Dr Turner the University expected her to conduct five sessions per quarter and:

> *Again, in the absence of any further information, we are of the belief that the teaching you refer to (which we understand to be the Maudsley tapes, video-based teaching) is not "additional" or "voluntary", and is also expected to be undertaken in those sessions. … I require urgent confirmation that Dr Turner will be performing the expected duties for the remainder of 2013.*

The personal grievance of unjustified disadvantage is raised

[60] Mr Forster sent two letters in response the second of which, dated 23 April 2013, is an 11 page memorandum raising a personal grievance of unjustified disadvantage about how the University had dealt with Dr Turner to date. It re-stated that Dr Turner did not agree *to undertake the voluntary teaching as part of her current 0.2 FTE workload.*

[61] On the same day Mr Forster also lodged a complaint with the Privacy Commissioner about the University's failure to provide personal information.

The first instruction

[62] On 9 May 2013 Mr Dorking, on behalf of the University, responded that it would provide a response to Dr Turner's personal grievance in due course and:

> *Our client has asked us to pass on its instructions to Dr Turner in the meantime, and to explain the basis for those instructions.*
>
> 1. *You are doubtless aware that Dr Turner's employment agreement provides that it is for the University to decide when Dr Turner will work, and the actual hours she will work within the broad parameters of a .2FTE position.*[7]
> 2. *It is also for the University to decide which classrooms Dr Turner will be allocated for the purpose of presenting her assigned courses, the broad subject matter to be covered in those courses and the amount of face to face teaching time to be provided.*
> 3. *Until further notice Dr Turner is instructed to* [sic] *that part of the Psychological Medicine Attachment she has previously taught, without reduction of content when compared with previous years, in five sessions per quarter, of three hours each, every Friday morning, in the class-room she is allocated.*
> 4. *Any change to that requirement will require the express agreement of the University, and any failure to comply is likely to be considered serious misconduct, unless Dr Turner has a reasonable explanation.*
> 5. *For the avoidance of doubt, the objections and arguments she has raised to date are not currently accepted as reasonable*

[7] Presumably reliant on the hours of work clause in Dr Turner's individual employment agreement.

> *explanations. If as you say these work requirements involve Dr Turner in "voluntary teaching" then that is something which can be dealt with as part of the resolution of her grievance.*
> 6. *It is likely the University will consider any failure by Dr Turner to comply with its instructions to be serious misconduct which could result in disciplinary action including possibly dismissal.*

The following day was 10 May, a date that student case presentations were scheduled.

[63] Dr Turner instructed Mr Forster to respond that she would not comply with the University's instructions for 10 May because she said the notice she received on the 9th was too short and she had made other arrangements.

[64] Mr Dorking replied that Dr Turner was entitled to dispute the terms of her employment and could not be forced to follow the University's instruction but while her:

> *dispute and grievance is [sic] being resolved she should be in no doubt that if she refuses to comply with the University's instructions she is likely to be dismissed.*
>
> *It is for her to decide whether she is prepared to take that risk.*

[65] Further correspondence ensued and in a letter of 14 May to Mr Dorking Mr Forster wrote:

> *It seems likely that you have not been provided with all of the relevant information regarding the employment relationship between our clients. We again offer to provide the relevant bundle of documents to you.*

[66] Dr Turner offered to meet on 14 May before the next due date for teaching on 17 May. That meeting did not occur. Dr Turner did not offer the video-based teaching on 17 May either.

The second instruction

[67] On 20 May Mr Dorking replied to the personal grievance of unjustified disadvantage by denying that there was any basis for it because the University had acted *entirely reasonably*. He did not take up Mr Forster's offer to supply *the relevant bundle of documents.*

[68] The University further wrote:

> *In the interests of bringing this matter to a conclusion, the University has decided not to make an issue of Dr Turner's apparent refusal to follow instructions on either 10 or 17 May, provided she follows instructions from now on.*
> *Dr Turner should be in no doubt that until further notice she is instructed to work the hours and times described … . If Dr Turner wishes to challenge the University's interpretation of the employment agreement, and consequently its right to issue that instruction, it is open to her to do so by following the procedures set out in the Employment Relations Act 2000. In the meantime, if Dr Turner fails to follow the instruction and has no reasonable explanation for that failure, it is likely the University will take disciplinary action against her including possibly dismissal. For the avoidance of doubt any argument that the University has no right to issue the instruction will not be accepted as a reasonable explanation.*

[69] On 22 May Mr Forster responded with a 10 page letter, which included a number of concerns about provision of information from the University. He again wrote:

> *we have written to you and offered a bundle of documents* and *we have twice offered to provide you with proper records that are contained in the bundle of documents. You have declined. We invite you to reconsider the approach.*

[70] He also wrote that:

> *your client continues to threaten our client with dismissal and disciplinary action over some perceived failure to do the teaching that they have clearly allocated to other staff.*
> …
> *We have repeatedly invited you and your client to meet and attempt to resolve this matter. We received no response.*

[71] Amongst other things that letter states *it is wrong to suggest the teaching loads of others are irrelevant.* However, Mr Forster also wrote *this is not a dispute about workload.*

[72] On 24 May Mr Forster sent a further letter:

> *This morning our client was informed that your client assigned the teaching at issue in the personal grievance … to another staff member some time ago.*

The letter alleged that the University could not require Dr Turner to do teaching that had been allocated to someone else and:

> *… any attempt … to change the approach … by reallocating the relevant teaching back to our client, then constructing some sort of disciplinary matter, prior to the resolution of the personal grievance of 23 April, is likely to be viewed objectively as bad faith.*

[73] On 27 May Mr Dorking responded by letter that Dr Turner:

> *… again failed to follow the instruction. …*
> *It has been made clear that matters previously raised by you would not be accepted as reasonable explanations for any failure by Dr Turner to follow instructions. Contrary to the assertion in your letter, Dr Turner's teaching had not been assigned to another staff member some time ago; or indeed at any time. Another staff member had been put on stand-by to teach Dr Turner's class should she leave early so that the students were not disadvantaged; as it turns out that was a wise precaution.*
> …

The decision making process

[74] Dr Turner was asked to provide a written explanation by 30 May 2013 for why she *failed to follow the clear instruction ... on each of the last three Fridays.* She was advised that in the absence of a reasonable explanation the University would conclude she deliberately refused to follow a lawful and reasonable instruction. The University considered that would amount to serious misconduct which would justify her dismissal. It continued:

> *To save you the trouble of drafting a long letter traversing the issues already raised by Dr Turner in the course of this year, those issues will not be accepted as justifying the failure to follow instructions.*
> *If our client considers it necessary to meet with Dr Turner in person you will be advised of a meeting time in due course. If you wish to present oral argument in support of Dr Turner's explanation for her conduct please let us know and our client will consider that request. For the avoidance of doubt the purpose of any meeting would be solely to hear Dr Turner's explanation and would not be an opportunity for you to traverse issues already raised.*

[75] On 30 May Mr Forster raised the possibility that another view of the problem was it *could be a dispute as to the interpretation or operation of an employment agreement*. Mr Forster invited the University to mediation at short notice to enable resolution under clause 14 of Dr Turner's IEA. However, he requested the information that he had previously requested to be provided before mediation.

[76] On 7 June 2013 Mr Forster again wrote about *provision of relevant information and* again asking for the information he had previously requested by 21 June 2013. He said that failure to provide the information *will simply delay resolution further*.

[77] On 18 June 2013 Mr Dorking sent Mr Forster an email confirming that the University was available for mediation on 28 June and that the date was being held by the mediation service. He attached *copies of emails between the HR/Dept and*

management and within the department and he said that they were all the remaining outstanding requested documents except those that fell within six listed exclusionary categories.

[78] On 21 June the mediation service sent an email to Ms McNichol that said Mr Forster was not available for mediation on 28 June and was *not prepared to set a date until they have received all the information that they have asked for.*

[79] On 24 June 2013 Mr Dorking sent Mr Forster an email acknowledging that he had raised a dispute and although the University did not agree there was a valid dispute it had agreed to mediation because a date was reasonably promptly available. He reiterated that Dr Turner was likely to be dismissed unless she had a reasonable explanation for her conduct.

[80] He wrote that the University believed that all requests for documents had already been dealt with by providing them, or giving reasons why they had not been provided. He offered another mediation date of 27 June and stated that the next available mediation date of 11 July was too late for the University's decision about Dr Turner, because the next term would be starting.

[81] Mr Dorking said the University would not go over earlier correspondence trying to identify what documents Mr Forster considered were missing and invited him to provide a specific list of documents:

- *That have previously been asked for and*
- *That have not already been provided or*
- *They have not already been refused and*
- *They are reasonably identifiable and*
- *They are reasonably related to Dr Turner's employment*

The University offered to provide any further documents in those categories before 27 June, if it could. It asked whether Dr Turner was willing to attend mediation on 27 June on that basis.

[82] On 25 June Mr Forster replied in a 9 page letter and a 3 page spreadsheet mostly about the provision of information and stating that:

> *the timeframe and approach set out in your email dated 24 June are unreasonable …*
> *The only other alternative is that we proceed to mediation and deal with the information in that fora. If mediation were limited to this issue of the provision of information, then we can attend (without our client) on 27 June 2013 at 2pm.*

> *Any mediation of the substantive dispute or personal grievance can only proceed <u>after</u> information has been provided and properly considered. This is likely to be late July as out offices are closed from 3 July 2013 and our client is then on leave until 22 July.*

[83] Mr Dorking responded the following day, a Wednesday, that as Dr Turner:

> *is not prepared to attend mediation … the process will continue as previously advised. Your propositions that the timeframes are unreasonable and that your client cannot respond until you have received the requested documentation are not accepted.*

[84] He advised the University would consider the spreadsheet re documentation. Dr Turner was invited to put any new explanation for her conduct to the University by *close of business Friday.*

[85] No real progress was made after this. Mr Forster still attempted to get the information and wrote that it was incorrect that Dr Turner was not prepared to attend mediation; instead she was unavailable on 27 June.

[86] In a separate letter on 26 June Mr Forster raised the dispute again and asked Mr Dorking to provide *a proper formal response*. He said that Dr Turner and he were available to mediate in the week beginning 29 July and asked for the requested information in advance of that.

[87] Mr Dorking replied to both letters on 27 June by denying that there was a valid contractual dispute *unless you can point to the contractual term which falls to be interpreted or applied in the manner you suggest.*

[88] Mr Dorking also wrote that the University had responded *in detail* on 20 May to the claim of unjustified disadvantage:

> *… the University does not accept that any of Dr Turner's teaching has been voluntary for the reasons given and so the grievance is untenable and the remedies claimed are denied.*

[89] Also on 27 June Mr Forster wrote again summarising Dr Turner's view of the University's position and again asking for information.

[90] Mr Dorking replied that the University's position was clearly set out previously and the request for information had also been responded to *several times.*

He reminded Mr Forster that anything further Dr Turner wished the University to take into account should be provided by the end of that day.

[91] Mr Forster said he could not make a substantive response without a specific response to his 27 June letter or the information sought.

[92] On 28 June Mr Forster wrote a letter of 7 pages setting out Dr Turner's views.

The decision

[93] On 2 July 2013 the University wrote a letter conveying that it had decided to summarily dismiss Dr Turner for failing to follow the University's instructions to teach what she had previously taught, without reduction of content, in five sessions per quarter of three hours each on Friday mornings in the room she was allocated. She specifically failed to do that on 10, 17 and 24 May. The University characterised that as serious misconduct which was deliberate.

[94] The University agreed to attend mediation on 29 July 2013.

[95] On 27 September 2013 Ms McNichol, having conducted a thorough review of documents related to Dr Turner, provided some further documents to Mr Forster.

The investigation meeting and Dr Turner's underlying position

[96] The investigation meeting went for four days and there are lengthy written submissions from both parties.

[97] I heard evidence from 14 witnesses all of whom were questioned.

[98] So far as I was able to understand Dr Turner's fundamental views I summarise them here. Dr Turner says that although the problem first arose through the non-availability of Room 119 to her for two sessions in the first quarter of 2013 the problem was never about room unavailability. She also says that the problem was never about her workload or her teaching hours.

[99] Instead Dr Turner, from the beginning, has relied on her belief that for about 6 years she offered the Maudsley video-based teaching towards the end of the slot dedicated to assessment of student case presentations purely voluntarily and out of

her personal goodwill. Therefore, she believed that she was entitled to withdraw or withhold that aspect of her teaching.

[100] She did so because the unavailability of her preferred teaching room was an example how she was being 'pushed around' in the department. In other words, she was withdrawing her goodwill. She steadfastly maintained that view and so felt justified in ignoring Professor Glue's direction in February and the University's subsequent directions to her to deliver the teaching for the period 9-12 on five Fridays per quarter using the video-based teaching she had developed.

[101] In addition, after her meeting with Professor Glue on 8 February Dr Turner says that if she had backed down and followed the University's instruction to teach as she previously had that would have been giving in to, or rewarding, Professor Glue's bad behaviour of shouting at her and treating her rudely and that would have been untenable for her. She said at the investigation meeting that she could not have continued to work under Professor Glue's management under those conditions.

[102] Dr Turner says that the meaning she and Mr Forster ascribed to her video-based teaching being 'voluntary' was perhaps not in line with the generally understood meaning of something done by a 'volunteer'. I understand from Mr Forster's submissions that he considers 'voluntary teaching' was *defined* in his 22 February 2013 memorandum as being:

- Not in the curriculum, unlike the case presentations,
- Not taught in The University's Wellington or Christchurch Schools of Medicine, and
- Not taught as part of the Dunedin fourth year either as the students whose placements are outside of Dunedin are not given this teaching.

[103] In Dr Turner's email to Professor Glue of 1 February 2013 she also wrote that the teaching *is not part of my job*.

[104] Although all of those assertions were made prior to Dr Turner's dismissal and also in the investigation meeting they do not amount to a definition of 'voluntary'. The University both before dismissal and afterwards struggled to

understand the basis of Dr Turner's view that the video-based teaching was voluntary. Indeed, I did not understand the basis for Dr Turner's view until at the investigation meeting.

The issues

[105] The primary issue to be determined is whether Dr Turner was unjustifiably dismissed. However, the following issues need to be determined in considering the primary issue:

(a) Did the University unjustifiably disadvantage Dr Turner by adding voluntary teaching to her workload?
(b) Did the University unjustifiably disadvantage Dr Turner by threatening to halve her FTE?
(c) Did the University withhold information relevant to its decision to dismiss Dr Turner and thus breach its duty of good faith?
(d) Was the University entitled to proceed to dismiss Dr Turner in the face of a dispute about the interpretation of her IEA?
(e) Was the University entitled to proceed with a disciplinary process ending in dismissal based on the same issues Dr Turner had raised as being of unjustified disadvantage to her?
(f) Was Dr Turner discriminated against because of her earlier raising of a personal grievance of unjustified disadvantage?
(g) Was the University entitled to conclude that Dr Turner's refusal to follow its instructions was serious misconduct?
(h) Was the process followed by the University in deciding to dismiss Dr Turner fair?
(i) Is Dr Turner entitled to remedies?
(j) What was Dr Turner's contribution to the situation giving rise to her personal grievance?

Test for unjustified disadvantage and unjustified dismissal

[106] Section 103A of the Employment Relations Act (the Act) sets out the requirements in determining whether a disadvantage or dismissal are justified:

> *(1)For the purposes of section 102(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
>
> *(2)The test is whether the employer's action, and how the employer acted, were what a fair and reasonable employer **could** have done in all the circumstances at the time the dismissal or action occurred.*

[107] The use of the word "could" means usually means that there is more than one possible justifiable outcome and more than one possible justifiable process available to a fair and reasonable employer. However, in assessing that the Authority cannot decide whether dismissal was justified by substituting its own decision for that of the employer.

[108] In applying the justification test to the dismissal claim and, so far as it is relevant, to the disadvantage claim, I need to consider s.103(A)(3) of the Act:

- whether, having regard to the resources available to the University it sufficiently investigated its allegations against Dr Turner before dismissing or taking action against her; and
- whether the University raised the concerns that it had with Dr Turner before dismissing or taking action against her; and
- whether the University gave Dr Turner a reasonable opportunity to respond to the University's concerns before dismissing or taking action against her; and
- whether the University genuinely considered Dr Turner's explanation (if any) in relation to the allegations against her before dismissing or taking action against her; and
- any other factors I think appropriate.

[109] In addition, I must not determine a disadvantage or dismissal to be unjustifiable solely because of defects in the process followed by the University if the defects were minor and did not result in Dr Turner being treated unfairly.

[110] Another key aspect in considering whether an employer's action or decision was justifiable is the duty of good faith set out in s.4 of the Act.

Was Dr Turner unjustifiably disadvantaged?

[111] Dr Turner raised a grievance of unjustified disadvantage on 23 April 2013 because:

- The University "added" what had previously been video-based "voluntary teaching" to her workload; and
- Professor Glue had threatened to reduce her FTE appointment by half unless she agreed to continue the video teaching.

[112] It was clear at least from the time Dr Turner started to refer to the video-based teaching as voluntary that she and Professor Glue, and ultimately she and the University, had a very different view of her duties and responsibilities.

[113] There are two limbs to the test for unjustifiable disadvantage as set out in s.103 (1)(b): firstly there must be an unjustifiable action by the employer, and secondly that action must have caused disadvantage to the employee.

[114] The test for whether or not the disadvantage was *unjustifiable* is whether the way that the University acted in relation to the disputed teaching was what a fair and reasonable employer could have done in all the circumstances at the time. The onus is on the University to prove that it acted in the way a fair and reasonable employer could have acted.

Did the University unjustifiably add teaching to Dr Turner's workload?

[115] Dr Turner alleged that the University added *voluntary* teaching to her workload. Dr Turner held a belief that the teaching using the Maudsley video tapes that she had undertaken for 6 years was always 'voluntary'. That belief is not grounded in reality. I am in no doubt that Dr Turner relied on the five sessions per quarter for three hours at a time being taken into account as part of her .2 FTE and in her performance reviews, as is demonstrated in Dr Turner's notes made in advance of her 2010 performance review where she wrote under the heading *Achievements/Duties in the Year 2009*:

> *There have been 81 4th year students this year.*
> *I have held 20 sessions examining students on their oral case history, case-based teaching, addressing questions from the students about their experiences on their attachment and on psychiatry in general and video-based neuropsychiatry teaching*. (emphasis added)

[116] The sessions held by Dr Turner, including the video-based teaching, *had excellent feedback* according to Professor Glue. That suggests to me that the department recognised that the video-based teaching did form part of Dr Turner's work load and that it valued that aspect of her work.

[117] Dr Turner requested that the University purchase the Maudsley sessions, at first on video tape for her use in teaching. The University did so and later purchased them on DVD also. Dr Turner did not personally purchase the recordings of the sessions and bring them into the University out of *goodwill*.

[118] If Dr Turner had genuinely considered that she was providing some voluntary teaching not recognised in her FTE allocation over 6 years I would have expected her to have asked for her FTE to be reconsidered or reassessed to reflect the additional hours she apparently believed she freely gave purely out of goodwill.

[119] I am in no doubt that Dr Turner would not have 'withheld' the video-based teaching if the department had not moved two of her sessions in the first quarter of 2013 out of room 119 and into room 120 without prior consultation with her. I reach that conclusion based on Dr Turner's early emails to Professor Glue despite Dr Turner denying that this case was about the room change. Her feeling of being undervalued because of a room change made without consultation is a completely different reason from considering what she had done for some years as 'voluntary'.

[120] It cannot be said that the University requesting that Dr Turner not reduce her teaching from what she had done over the previous 6 years was the University unilaterally adding work to her workload. The request from Professor Glue that Dr Turner continue to teach the 4th year students - *that your contributions to the 4th year teaching programme are not changed for this year* - could not be considered a disadvantage to Dr Turner at all let alone an unjustified action by her employer.

[121] A fair and reasonable employer could have acted as the University did in requesting that Dr Turner continue teaching as she had done for the previous 6 years[8] considering all the circumstances at the time the request was made.

[8] Barring occasional changes requested by the University, such as when there was a prominent visiting lecturer, and the flexibility accorded to Dr Turner for study leave to attend conferences.

Did the University unjustifiably 'threaten' to halve Dr Turner's FTE?

[122] A *threat* to unilaterally halve an employee's FTE could amount to a disadvantage, particularly if the threat was carried out and a unilateral reduction in the contracted hours resulted. However, although Professor Glue did contact the HR department, which was the first step in organising a reduction in Dr Turner's FTE, the University did not proceed to halve Dr Turner's FTE. Professor Glue's reaction was an understandable one in the face of a puzzling decision from Dr Turner to withdraw from what he understood to be part of her contractual teaching obligations. In the light of an apparent unilateral reduction by Dr Turner in her face-to-face teaching hours a fair and reasonable employer could have considered that she was in fact acting as if she had less than a .2 FTE appointment and pointed that out to her, as Professor Glue did. His reaction was justified in all the circumstances at the time, even if the exact ratio of teaching hours Dr Turner withdrew was not quite a half. There was not an unjustified threat of halving Dr Turner's FTE but there was an understandable frustration and a justified view that in withdrawing some teaching Dr Turner was effectively reducing her own FTE.

[123] The University reacted to Dr Turner's view that she could legitimately withhold the teaching and her complaints about Professor Glue requiring that she not change her commitments and his attitude to her in their meeting of 8 February by holding a meeting with Dr Turner and her lawyer on 26 February. Despite considering that Dr Turner seemed to be digging herself into a position of intransigence Dr Adams recognised that he had to understand why Dr Turner was acting as she was. After questioning Dr Adams at the investigation meeting I am satisfied that he was genuinely puzzled about Dr Turner's approach and wished to understand how she felt and why she proposed to act as she had suggested. I do not consider that he had a closed mind and consider he genuinely hoped the issue could be resolved by talking about the issues.

[124] Dr Turner had her opportunity to tell Dr Adams her view and I am satisfied that he considered her view before writing his letter of 8 March. I am aware that Dr Turner did not agree with his view that she had not attended work on 15 February since she had met with Dr Gallagher. She was able to explain that via Mr Forster's correspondence.

[125] The claim/s of unjustified disadvantage are dismissed. The University acted as a fair and reasonable employer could have acted in all the circumstances at the time in asking Dr Turner to continue to teach unchanged from previous years and in exploring the possibility that her FTE would need to be reduced but ultimately not continuing down that path.

Did the University withhold information in breach of good faith and/or other statutory requirements?

[126] The first mention of suspicion that specific documents and/or information had been altered or withheld by the University came in Mr Forster's 18 March letter to Dr Adams:

> *We are very concerned about the authorship and accuracy of what you have included at Appendix 5 to your 8 March 2012 [sic] letter. Please provide a complete original copy of all the documents you referred to therein.*
> *Please provide such in an electronic form so that the authenticity of these documents can be analysed. It appears that these documents have been recently produced and this would be a significant issue if this were the case and might amount to falsification of evidence as you have been warned that proceedings are being considered.*
> *Further please provide a copy of all internal communications surrounding Appendix 5. Again, if this in not in writing, please ensure an accurate record of what was said is in fact recorded at this early stage.*

[127] This referred to extracts from student handbooks dating back to the early 2000s which showed that the time set for the case presentations was 9-12 from the early 2000s when Dr Turner knew that the time had only been extended officially in 2008.

[128] Mr Forster's submissions say that the University had been *put on notice that the information was not correct.* That is true to a certain extent and is reflected in the quote above. However, it would have been much clearer to actually state that the view of Dr Turner was that the extracts were not directly copied from the actual handbooks and to say that the extracts had been deliberately altered because Dr Turner knew the time had only been officially extended in 2008. Mr Forster should then have asked who had altered them and why. The duty of good faith communication is a duty on employees as well as employers.

[129] During the investigation meeting it became clear, only after targeted questioning from me, that Dr Turner believed that Ms Admiraal had deliberately set her up by failing to forward her 19 December 2012 email to Professor Glue until 31 January 2013 and had, in bad faith, altered the handbook documentation.

[130] Dr Turner also believed that the University had wrongly withheld, altered or destroyed other relevant information. For example, Dr Turner wrote in her witness statement that she had:

> *repeatedly requested the communication that occurred prior to the forwarded email being sent to me with the HoD's comments at 2.51pm on 31st January 2013. This information has never been provided.*

[131] Dr Turner told me that she was suspicious that the copy of the forwarded email that had been provided to her omitted Ms Admiraal's signature line from the email that she forwarded to Professor Glue and so had been altered, probably by Ms Admiraal. Dr Turner believes that the email forwarded by Ms Admiraal probably contained information about Dr Turner that Ms Admiraal had conveyed to Professor Glue. Dr Turner believed this information had been destroyed or deliberately withheld from her.

[132] As a result of Dr Turner's views I decided that I needed to hear evidence from Ms Admiraal, who attended and brought with her copies of the original handbooks, the extracts of which had been in contention.

[133] Ms Admiraal candidly answered my questions and those put to her in cross-examination by Mr Forster. I am satisfied that Ms Admiraal did not exclude any text of her email to Professor Glue on 31 January apart from her automatically added electronic signature. She said she often excluded this to shorten a chain of email correspondence. There was nothing aimed at setting Dr Turner up and no comment, whether negative or not was appended.

[134] Ms Admiraal admits to having amended the extracts from the handbooks from the early 2000s which were supplied to Dr Turner. She says she did so to show the sessions as lasting from 9-12 when it is abundantly clear, and Dr Turner was aware of this, that the session length was not amended until probably 2008. Ms Admiraal says she did that to be helpful as she believed the sessions were

actually 9-12 pm in the years prior to 2008 also. Unfortunately, she was wrong about that.

[135] Ms Admiraal's action in amending the handbook extracts was unhelpful, although not maliciously done, and means that it is likely Mr Seales may have relied on incorrect information in making his decision about how long the video-based teaching had been delivered.

[136] Dr Turner believes that Ms Admiraal should have forwarded Dr Turner's 19 December 2012 email to Professor Glue earlier. However, there was no bad faith in Ms Admiraal forwarding the email to Professor Glue when she did. Ms Admiraal would not have had to forward the email if Dr Turner had copied him into the message, which clearly concerned him, when she sent it in December 2012.

[137] Apart from the handbooks, it is impossible to know what other relevant documentation or information, other perhaps than that discovered by Ms McNichol after the dismissal but prior to the investigation meeting should have been disclosed prior to the decision to dismiss.

[138] It appears that an effort was made by the University to respond to Mr Forster's requests for documents, even if not always within a timeframe he stipulated, and I am not at all attracted to Mr Forster's submission that there was spoliation of evidence[9]. He suggests that there was negligent non-production or destruction of documents by the University. I am certainly not convinced that there intentional destruction, alteration or non-provision of documents, other than the altered handbooks that should have been provided in original form as requested.

[139] I am somewhat concerned about the fact that requests for information and documentation from Mr Forster or Dr Turner's behalf appear to have been treated a little more lightly than was ideal. However, I say that bearing in mind my concurrent concern about what appeared to be Dr Turner's over-focus on provision of information rather than the parties getting together and focusing on the resolution of the problem.

[140] In addition I am puzzled by Mr Forster's first reference in his letter of 4 March 2013 in giving *notice that destruction of records will amount to spoliation*.

[9] Apart from issues about the handbooks dealt with above.

That followed an earlier allegation on 22 February that the University had not disclosed all the relevant information. The 22 February allegation about non-disclosure of all relevant information would have been much more conducive to resolution if Dr Turner had specified what information she considered the University had not disclosed.

[141] It only became clear at the investigation meeting that the comment referred to Ms Admiraal's email to Professor Glue. That suspicion was not clearly enough stated to allow the University to do something about it at that stage. As well, so far as I am aware there was no factual basis on 4 March to base a statement about suspected destruction of records on.

[142] I wonder whether a potentially inflammatory statement about destruction of records and spoliation was wise while the employment relationship was on foot. The duty of good faith is a two-way street and direct and clear communication is necessary to allow the other party to the relationship to understand exactly what you allege so that an issue can be resolved.

[143] I disagree with Mr Forster's submission that the state of the University's record keeping had been directly criticised in a previous Authority determination. I have carefully read Member' Doyle's determination in *Dr Millichamp v the Vice Chancellor of the University of Otago* referred to by Mr Forster. The determination contains no general criticism of the state of record keeping at the University; any criticism is specific to the facts of that case.

What about information in the minds of people that had not been committed to writing?

[144] Dr Turner frequently sought information that was not documented and that resulted from meetings or conversations between people about her.

[145] Section 4(1A)(c) of the Act, which is part of the section requiring good faith, requires an employer:

> *who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*

> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*[10]

[146] I agree with Mr Forster's submissions that the Act and the Privacy Act 1993 (Privacy Act) both apply to Dr Turner's case.

[147] From very early on, and in voluminous correspondence, requests for information and correspondence were made. The University took the stance that it was not required to produce information if it was not already in recorded form, or only existed in the minds of people, and used an exception under the Privacy Act to support that position.

[148] However, there are differences between the two Acts, especially in relation to *information in the minds of people*.

[149] Although Mr Forster did not say so, I take it that the applicant relies on the Employment Court case of *Vice-Chancellor of Massey University v Wrigley and Kelly*[11] in which Judge Travis held that s.4(1A)(c) of the Act requires that the provision of information to an employee:

> *… must include not only information which is written down or otherwise recorded but also information in the minds of people. Otherwise, if any relevant information was not recorded, the purpose of the legislation would be defeated. … … The fact that information is not recorded and held only in the minds of persons may make it more difficult to retrieve and less certain in its accuracy but does not affect whether it is relevant for the purposes of s.4(1A) (c).*[12]

[150] The *Massey* case was in relation to a redundancy process. Proposed redundancies are decisions that will or are likely to have an adverse effect on the continuation of the employment of an employee or employees. Therefore all information related to the redundancies and appointments process would have to be disclosed to the affected employees so they could comment on it before any decisions were made.

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[10] I am required to consider the section as it was prior to 6 March 2015 when amendments came into force.
[11] [2011] ERNZ 138
[12] Ibid., paragraph [63]

[151] In Dr Turner's case not all information in the minds of University employees was relevant to the continuation of her employment, especially initially. Therefore, the University was correct in the early stages when it denied that it needed to render discussions or meetings into written records.

[152] However, once the University issued its first instruction and notified Dr Turner that the consequence of not following the instruction could include her dismissal all relevant information that came into being and was not subject to legal professional privilege or another justified exclusion, should have been provided to Dr Turner for her consideration and comment.

[153] By that stage Kevin Seales, the Human Resources Director, was involved in instructing Mr Dorking and was going to be the decision maker. Any meetings Mr Seales had with other University staff, such as Dr Adams and/or Ms McNichol, which discussed Dr Turner should have been recorded in writing and copies of those discussions provided to Dr Turner.

[154] Unfortunately I am unable to determine whether or when there were any such relevant meetings as Mr Seales does not have a record of and has no memory of the meetings he may have had about Dr Turner, outside of those for which legal professional privilege has been claimed. However, I am satisfied that there must have been at least one initial conversation or meeting whereby Dr Adams' and/or Ms McNichol raised their concerns about Dr Turner's actions with him. In reliance on s.4(1A)(c) of the Act, the content of that discussion and any other in-house discussion or meeting about Dr Turner should have been recorded in some way and supplied to Dr Turner once it became clear that the University had dismissal in mind as one of a number of possible outcomes.

[155] Mr Seales does not have a record of or any memory of what documents he considered in making decisions about the continuation of Dr Turner's employment. There must have been some written and oral information provided to him, including probably the exchange of emails between Dr Turner and Professor Glue, and perhaps the Professional Practice Fellow job description and Dr Turner's Individual Employment Agreement (IEA).

[156] It is impossible to know what documents and information Mr Seales relied on to make his decision. But in light of the fact that he was privy to some oral information and probably some written information that was not disclosed to Dr Turner it is safe to conclude that there was a breach of s.4(1A)(c). This was more than a minor breach of a fair process and did result in Dr Turner being treated unfairly.

[157] Some documents were only discovered and disclosed after dismissal and ERA proceedings began and I am satisfied Mr Seales did not see those before making his decision and so could not have taken them into consideration when making his decision. Therefore there was not a breach of s.4 (1A)(c) in relation to this information.

[158] However, I am somewhat concerned that Dr Turner became fixated on the provision of information in a way that was a barrier to the parties getting together in mediation. Mediation might have had a positive bearing on the matters. Even very late in the piece when it is clear dismissal was being seriously considered Mr Forster's letters insisted that various documents be provided before any mediation could take place.

[159] For example, scheduled mediation on 27 or 28 June could have taken place to consider the claimed dispute and/or the rest of the employment relationship problem even without a further response from the University about information sought. While the employment relationship was still in place such an insistent approach to obtaining documents and information is not a particularly helpful one and is one more commonly seen in litigation.

[160] Without seeing the relevant bundle of documents Mr Forster offered to supply if the University requested it the University had no way of knowing whether it was useful or not. Again it would have been useful for Mr Forster to be specific and to point out what relevant documents he and Dr Turner had which they believed the University was operating in ignorance of. They did not do that at the time and still have not done so. If they truly believed the University lacked relevant documents I would have expected Mr Forster to simply provide them to make sure the University made its decisions about Dr Turner informed by all the relevant information.

[161] At the investigation meeting Mr Forster asked Mr Seales about the view expressed in his witness statement that Dr Turner's workload had *always been exceptionally light and she wishes it to be lighter still*. He asked if Mr Seales had put that to Dr Turner before making his decision to dismiss her.

[162] I am satisfied that Mr Seales conclusion using the words *exceptionally light* was not put to Dr Turner but that other more specific detail about her FTE contact hours was included in Mr Dorking's letter of 20 May which pointed out that Dr Turner was paid for 336 hours per year. The letter stated that when she had delivered five sessions of 3 hours each per quarter her contact hours amounted to 60, which gave her 6 hours of non-contact paid time per contact hour[13]. The letter also set out the University's view that in reducing her contact teaching time Dr Turner was reducing her contact teaching load to 30 hours annually but still wishing to be paid for 336 hours. Its view was that if Dr Turner only taught for 30 hours she would be paid for 11 paid non-contact hours per paid contact hour[14]. I do not think that the University's failure to directly put to Dr Turner that her workload was already *exceptionally light* is more than a minor failure and in any event given the detail it did give her it did not result in Dr Turner being treated unfairly. Dr Turner had an opportunity to disagree with the University's view of her FTE contact and non-contact hours.

Was the University entitled to proceed to dismiss Dr Turner in the face of a dispute raised by her?

[163] Both parties are critical of the approach of the other in relation to the dispute Dr Turner first identified existed on 30 May 2013. Mr Forster advised Mr Dorking on 26 June 2013 that a *dispute had been raised with the Department of Labour*. That dispute did not proceed to the Authority at the time. The Authority's records disclose that it was closed after it did not settle at mediation. I have no information or submissions in front of me about why Dr Turner did not proceed to have the Authority resolve the dispute she alleged existed while the employment relationship was still on foot.

[13] On my calculation that makes 5.6 non-contact hours per contact hour.
[14] Again, on my calculation that makes 11.2 non-contact hours per contact hour.

[164] The University submits that because it suggested that Dr Turner follow the process for dealing with a dispute set out in the Act and she failed to do so the continuation of the disciplinary process was justifiable.

[165] The University also submits that the Court of Appeal *Sky Network Television v Duncan*[15] case, relied on by the applicant, only applies to stop an employer dismissing an employee if the employee's interpretation of the dispute:

> *had a real prospect of being decided in favour of the employee. This is what made the dispute genuine for the purposes of that jurisdiction. By contrast, Dr Turner's view of her contractual obligations does not come even close to being arguable on any sensible analysis.*

[166] It is clear that Dr Turner's view was that some of her teaching was voluntary so that she could decide to withhold it and could not be instructed to deliver it. The University was aware that Dr Turner maintained that view even after she had legal advice.

[167] The question is not whether Dr Turner's view was correct or even whether it was reasonably held. In *IRD v Parkes (No 2)* Judge Shaw of the Employment Court wrote the *Duncan* case established that:

> *… an employer is not justified in taking disciplinary action against an employee who refuses to act in accordance with an employer's instructions if he or she is found to have been acting in good faith and in defence of rights which are in dispute.*
> [The Court of Appeal] *confirmed that the test was not whether there was wilful disobedience to obey a lawful and reasonable instruction but whether the conduct of the employee justified disciplinary action.*[16]

[168] The University proceeded with its disciplinary action resulting in dismissal even though it knew Dr Turner contended that there was a dispute over whether it was entitled to instruct her in the way that it had.

[169] Also in *Duncan* the Court of Appeal stated:

> *The obligation to act reasonably and in good faith in pursuing contractual rights rests upon the employee was well as the employer. The genuineness of the employee's behaviour, which is central to the character of the act of disobedience, is to be judged objectively in the*

[15] [1998] 3 ERNZ 917
[16] [2003] 1 ERNZ 540 at 561

> *light of all the circumstances, including the way in which resolution of the dispute is approached.*[17]

[170] Although in *Duncan* the employee's interpretation of the contract was found to be wrong his disobedience was not found to be wilful because he acted in good faith based on his interpretation of his employment agreement.

[171] Either party could have approached the mediation service or the Authority for assistance to resolve the dispute. The obligation to do so was not solely on Dr Turner. However, the University was hamstrung because Mr Forster was not clear in expressing exactly what was the subject of the dispute, even after Mr Dorking's letter of 27 June 2013 asked that Mr Forster *point to the contractual term that falls to be interpreted or applied in the manner you suggest.*

[172] The University knew Dr Turner was relying on Mr Forster's advice. It believed she may have been given erroneous advice. That is the reason the University gave Dr Turner a number of opportunities to comply with its instructions without imposing a disciplinary outcome. However, it was reasonable for the University to have relied on the fact that Mr Forster was acting under Dr Turner's instructions, as he certainly was.

[173] Dr Turner's IEA includes an Hours of Work clause, on which it appears the University relied for its assessment of the reasonableness of its instructions. Clause 4 provides:

> *The hours of work shall be such as are reasonably required to fulfil the duties of an academic staff member of the University and shall be worked at such time and on such days as the employer may require.*
> *In determining the exact hours of work, consideration will be given to the needs of the employee and current practice.*
> *The 'reasonable' requirements for part-time employees will be based on the proportion of full-time for which they are paid.*

[174] Once a dispute was raised it was incumbent on <u>both</u> parties to take that seriously and act in good faith to resolve it. However, it was very difficult for the University to do that without the disputed clause being identified and Dr Turner's interpretation of it being notified to the University.

[175] Clause 4 was not specifically referred to as being relied on before the dismissal. However, it is likely to be the clause Mr Forster claimed was in dispute although even in

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[17] *Duncan* (CA) at page 924.

submissions it was not identified as being the provision in dispute. I assume from some of Mr Forster's correspondence that he was aware of clause 4. For example, in his letter dated 27 June 2013 he wrote that he considered the University believed:

> *The individual employment agreement should be interpreted as not requiring the University to consider Dr Turner's needs or clinical practice before making the decision of 9 May 2013.*

However, Mr Forster never specified the disputed clause or clauses and never clarified what it was that was disputed.

[176] In addition, if there was a genuine belief in the existence of a dispute, the resolution of which could have resolved the employment relationship problem, I am puzzled why Dr Turner made herself unavailable to attend mediation until she and Mr Forster were satisfied that all relevant information had been supplied. There was no need for any documentation to mediate the *dispute* other than Dr Turner's IEA and the Profession Practice Teaching Fellow job description and perhaps the letter of offer to her which formed her employment agreement and were readily available.

[177] In all the circumstances, including no specification of any provision that was claimed to be in dispute and my finding that Dr Turner's view that she was entitled to ignore the instructions was, when objectively assessed, not a reasonable view, I consider the University was entitled to proceed down a disciplinary path. However, that does not necessarily mean it was reasonable to have dismissed Dr Turner. That, I deal with below.

Was the University entitled to proceed to discipline Dr Turner without first dealing with her personal grievance of unjustified disadvantage?

[178] The applicant submits that the University was not entitled to proceed to instruct Dr Turner to provide the disputed teaching and attach a potential disciplinary consequence to that without having first dealt with her personal grievance for unjustified disadvantage.

[179] I understand the reasoning behind this submission to be that because Dr Turner had raised a grievance about the disputed teaching the University was not entitled to require her to do the disputed teaching until the grievance was resolved. I take that to mean resolved to Dr Turner's satisfaction. My view is that nothing would have resolved the grievance to Dr Turner's satisfaction and induced her to do the

disputed teaching unless the University, at a minimum, agreed to her having the room she wanted for her teaching[18], which it was not obliged to do.

[180] The University submits that it fully addressed Dr Turner's unjustifiable disadvantage claim in its letter dated 20 May, in which it denied that any of Dr Turner's teaching had been voluntary.

[181] The employment relationship remained on foot for some months after the issue initially arose and the parties should have met about the personal grievance either in mediation or outside of it. The only meeting between them was before the grievance was raised, before Mr Seales became involved, and apparently before the University had taken legal advice. Dr Adams was of the view very early on that the relationship between Professor Glue and Dr Turner was at the root of the issue.

[182] The investigation meeting demonstrated that both Professor Glue and Dr Turner, although quite different personalities, were both convinced of the rightness of their own view and the wrongness of the other. Their relationship was central to maintaining the employment relationship.

[183] A fair and reasonable employer could have decided to hold a meeting or mediation without Professor Glue's presence in the hope of resolving the issues. It is very unfortunate that neither party suggested this approach or mediation at an early stage despite Dr Adams considering early on that the problem seemed to be an interpersonal one between Dr Turner and Professor Glue.

[184] However, it cannot be the case that an employer is always prevented from dealing with what it considers to be a disciplinary issue merely because an employee has raised an earlier personal grievance relating to the same subject matter. In this case the University failed to respond to Dr Turner's unjustifiable disadvantage personal grievance by way of written response or in mediation before issuing its first direction to Dr Turner on 9 May with the potential consequence of dismissal attached. I think that was unfortunate and led Dr Turner to feel that her earlier grievance was being ignored by the University.

[18] I base that view on Dr Turner's evidence at the investigation meeting and her notes of the meeting with Professor Glue on 26 February in which she wrote that she told him she would not change her mind and *I forced him to listen to the reasons why I was concerned about the move of the room*.

[185] However, on balance, I consider that in all the circumstances a fair and reasonable employer could have continued to issue the instructions the University issued and to attach a disciplinary consequence to any failure to comply with the instructions. Whether or not that disciplinary consequence could have been dismissal remains to be considered below.

Was Dr Turner discriminated against because of her earlier raising of a personal grievance of unjustified disadvantage?

[186] Mr Forster submits that Dr Turner was discriminated against in her employment under s.103(1)(c) of the Act. Section 104(1) of the Act defines discrimination for the purposes of s.103(1)(c):

> *…an employee is* ***discriminated against in that employee's employment*** *if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or by reason directly or indirectly of that employee's … involvement in the activities of a union in terms of section 107,—*
> *(a) …; or*
> *(b)* ***dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment;***

[187] *Detriment* is defined in s.104(2):

> *For the purposes of this section,* ***detriment*** *includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.*

[188] The portion of section 107 of the Act relied upon is:

> *For the purposes of section 104,* ***involvement in the activities of a union*** *means that, within 12 months before the action complained of, the employee—*
> *…*
> *(e) had submitted another personal grievance to that employee's employer;*

[189] Under s. 119 of the Act there is a rebuttable presumption that applies to discrimination cases:

> *Subsection (2) applies if, in any matter before the Authority or the court,—*
> *(a) the employee establishes that the employer or the employer's representative took any action or omitted any action as described in any of paragraphs (a) to (c) of section 104(1) in relation to that employee; and*
> *(b) if it is a case where the employee alleges that the discrimination was by reason directly or indirectly of the employee's involvement in*

> *the activities of a union, the employee establishes that he or she was a person described in section 107.*
> *(2) If this subsection applies, there is a rebuttable presumption that the employer or representative of the employer discriminated against the employee on the grounds, or for the reason, specified in section 104(1) and alleged by the employee*.

[190] Mr Forster submits that Dr Turner has proved that she was involved in activities of a union under s.107(e) because she had earlier raised her personal grievance of unjustified disadvantage.

[191] He says that the University dismissed and/or subjected Dr Turner to detriment in circumstances where another employee employed by the University on work of the same description would not have been dismissed or subjected to such detriment. Mr Forster submits that this satisfies s.104(1)(b) of the Act. Therefore, s.119 of the Act applies to allow me to presume that the University discriminated against Dr Turner on the grounds of or for the reason that she had submitted a personal grievance of unjustified disadvantage earlier.

[192] Mr Forster submits that the presumption is triggered once an employee proves that the action, of dismissal or detriment, under s.104(1)(b) has occurred, i.e. that Dr Turner was dismissed. Clearly, a dismissal is a detriment.

[193] Mr Forster further submits that the employee does not have to prove that her dismissal, or other disadvantageous action, would not have happened to other employees (who had not raised personal grievances) in the same circumstances.

[194] I consider the whole of s.104(1)(b) would need to be proved to trigger the rebuttable presumption. Dr Turner has not proved that another employee would not have been subject to dismissal in the same circumstances if that employee had not raised a personal grievance.

[195] Therefore, the presumption does not apply. However, even if it did I am satisfied that the University presented sufficient evidence to rebut the contention that it dismissed Dr Turner because she had raised her personal grievance on 23 April 2013. It is correct that the University did not embark on its course of issuing instructions to Dr Turner with the possibility of dismissal attached until after she raised her personal grievance. However, Dr Turner had already been requested to

teach without change from previous years and had refused to do so. The University had already met with her to see if it could resolve the issue and written her a letter outlining its expectations of her and outlined its view that her apparent failure to attend work on 15 February to undertake work without change from previous years was *potentially a disciplinary matter*. That was all before the raising of her grievance on 23 April.

[196] Mr Seales' evidence was that the University had not, in the two years he had been in his position, dismissed an academic in similar circumstances. Mr Forster submits that is evidence that an employee in Dr Turner's circumstances would not be dismissed and therefore that she had been dismissed because of her raising of a grievance. I do not accept that. Instead, I accept Mr Seales' evidence that no other academic staff member had been in equivalent circumstances to Dr Turner over the previous two years. That is, no other academic staff member had refused to follow instructions to teach specific classes. I accept Mr Seales' evidence that he would have been likely to dismiss another academic staff member who did so refuse even if that staff member had not raised a personal grievance.

[197] Therefore, I find that Dr Turner was not discriminated against, directly or indirectly, because of her involvement in the activities of a union.

Was Dr Turner unjustifiably dismissed?

Was the University entitled to consider that Dr Turner had committed serious misconduct?

[198] In her evidence, Dr Turner was adamant that Professor Glue had initially agreed to her plan in the first quarter to only deliver three sessions. Professor Glue, equally adamantly, denied that his 3 December 2012 email could be read that way, and says that is not what he intended to convey. It is my view that the email certainly can be read to condone Dr Turner's initial approach. However, Professor Glue resiled from that approach and then directed Dr Turner to reinstate the two cancelled sessions. In any event, that is not entirely relevant because the University did not rely on Dr Turner's failure to provide the video-based teaching in the first quarter but specifically relied on her failure to do so in breach of instructions to do the video-based teaching on 10, 17 and 24 May 2013.

[199] Defiance by an employee of a lawful and reasonable instruction does not necessarily amount to serious misconduct. Each case needs to be considered on its own merits and is a matter of fact and degree.

[200] Mr Forster submits that Dr Turner could not be instructed to deliver the video-based teaching because she did not have a *fixed commitment* to do anything more than to examine the case presentations, provide individual feedback and lead any additional discussion. I disagree and consider that despite what was set out in the handbooks[19] the video-based teaching had become part of Dr Turner's contractual requirements over the years, although the students were not assessed on it. Not all teaching delivered in a University is necessarily examined or assessed.

[201] Dr Turner mistakenly took the general flexibility accorded to her by the University to work off-site if she needed to do so to mean that she could chose to deliver or not to deliver the video-based teaching as it suited her because she had developed it and students were not assessed on it.

[202] Dr Turner's obligation to deliver the video-based teaching does not mean that the written material Dr Turner had developed in relation to the Maudsley tapes became a part of the University's intellectual property or that the University could have directed Dr Turner on exactly what material within neuro-psychiatry she taught or how she taught that. However, that is not what the University did.

[203] The University was responsible for allocating the room or rooms in which Dr Turner carried out her teaching. Of course, it also had the responsibility to ensure that she had the necessary teaching resources. However, despite Dr Turner's misgivings about using room 120 there is no evidence that the University would not have provided the necessary audio-visual equipment. Dr Turner did not raise that as an issue of concern in her first correspondence with Professor Glue instead proposing to simply cancel the case presentations on the two dates she was required to use room 120. Without Dr Turner raising the issue of adequate supply of audio visual equipment the University did not have an opportunity to make sure it would have been available in room 120. However, that cannot have been the issue for Dr Turner.

[19] The handbooks set out in detail what the students were to be assessed on and how.

[204] I consider that the University issued lawful instructions to Dr Turner. The instructions were not illegal, what she was instructed to do was within the scope of her contractual obligations and was not impossible or dangerous.

[205] It follows that I consider the University's instructions to carry out the disputed teaching in May 2012 were also reasonable.

[206] Mr Forster submits that Dr Turner's genuinely held view that she was not required to do the teaching means that she did not wilfully disobey the instructions so there could not be serious misconduct. However, in the *Duncan v Sky Network Television Limited* Employment Court case Judge Travis stated that the test for whether disobedience was wilful or not was an objective one but that a strongly held belief that had no bona fide or objective basis would not provide grounds for a refusal to obey a lawful instruction.[20]

[207] Also in *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)*[21] the Court of Appeal held that a failure to establish wilfulness does not always create a presumption that the conduct is not serious misconduct. The Court of Appeal said that what should be evaluated is the nature of the obligation imposed on the employee by the employment [agreement], the nature of the breach that has occurred and the circumstances of the breach. [22]

[208] Dr Turner's belief may have been genuine. However, her belief does not stack up on an objective examination as being a rational reason for disobeying the instructions. There was no disadvantage in Dr Turner following the instructions while a disputes process was worked through. On 10 May she had made another arrangement, possibly in her other paid employment, that she either could not or was not willing to change at short notice. However, she had been on notice since 31 January 2013 that the University required her to not only assess the case presentations but to teach the video-based teaching and she knew that she was expected to do so all year, including on 10 May 2013.

[209] Dr Turner's belief that the University had assigned that teaching to someone else could not credibly be maintained past 27 May when Mr Dorking's letter clarified

[20] [1998] 1 ERNZ 354, at page 360.
[21] [2005] ERNZ 767
[22] Ibid, page 777

that a staff member had instead *been put on stand-by to teach Dr Turner's class should she leave early*. It is also debatable whether that view was ever an objectively reasonable belief once Ms Admiraal and Dr Canton's statements about what happened on 15 February were produced. It was clear that the University had only made stand-by plans and had not allocated Dr Turner's teaching to another staff member at that point. Certainly from 27 May it would have been reasonable for Dr Turner to deliver the disputed teaching while any dispute was resolved or determined.

[210] Serious misconduct is conduct which deeply impairs the essential confidence that should exist between an employer and an employee.

[211] A compromise position was not possible from the University's point of view. It valued the teaching Dr Turner had developed and had delivered in previous years, the room it had allocated for the sessions was adequate and it desired Dr Turner to keep teaching as she had done. It considered that it had given Dr Turner a number of opportunities to comply with what it required of her. It did not attach any disciplinary consequence to her prioritising the meeting with Dr Gallagher on 15 February over the scheduled assessment and teaching. It gave her three opportunities to comply during May.

[212] For her part Dr Turner refused to back down and the University did not accept that she had reasonable grounds for continuing to withdraw, or withhold, the teaching.

[213] I consider that the University could have decided to consider Dr Turner's failure to deliver the teaching as instructed and all the circumstances leading up to its decision did impair the essential trust and confidence it needed to have in her. In all the circumstances a fair and reasonable employer could have considered her failure to follow its instructions was serious misconduct.

Was summary dismissal a reasonable response in all the circumstances?

[214] Whether or not summary dismissal was a reasonable response remains to be considered. Consideration of this also includes an examination of the process used to reach the decision that Dr Turner would be dismissed.

[215] Generally speaking, when serious misconduct is found because trust and confidence is significantly eroded, summary dismissal is potentially a justifiable consequence. However, the main problem for the University lies in the process used.

[216] An employee has to have the right to be heard and must have the opportunity to be heard by the person who will ultimately make the decision about whether that employee has committed serious misconduct and whether or not they will be dismissed. In *Irvines Freightlines Limited v Cross*[23] Judge Palmer stated:

> *It is, I consider, of the essence of that fundamental principle of natural justice, namely the right to be heard, that this right in a disciplinary setting affecting a particular employee should be exercisable by that employee in a real and purposeful hearing before the person or persons who are to decide how the disciplinary infraction, if proved or admitted, shall be dealt with.*[24]

[217] All communications once the instruction/s were issued were in writing and Mr Forster made extensive representations on Dr Turner's behalf to Mr Dorking, which were presumably passed on to Mr Seales. However, that was insufficient to meet the basic requirements of natural justice. Dr Turner was not advised when Mr Seales became the person who was instructing the University's lawyers and when he became the decision-maker. The Employment Court held in *Ione v Waitakere City Council* that:

> *The fair enquiry that must precede every dismissal for cause must be carried out by the decision maker.*[25]

[218] There is no evidence of what, if any, enquiry or investigation Mr Seales carried out, beyond reading the exchanged correspondence. For example, he did not enquire into when and how the video-based teaching was developed and became a regular part of the sessions.

[219] Dr Turner was entitled to meet Mr Seales and have her explanation heard by him. She never did and was never offered the opportunity.

[220] Instead by letter of 27 May the University asked Mr Forster to make submissions on Dr Turner's behalf by 30 May and said if he wanted the opportunity to make *oral argument* it would consider the request and stated that the University

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[23] [1993] 1 ERNZ 424
[24] Ibid, at 442
[25] [2003] 1 ERNA 104, at para [25]

would only offer to meet with Dr Turner if it *considers it necessary* and would advise if it did so *in due course*. The University never invited Dr Turner to meet Mr Seales. Offering an employee's counsel the potential opportunity to make oral argument on her behalf is not the same thing as allowing the employee to make her explanation/s to the decision maker.

[221] The University's actions were not sufficient to meet its responsibility to give Dr Turner a reasonable opportunity to explain her actions to the decision maker and for the decision maker to genuinely consider her explanations before making his decision to dismiss. That was not a minor breach and caused unfairness to Dr Turner.

[222] Also, as already covered above, Dr Turner had no idea what information Mr Seales had and was taking into account about her and the issues she had with the University. That too was more than a minor breach and contributed to Dr Turner being treated unfairly.

[223] I have a further concern that there may have been some inappropriate pre-determination that dismissal would be the only possible outcome. That arises out of Mr Dorking's email of 9 May 2013 which stated that if Dr Turner refused to comply with the University's instruction *she is likely to be dismissed*. Given that Dr Turner did not comply with the instruction any explanations that she was invited to make in writing would have to be directed not only to any explanation for her failure to do so but to the proposal that she was likely to be dismissed, which was the expected outcome if her explanations were not accepted.

[224] In addition, at the investigation meeting Mr Seales said that he did not consider any disciplinary consequence other than dismissal because once Dr Turner failed to follow instructions for the third time he had *run out of options* and that prior to the failure to follow the instructions he had been convinced she would comply rather than risk dismissal. This too was unfair to Dr Turner. He should have at least turned his mind to the possibility of other disciplinary consequences and raised those with Dr Turner, giving her an opportunity to make comment on what might be a suitable disciplinary outcome. It is also unclear what considerations Mr Seales took into account in deciding that dismissal was the correct outcome. For example, did he consider Dr Turner's employment record?

[225] Mr Seales' right to make decisions about the continuation of employees' employment is delegated to him by the Vice-Chancellor. The Vice-Chancellor retains a right of veto over Mr Seale's decision/s to dismiss. Mr Seales' evidence is that the current Vice-Chancellor, Professor Harlene Hayne, does not veto his decisions as frequently as her predecessor but instead requires a *no surprises* policy. That means that Mr Seales must keep her informed of any decision to dismiss an employee. The Vice-Chancellor's decision on whether or not to over-ride Mr Seales' decision by way of veto was the final decision about whether or not Dr Turner would be dismissed.

[226] Mr Seales says that he was likely to have discussed Dr Turner's situation with the Vice-Chancellor in one of their regular discussions when he would have discussed a number of other issues also. He did not put anything in writing to the Vice-Chancellor about Dr Turner and how and why he reached his decision.

[227] Dr Turner should not only have been informed of who the decision maker was and been afforded an opportunity to meet Mr Seales but should also have been informed that he was acting under delegated authority from the Vice-Chancellor and that the Vice-Chancellor retained the right to over-ride Mr Seales' decision.

[228] Mr Seales should also have put into writing the information he intended to put to the Vice-Chancellor about Dr Turner, which was clearly information relevant to the continuation of her employment, thus engaging s.4(1A)(c) of the Act. Dr Turner had to be supplied with that information and given an opportunity to comment on the information before the final decision, by the Vice-Chancellor, was made. The failure to do this means that there was a further breach of the University's duty of good faith under s.4(1A)(c) of the Act.

[229] The combined effect of the failures to record and supply information relevant to the continuation of Dr Turner's employment to her and the consequent failure to give her a reasonable opportunity to respond to that information, coupled with a failure to afford Dr Turner the opportunity to meet with Mr Seales, and to make any explanation or submissions to the Vice-Chancellor mean that how the University acted was not how a fair and reasonable employer could have acted in all the circumstances at the time the decision to dismiss was made. Therefore, Dr Turner

was unjustifiably dismissed. Having reached that conclusion I do not propose to consider and determine Mr Forster's submissions on other factors that made the dismissal unjustified. Instead, I need to consider remedies.

Remedies

Lost wages

[230] Section 123(1)(b) of the Act allows me to provide for the reimbursement by the University of the whole or any part of wages Dr Turner lost as a result of her grievance. Section 128(2) of the Act provides that I must order the University to pay Dr Turner the lesser of a sum equal to her lost remuneration or to 3 months' ordinary time remuneration.

[231] Dr Turner seeks lost wages of $7,564.68 being what she says she would have earned from her .2 FTE in the three months after her dismissal. The information filed by the University with the IRD for Dr Turner in the year ended 31 March 2014 shows that Dr Turner's usual salary was $2,478.00 gross per month. That means the maximum wages she could possibly have lost for three months is $7,433.99 gross[26].

[232] During 2013 Dr Turner's FTE with the Southern District Health Board (SDHB) varied, both before and after her dismissal. In May 2013 Dr Turner increased her hours with the SDHB to hold a .7 FTE appointment. She continues to work for the SDHB on a .7 FTE appointment. At the end of October 2013 Dr Turner accepted a temporary increase to her FTE with the SDHB to a .9 appointment, which was then decreased back to a .7 FTE appointment in June 2014.

[233] Dr Turner's experience, training and skills are very specialised. I am satisfied that there were no other organisations in Dunedin, outside of the SDHB or the University, which would have been likely to employ her[27]. I do not consider there are any issues of her failing to mitigate her loss.

[234] I do not accept Mr Dorking's submission that in anticipation of being dismissed Dr Turner accepted the .2 increase in her FTE at the SDHB in May 2013 at a significantly better pay rate and therefore cannot be said to have suffered any lost

[26] When three months is calculated as 13 weeks.
[27] I am aware that Dr Turner also does a small amount of private consulting from time to time.

wages when she was dismissed from the University as at 2 July 2013. Dr Turner did not work full-time and her FTE at the University and at the SDHB had changed from time to time over the years. She was entitled to increase her SDHB FTE as she saw fit without it having any negative effect on what she is entitled to by way of wages lost as the result of her grievance of unjustified dismissal.

[235] Therefore, subject to contribution, the University must pay Dr Turner $7,433.99 gross in lost wages which was her actual lost wages for the three months after her dismissal.

Compensation

[236] Dr Turner has claimed $10,000 compensation under s.123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to her feelings. I can only consider the effect on Dr Turner of the unjustified dismissal not the effect on her of any negative interactions with Professor Glue over the room etc. as I have dismissed her unjustified disadvantage grievances.

[237] Dr Turner's written evidence is that the dismissal was humiliating for her and that she considered that it had a significant negative effect on her reputation. She says that she was shocked that things escalated to the extent that she was dismissed.

[238] At the investigation meeting Dr Turner's evidence was that she was extremely upset and distressed about the dismissal and had been noticeably emotionally affected by it. She felt as if she did not matter, as if she was expendable and as if everything she had done for the department over the years was unvalued. She found it very hard explaining to her parents and her children that she had been dismissed.

[239] I accept that Dr Turner's dismissal was distressing and humiliating for her and may have had a negative effect on her personal reputation. However, I do not accept that her professional reputation, at least as a clinical psychiatrist, has been significantly negatively affected by it within the Dunedin locality. Dr Turner called eight witnesses who were current or former colleagues whose evidence was that Dr Turner was highly regarded by them in her profession. However, gossip will happen whenever a person has been dismissed and it may be that Dr Turner's personal reputation has suffered as a result of her unjustified dismissal and perhaps

her professional reputation beyond her circle of current and former colleagues. Certainly, the feeling that it has is a real one for her.

[240] In all the circumstances I consider that compensation of $10,000 is reasonable as being a modest amount and within the usual range of compensation, subject to consideration of Dr Turner's contribution.

Contribution

[241] Under s.124 of the Act I am also required to consider whether Dr Turner's behaviour contributed in any blameworthy way to the situation leading to her personal grievance. If so, I am required to reduce the remedies that she should receive.

[242] The University says that Dr Turner contributed 100% to the situation leading to her dismissal and so should receive no remedies. In contrast Dr Turner says she was entirely blameless.

[243] It is clear from my determination I do not consider that Dr Turner was entitled to act as she did. Not all blameworthy conduct necessarily means that remedies should be reduced because of it. Dr Turner's initial reaction directly after finding out that two sessions in the first quarter of 2013 had to be held in the room next door to room 119 was to refuse to conduct those two sessions despite being offered an objectively acceptable alternative room. That refusal to conduct any case presentations assessments on those days was a refusal to perform what she later accepted was a part of her contractual obligations. It was the beginning of the situation that led to her personal grievance. I appreciate that she did resile from her proposal to offer only three, instead of five, sessions per quarter once Professor Glue told her he did not approve of that plan. However, instead and with the sole purpose of maintaining a protest about being "pushed around" she withheld or withdrew (to use her own words) the video-based teaching. That was blameworthy behaviour and it directly led to the situation giving rise to her personal grievance. I consider her behaviour was sufficiently blameworthy to mean that there should be a reduction of 50% in the remedies she will receive.

[244] Therefore, the University must pay Dr Turner:

- Lost wages of $3,717.00 gross, and
- Compensation of $5,000.00.

Costs

[245] Costs are reserved. I encourage the parties to reach agreement between them. If the Authority has to decide costs it is likely to do so on the basis of the daily tariff of $3,500 per day, subject to any factors tending to increase or decrease that tariff, such as *Calderbank* offers.

[246] If the parties are not able to agree on costs the party applying for costs shall have 28 days from the date of this determination in which to file and serve a memorandum. The other party shall have 14 days from that in which to file and serve a memorandum in reply.

Christine Hickey
Member of the Employment Relations Authority