

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 259
5536429

BETWEEN

DON MILHAM
Applicant

AND

CHIEF EXECUTIVE OF THE
WAIKATO INSTITUTE OF
TECHNOLOGY
Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Scott for Applicant
Samuel Hood for Respondent

Investigation Meeting: 9 and 10 May 2016

Submissions Received: 24 May and 10 June 2016 from Applicant
7 June 2016 from Respondent

Determination: 29 July 2016

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Dr Milham's employment were affected to his disadvantage by the unjustifiable actions of the Chief Executive of the Waikato Institute of Technology.**
- B. Dr Milham was unjustifiably dismissed by reason of redundancy.**
- C. The Chief Executive of the Waikato Institute of Technology is ordered to calculate and reimburse Dr Milham a sum equal to his lost wages for the period 9 May 2015 to 29 July 2016 within 28 days of the date of this determination.**

D. The Chief Executive of the Waikato Institute of Technology is ordered to pay to Dr Milham the sum of \$15,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

E. Costs are reserved.

Employment relationship problem

[1] Dr Don Milham claims one or more conditions of his employment was affected to his disadvantage by an unjustified action of his employer and that he was unjustifiably dismissed by reason of redundancy from his employment with the Chief Executive of the Waikato Institute of Technology (Wintec).

[2] Wintec denies the claims.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Dr Milham and Wintec but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[4] Dr Milham was initially employed by Wintec in August 2009 on a fixed term agreement to teach Anatomy and Physiology in the Bachelor of Nursing/Bachelor of Midwifery courses. The agreement expired on 17 November 2009 which was the end of the academic year. In January 2010 Dr Milham was offered and accepted a full time position of Academic Staff member (Anatomy and Physiology) in the School of Science and Primary Industries. This was followed in July 2011 by an offer and acceptance by Dr Milham for the full time position of Team Manager in the School of Sport and Exercise Science. In 2014 when the events which are the subject of this determination occurred Dr Milham reported to Mr Greg Smith, Centre Director.

[5] On 28 July 2014 at 2.58pm Mr Shaun Paterson, a direct report of Dr Milham, sent a text message to Dr Milham advising him that he was stuck at a prior appointment and had cancelled his 3.00pm class earlier that morning. On arrival at work on 29 July 2014 Dr Milham attended Mr Paterson's office to discuss the cancelled class from the previous day. Mr Paterson was concerned Dr Milham had been physical in his approach toward him and had blocked his exit from his office leaving him feeling aggrieved.

[6] After Dr Milham had left his office, Mr Paterson texted Ms Marlene Pourie-Lane, Office Manager, enquiring how to make a complaint about Dr Milham. Ms Pourie-Lane advised him to speak to Mr Smith providing full information about his complaints.

[7] Upon leaving Mr Paterson's office Dr Milham reported to Mr Smith that he had had an interaction with Mr Paterson and invited Mr Smith to check on Mr Paterson to see if he was okay.

[8] On 30 July 2014 Mr Smith formally invited Dr Milham to an investigation meeting to discuss the incident with Mr Paterson. Dr Milham was advised the meeting was to be a fact finding meeting but that further action may result in disciplinary processes. Dr Milham was invited to bring a support person and any information he may have that may be useful for the investigation.

[9] Dr Milham emailed Mr Smith on 1 August 2014 requesting further information and noting that Mr Smith had not indicated any allegations or complaints had been made by Mr Patterson or what, if any, concerns Mr Smith had about the conversation. In response Ms Kirsty Marshall, Human Resources and Organisational Development Manager, advised Dr Milham that the intention of the meeting was to investigate an alleged inappropriate exchange between Dr Milham and Mr Paterson. No further details were provided to Dr Milham by way of a written complaint or the specific allegations of what was said to be inappropriate about the exchange.

[10] Ms Marshall undertook an investigation into the incident which resulted in an investigation report dated 7 August 2014. During her investigation Ms Marshall interviewed Mr Paterson, Dr Milham, Mr Kaz Thompson (a Tutor who has an office next to Mr Paterson's) and Mr Reece Turner, an academic staff member.

[11] Ms Marshall concluded that the interaction between Dr Milham and Mr Paterson was inappropriate workplace behaviour and made a number of recommendations including a recommendation that Dr Milham be subject to performance management in respect of Wintec's principles of professional practice and standards of behaviour.

[12] After receiving the notes from his interview on 8 August 2014, Dr Milham advised Ms Marshall that there were some inaccuracies in her record of the discussion and there were gaps in the notes with important comments and responses not recorded.

[13] On 13 August 2014 Ms Gaye Barton, Dean of Faculty, wrote to Dr Milham and invited him to a formal disciplinary meeting. The letter indicated that the incident on 29 July 2014 may amount to serious misconduct which may result in disciplinary action up to and including a final written warning.

[14] In response Dr Milham advised that his support person was not available on the date and time set down and requested that the meeting be rescheduled. Dr Milham also requested copies of all relevant documentation including Mr Paterson's written complaint, and the notes taken by Ms Marshall during her investigation.

[15] On 15 August 2014 Ms Marshall emailed Dr Milham and invited him to provide the additional comments to contribute to the record of his interview. Ms Marshall also forwarded a copy of her 7 August 2014 report which included the interview notes taken from the employees interviewed as part of her investigation process.

[16] Ms Marshall wrote to Dr Milham on 18 August 2014 asking for suitable dates for a meeting and inviting Dr Milham to ask any questions he had about the report or investigation interviews. In response Dr Milham requested the letter of complaint from Mr Paterson and a copy of the notes taken by Mr Smith from his meeting with Mr Paterson on 30 July 2014. Ms Marshall advised Dr Milham he had received all the documentation held by Wintec and referred him to the Worksafe Bullying Guidelines section 5.5.1.

[17] The formal disciplinary meeting took place on 4 September 2014. Following that meeting Dr Milham requested further information including a copy of text messages referred

to in the meeting. The parties met again on 16 October 2014 to receive Dr Milham's explanations.

[18] The final decision and outcome from the disciplinary process was, by agreement, conveyed to Dr Milham in writing on 24 October 2014. Wintec considered Dr Milham's actions on 29 July 2014 constituted serious misconduct, but determined no disciplinary action would be taken against him. Dr Milham was advised that the outcome letter would be retained on his personal file and that the letter did not constitute a warning.

[19] On 3 November 2014 Dr Milham raised a personal grievance claiming one or more conditions of his employment had been affected to his disadvantage due to Wintec not following its own policies and procedures during the investigation and disciplinary processes. Dr Milham requested that the letter notifying him of the final outcome be removed from his file and that he be reimbursed his legal costs. Wintec denied Dr Milham had been disadvantaged and declined his requests for the letter to be removed and payment of his legal costs.

[20] Concurrently with the personal grievance being raised and mediation taking place, on 11 December 2014 Dr Milham engaged in a facilitated process in an attempt to repair the working relationship between himself and Mr Paterson. The first meeting proceeded well and Dr Milham requested a second shorter meeting to cover off areas that they had not had time to cover during the first meeting. This request was declined with no reasons given.

[21] The intention was also for Dr Milham and Mr Smith to engage in a similar process on 12 December 2014 but Dr Milham was sick on the day the facilitation was to be undertaken and it did not proceed. Despite a request from Dr Milham, Mr Smith refused to postpone the meeting and advised Dr Milham it would now not take place.

[22] On 18 December 2014 Dr Milham and Mr Smith met to discuss Dr Milham's annual performance review rating. At the end of that meeting Mr Smith advised Dr Milham that he would like to meet with him the next day to discuss a change proposal. Due to the short notice the meeting was postponed until 22 January 2015.

[23] Dr Milham received a document on 14 January 2015 via email setting out a proposal to disestablish his role of Team Leader. The background to the change proposal was a need to reduce costs to ensure Wintec operated within its budget for the 2015 year.

[24] The rationale for the change process included that Academic Staff Members were disconnected from Mr Smith and the role of Team Leader was seen as a potentially unnecessary layer of management. The rationale included the possibility that communication lines could be more efficient with direct interaction between Mr Smith as Centre Director and Academic Staff Members.

[25] It was proposed that all academic staff would report directly to Mr Smith with the duties currently undertaken by Dr Milham being shared between the Office Manager (Ms Marlene Pourie-Lane), who would move from a 0.5 role to a 0.7 role, and Mr Smith.

[26] The proposal document set out a suggested consultation process. This included a date for a meeting to discuss the proposal, timeframes for feedback to be received and considered, and a date for the final decision to be made.

[27] Dr Milham commenced a period of sick leave on 21 January 2015 and was not due to return to work until 9 February 2015. When notifying Mr Smith of his absence Dr Milham suggested they meet on 11 February 2015 to discuss the change proposal.

[28] While Dr Milham was on sick leave, Mr Smith wrote to him on 23 January 2015 changing the consultation process by removing the need for a meeting to discuss the change proposal and setting a new timetable for Dr Milham to provide his feedback on the proposal in writing.

[29] On 29 January 2015 Ms Belinda Bassett, HR Advisor, emailed Dr Milham and requested further information relating to his medical certificate which he had provided on 26 January 2015.

[30] On 9 February 2015 Ms Bassett emailed Dr Milham reminding him of the meeting previously arranged for 11 February 2015 and advising him that the purpose of the meeting was to seek his initial feedback on the proposal and to ask questions. Ms Bassett also asked Dr Milham to provide her with additional information regarding his medical certificate which

she had requested in her earlier email dated 29 January 2015. Dr Milham responded on 9 February 2015 answering Ms Bassett's questions and advising that a fuller medical certificate would follow.

[31] Dr Milham met with Mr Smith and Ms Bassett on 11 February 2015. At that meeting Dr Milham asked for further information but it was not available at the meeting. On 13 February 2015 Dr Milham wrote confirming the additional information he had requested on 11 February 2015.

[32] In response Wintec wrote to Mr Milham expressing its disappointment that Dr Milham attended the 11 February 2015 meeting requesting further information when he had been provided the opportunity to request further information prior to the 11 February 2015 meeting.

[33] Between 13 February and 25 February 2015 further information was provided to Dr Milham as part of the consultation process. Dr Milham provided written feedback on the proposal to disestablish his position on 27 February 2015.

[34] The parties met on 9 March 2016 to allow Wintec to respond to Dr Milham's feedback. Prior to the meeting Wintec decided to disestablish Dr Milham's position and decided Dr Milham would be given notice of redundancy. These decisions were conveyed to Dr Milham on 9 March. By agreement he was paid out two month's salary in lieu of notice and was not required to work out the notice period.

[35] On 16 April 2015 Dr Milham raised a personal grievance for unjustified dismissal by reason of redundancy claiming the redundancy was a sham.

Issues

[36] The issues to be determined are:

- a) Whether one or more conditions of Dr Milham's employment were affected to his disadvantage and if so, what if any, remedies should be awarded; and
- b) Whether Dr Milham's dismissal by reason of redundancy was unjustified and if so, what if any, remedies should be awarded.

Relevant policies

[37] Wintec has published a number of policies and guidelines which are relevant to this matter including:

- a) Principles of Professional Practice
- b) Employee Complaint Management
- c) Guidelines for Employee Complaint Management
- d) Principles and Procedures: Delegated Employment Authorities
- e) Restructure process guidelines for Managers

Principles of Professional Practice

[38] This document sets out the expected standards for Wintec and its employees. The document describes Wintec's responsibilities to be a good employer and includes statements that Wintec recognises the need to create a safe and caring environment, that in valuing its employees Wintec recognises it will only achieve its purpose if its employees are well motivated and supported, and commits to consulting with employees in a way that is consistent with employment law.

[39] Wintec's expectations of its employees are described including a requirement that employees carry out their duties in a professional manner which includes demonstrating professional standards of presentation and demeanour. In respecting the rights of others employees are expected to treat their colleagues with courtesy and respect.

[40] The policy sets out how issues arising from the Principles of Professional Practice should be resolved and provides a list of a number of other policy documents that may be of assistance. Included in this list is the Employee Complaint Management Policy.

[41] The policy then proceeds to set out examples of the type of behaviour that constitutes serious and less serious misconduct.

Employee Complaint Management

[42] This policy document sets out Wintec's commitment to addressing employee working relationships. The policy is to be administered with reference to the Wintec Employee Complaint Management Guidelines. The policy only applies to employee complaints and does not apply to student complaints.

[43] In its policy Wintec states that it will manage employee complaints in a fair, timely and confidential manner, adhering to processes in a manner that is consistent with procedural fairness while recognising the need to maintain the rights of and support the well-being of all employees implicated in a complaint.

[44] One of the measures of effectiveness of the policy is that the majority of complaints are resolved at the informal stage.

Guidelines for Employee Complaint Management

[45] This document sets out guidelines for managers dealing with employee complaints. The guidelines set out Wintec's expectation that a complainant will make every effort to resolve a complaint with the employee concerned, prior to a formal process being followed.

[46] Procedural fairness obligations set out in the guidelines include the importance of how and why the employee believes the problem has arisen and suggested solutions to help resolve the situation. The Manager is advised to ask the employee to write down their perspective of the complaint background and circumstances to avoid confusion and misunderstanding.

[47] The guidelines set out the principles to apply to complaint management including the principle that the parties should attempt, in good faith, to resolve complaints as soon as possible to avoid escalation of the issues.

[48] Attached to the guidelines are two further documents, one is a flow chart setting out the process of dealing with employee complaints and the second is a list of headings and explanations setting out Wintec's definition of procedural fairness.

[49] Included in the flow chart and the list of headings is a requirement that the complaint details be put in writing by the complainant, which should then be discussed with the employee against whom the complaint has been made.

Principles and Procedures: Delegated Employment Authorities

[50] This document sets out the authorised delegations for Managers of Wintec. The document states that commitments made without the correct authority will be returned to the manager to seek the appropriate level of approval. Further the policy states that it is the responsibility of the person requesting the authorisation to ensure the required signatures are obtained.

[51] The Authority for reviewing the work area under a surplus staffing situation is at delegated authority Level B which includes a Dean and Directors and Senior Managers reporting directly to the Chief Executive. The authority for redundancy is limited to Level A, the Chief Executive.

Restructure process guidelines for Managers

[52] The guidelines set out the processes to be followed throughout a restructuring process. The guidelines indicate that it may be appropriate to let affected employees know that there may be a need for review which will also be an opportunity to seek ideas, options or solutions from them.

[53] Managers are required to discuss their ideas with their Manager and to consider all possible options and solutions before deciding on a course of action. Options are stated to include:

- Thinking of ideas for increasing revenue
- Realigning of business units
- Reducing fixed term employee numbers by reallocating tasks to existing permanent employees
- Planning for the closure of programmes with insufficient numbers
- Suspending programmes for designated periods of time to allow redevelopment work to occur
- Retraining staff
- Calling for voluntary redundancy

[54] After these options have been considered the most appropriate course of action is to be decided and approval from the Managers Executive Member is to be obtained.

[55] The guidelines require the Manager and employee to agree on the consultation period. The guidelines acknowledge that the consultation period is a difficult time for all involved, and notes that communication and support is important. Managers are encouraged to check in with their staff to see how they are going and what support Wintec can provide.

[56] At the outcome meeting employees are to be told of the decision including a summary of the submissions and management responses. At this meeting also Managers are to explain the options going forward including redeployment, retraining or redundancy.

[57] Managers are told that if there are no redeployment options within their team they should proceed to step three of the guidelines which relates to redeployment. The guidelines state that redeployment must always be considered in the case of redundancy.

Unjustified disadvantage

[58] Dr Milham claims the investigation report compiled following an investigation into an allegation by Mr Paterson and the letter confirming that serious misconduct had been established but that no further action would be taken should not have been left on his personal file as the process used by Wintec during the investigation and the investigation itself was unfair.

[59] Pursuant to section 103A I must be satisfied on the balance of probabilities that one or more conditions of Dr Milham's employment were affected to his disadvantage due to the employer's unjustified action. This requires a two-step process, firstly I must be satisfied of the disadvantageous actions and then I must determine whether those actions were justifiable.

[60] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action or dismissal. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Wintec's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[61] The Authority must consider the four procedural fairness factors set out in section 103A(3) of the Act. These are whether the allegations against Dr Milham were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to the concerns and whether such explanation was considered genuinely by Wintec.

[62] The Authority may take into account other factors as it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

The investigation

[63] The Employment Court¹, has described what it considers to be a textbook example of how an employment investigation should be carried out:

In many ways, the process followed by Mr Firman was a textbook example of how a disciplinary investigation should be carried out. After receiving the terms of reference and finding out what was alleged, Mr Firman proceeded to work out what was required to be determined and who needed to be spoken to. He then constructed a series of open-ended investigation questions that would not bias the investigation. He used his manager to critique his questions and make sure that they were fit for the purpose. He told the Court that after crafting the questions he then made contact with Mr Goel and asked him who else he should talk to. He also ran over the process with Mr Goel and arranged to meet with him on 10 January 2013 in a neutral area, the Wellington Library Cafe. He confirmed the meeting arrangement with Mr Goel in writing, reminding him that he could bring a support person/representative with him and he recommended that Mr Goel obtain support and assistance that was available to him through the EAP service.

Mr Firman followed the same process for all interviews. He asked the open-ended questions that he had prepared and he recorded the responses "hopefully verbatim" as the interviewees answered. There was nothing said to him that was not recorded in his notes. At the end of each interview he spell checked and then sent the transcript to each person interviewed, including Mr Goel and he had each person verify that the interview was correctly recorded. He then proceeded to draft his investigation report. He attached all of the interview notes to the report and sent a copy of everything to Mr Goel for his response. He had emailed Mr Goel and spoken to him on the telephone informing him that he needed his comments on the draft report prior to it being sent to the decision-maker.

Mr Goel went through the draft report and added his comments to the document through "track changes" which were highlighted in red. Mr Firman said that he carefully considered all of Mr Goel's comments but they did not lead him to change his conclusions or recommendations. He then proceeded to finalise his Formal Investigation Report which was dated 31 January 2013 and sent it through to Mr Bolger. The document Mr Bolger received included Mr Goel's marked-up comments highlighted in red. Mr Firman had no discussion with Mr Bolger about the nature of the disciplinary action (if any) to be taken against Mr Goel.

[64] On Tuesday 2014 at or around 1.00pm Mr Paterson sought the advice of Ms Pourie-Lane about laying a formal complaint against Dr Milham. Ms Pourie-Lane's advice was that Mr Paterson speak with Mr Smith and write everything down methodically or nothing can be done. Mr Paterson spoke to Mr Smith but did not write anything down.

[65] On 30 July 2016 Mr Smith formally notified Dr Milham that he was requested to attend an investigation meeting on 4 August 2014 regarding the discussion between Dr

¹ *Goel v The Director-General for Primary Industries* [2015] NZEmpC 214 at [42 – [44].

Milham and Mr Paterson on 29 July 2014. No further details were provided including any statements made by Mr Paterson to Mr Smith when they met on 29 July 2014. In his letter Mr Smith advised Dr Milham that the meeting was a fact finding meeting but that potential outcomes may require further action including disciplinary action.

[66] At the Authority's investigation meeting Mr Smith told me that he did not take any notes from his discussion with Mr Paterson on 29 July 2014 and he did not require Mr Paterson to put his complaint in writing.

[67] Dr Milham, concerned about the lack of information he had received, emailed Mr Smith and sought clarification from him. Dr Milham advised Mr Smith that he had not indicated if any allegations or complaints had been made by Mr Paterson and what the specific concerns were about the discussion on 30 July 2014.

[68] Mr Smith did not respond to this request. Instead Ms Marshall responded advising Dr Milham that the event to be investigated was an "*alleged inappropriate exchange*" with Mr Paterson. No further particulars were provided including any statements made by Mr Paterson.

[69] Ms Marshall proceeded to investigate Mr Paterson's allegations and finalised her report on 7 August 2014. At the time of finalising her report Ms Marshall had spoken to Mr Paterson but he had not yet put his concerns in writing. This did not happen until 12 August 2014, the day before Ms Barton instigated the disciplinary process.

[70] Ms Marshall made the following recommendations in her 7 August 2014 report:

- a) That a formal performance management process be implemented;
- b) Wintec acknowledge Mr Paterson's complaint, assure him the complaint was taken seriously and advise that opportunities to improve people-management will be implemented;
- c) A mediated "clear the air" discussion between Mr Paterson and Dr Milham be undertaken; and
- d) Implement development of Dr Milham's management style.

[71] With the exception of the general allegation Dr Milham was not provided with any statements or other information prior to being interviewed by Ms Marshall. Dr Milham was not provided with a copy of a draft report prior to it be finalised and was not given an opportunity to rectify errors and omissions he says were contained in his own statements until after Ms Marshall had published her report. By the time Ms Marshall followed up with Dr Milham on 15 August 2014 Dr Milham's about his concerns that his statement was not accurate her report had been published and had been sent to Dr Milham's Manager and the disciplinary process was under way.

[72] None of the statements provided by others interviewed by Ms Marshall were signed off or confirmed as an accurate record of their interviews with her. At the investigation meeting Dr Milham raised valid concerns about the notes pertaining to the interview of Mr Thompson who reported to Ms Marshall that Dr Milham was standing over Mr Paterson blocking the door. Ms Marshall did not provide any information about why she believed Mr Thompson could see what was happening in Mr Paterson's office. Mr Thompson was in his office and had no direct line of sight into Mr Paterson's office.

[73] It is not clear from Ms Marshall's report which policy the investigation was being conducted under. Ms Marshall's report dated 7 August 2014 references the Employee Complaint Guidelines at the end of the document, but in her correspondence to Dr Milham on 18 August 2014 she referred Dr Milham to the Worksafe Bullying Guidelines. This created confusion for Dr Milham about the nature of the complaint.

The disciplinary process

[74] Ms Barton wrote to Dr Milham on 13 August 2014 inviting Dr Milham to a disciplinary meeting. Ms Barton advised Dr Milham that at that point in time Wintec had completed a Wintec employee complaint investigation process and wished to meet with Dr Milham to discuss the incident between himself and Mr Paterson.

[75] The process used by Wintec when compared to the published guidelines identifies a number of omissions. For example Mr Paterson was not asked to put his complaint in

writing. Nor was he asked why he believed the problem had arisen and was not asked for solutions.

[76] The guidelines set out the principles Wintec will apply to employee complaints. This includes that the parties should attempt in good faith to resolve complaints as soon as possible to avoid escalation. This did not happen. At the investigation meeting Mr Paterson's uncontested evidence was that he wanted the issue resolved much earlier than it was and felt that he and Dr Milham could have moved on if they had had the opportunity to discuss the incident over a cup of coffee.

[77] Wintec's policy on staff discipline states that the intention of the performance management procedures is to improve the performance of the staff member. Initially this should be attempted through an informal procedure. The informal procedure provides management and staff with the opportunity to discuss areas of concern, in a supportive and positive manner, with a view to changing the behaviour.

[78] The policy states that formal disciplinary action should only be implemented after the Manager has made a real attempt to change the behaviour of the staff member by use of the informal performance management process.

[79] Wintec determined to proceed to a disciplinary process based on allegations of serious misconduct. In her report Ms Marshall concluded that Dr Milham's conduct on 29 July 2014 was inappropriate behaviour and the tone used by Dr Milham in his interactions with Mr Paterson was above normal in intensity. In her report Ms Marshall does not set out her reasons for recommending a formal procedure be used in preference to the use of informal procedures.

[80] On 15 October 2014 Wintec sent an email to Dr Milham confirming a meeting would be held the following day. The email stated:

The purpose of this meeting is to give Dr Milham the opportunity to put forward any explanation or information he feels WINTEC needs to know prior to WINTEC making any final decision in the matter. Alternatively, if your client does not wish to appear in person tomorrow, he may submit his response in writing to be received by us no later than 10 am Friday 17 October 2014. Should your client decide not to avail himself of either of these opportunities, WINTEC will make a decision on the information it currently holds after the time for your client's written response has passed.

[81] The meeting took place as scheduled and was recorded. The Authority has received a copy of the transcript of the recording and has reviewed it. The transcript shows that Dr Milham spent the majority of the meeting time providing his explanations as to what had occurred between him and Mr Paterson on 29 July 2014 as well as setting out his concerns about the process followed by Wintec to date and highlighting discrepancies he believed were contained within the investigation report.

[82] Wintec wrote to Dr Milham on 24 October 2014 setting out its final decision and outcome. In that letter Wintec sets out a summary of the comments made by Dr Milham during the disciplinary process.

[83] The outcome of the disciplinary process was a finding that Dr Milham's interaction with Mr Paterson on 29 July 2014 amounted to serious misconduct. While no disciplinary action was taken this finding was to remain on Dr Milham's personal file for future reference.

Good faith obligations

[84] Wintec and Dr Milham both owed duties of good faith to each other including the obligation to maintain a constructive employment relationship. While the investigation into the 29 July 2014 incident was being undertaken Mr Smith instructed Mr Paterson to report directly to him [Mr Smith] and not to Dr Milham.

[85] Dr Milham was not advised of this instruction and neither was he provided with an opportunity to comment on the decision. Also not known to Dr Milham at this time was that Mr Smith was meeting with Dr Milham's direct reports on a regular basis. Dr Milham was purposefully excluded from these meetings and was never advised of their existence.

[86] These actions by Mr Smith are not conducive to maintaining a productive employment relationship.

Conclusions

[87] I have set out earlier in this determination the flaws associated with the investigation undertaken by Ms Marshall. I am also satisfied that after receiving the complaint from Mr Paterson Wintec has failed to follow its own processes. For example Mr Paterson was not

asked to put his complaint in writing and no steps were taken to resolve matters between the two men to avoid the escalation.

[88] At the outset Wintec determined Mr Paterson's allegations related to alleged breaches of Wintec's Principles of Professional Practice. The appropriate process for resolving issues arising out of the Principles of Professional Practice is through the Employee Complaint Policy. This conclusion is supported by the fact that at the end of her report Ms Marshall highlights links to Wintec's Employee Complaint Management documents.

[89] The guidelines supporting the Employee Complaint Policy require Managers to take every effort to resolve a complaint with the employee concerned prior to a formal process being followed. The guidelines stipulate that the complaint details be put in writing by the complainant, which should then be discussed with the employee against whom the complaint has been made.

[90] Wintec has not followed this process instead elevating the allegations to a formal disciplinary process. The process of instigating a formal disciplinary process was contrary to the guidelines which it has as one of its principles that Dr Milham and Mr Paterson should attempt, in good faith, to resolve the complaints as soon as possible to avoid escalation of the issues.

[91] Mr Smith spoke to Mr Paterson and Mr Thompson but was unable to recall the dates of those discussions and did not take any notes. Mr Smith told me that he wanted the two men to clear the air and that he wanted this from the outset. This evidence is inconsistent with his view that there had been a physical altercation which needed to be dealt with in a formal disciplinary setting. If Mr Smith was genuine in his desire to have the matter cleared up between the two men from the outset, the employee complaint procedure would have provided a much less formal process and would have achieved this outcome for him.

[92] If Wintec had followed its policies and guidelines it is more likely than not that Dr Milham would not have had a finding of serious misconduct made against him. This is because Mr Paterson had wanted the matter resolved much earlier and felt at times that he and Dr Milham could have moved on if they had had the opportunity to discuss the incident over a cup of coffee.

[93] The defects in Wintec's process were not minor and resulted in Dr Milham being treated unfairly. One or more conditions of Dr Milham's employment were affected to his disadvantage as a result of the finding of serious misconduct and this finding being retained on his personal file indefinitely.

[94] I am supported in my conclusions by the evidence that in December 2014, Mr Smith's performance rating of Dr Milham, resulted in Dr Milham being rated as not effective in the area of leadership which in turn resulted in Dr Milham not receiving an increase in his salary. Mr Smith relied on the finding of serious misconduct and Dr Milham's challenge to that finding in his rating of Dr Milham.

[95] Wintec's flawed investigation and its failure to follow its own policies following the 29 July 2014 incident is not what an employer acting fairly and reasonably could have done in all the circumstances. Dr Milham has established a personal grievance for unjustified disadvantage and is entitled to a consideration of remedies.

Unjustified dismissal

[96] On 3 November 2014 Dr Milham raised a personal grievance relating to the outcome of the disciplinary process. While the parties were waiting to attend mediation to attempt to resolve the personal grievance, Mr Smith advised Dr Milham on 18 December 2014 that he wished to meet with him the following day to discuss a change proposal. 19 December 2014 was the last day of work for 2014.

[97] On 9 March 2015 Dr Milham was dismissed by reason of redundancy. Dr Milham claims the redundancy was a sham and the restructuring was used as an excuse to terminate his employment after the investigation into Mr Paterson's complaint failed to establish grounds for dismissal.

[98] The test of justification for dismissal is set out in section 103A of the Act. The test requires the Authority to assess whether Wintec's actions and the way it acted was what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[99] The Court of Appeal considered the application of section 103A in a redundancy setting in *Grace Team Accounting Limited v Brake*.² That decision upheld the earlier Employment Court³ decision where the Court confirmed employers must show that a decision to make an employee redundant is genuine and based on business requirements. This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[100] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

Genuineness of the restructuring

[101] There are a number of issues which leave me with some doubts as to the genuineness of the need for this restructuring. These relate to the use of correct authorities for undertaking the restructuring and also to the reasons for the restructuring. I have also considered whether there were ulterior motives on the part of Mr Smith for undertaking the restructuring.

Authority for restructuring

[102] The authority for dealing with surplus staffing situations is set out in Wintec's delegation document. Mr Smith, while a Centre Director by title, does not report to the Chief Executive. This means that Ms Barton had the delegated authority to review the work area and the Chief Executive had the authority to determine redundancies.

[103] Ms Barton told me that she would have had discussions with Mr Smith after receiving an email dated 18 June 2014 requesting Deans to review their areas and identify where savings could be found. Ms Barton was unable to say when such discussions would have taken place and confirmed that no notes of these discussions were made.

² [2014] NZCA 541.

³ [2013] NZEmpC 81.

[104] Ms Barton told me that she did not give a formal approval to Mr Smith for his restructuring. Ms Barton told me Mr Smith met with her in about September 2014 and asked if he could restructure. Ms Barton says she thought this was a good idea but required the job descriptions to be sorted out. Ms Barton thinks that Mr Smith would have been working on this from August until December. Mr Smith told me he could not recall when his job description was updated, however, I am satisfied that neither the Centre Director or the Office Manager's positions descriptions were updated prior to the restructuring process being embarked upon.

[105] Ms Barton and Mr Smith disagree on whether a written report was provided to Ms Barton regarding the restructuring. Ms Barton told me Mr Smith had written a report but she had never seen it. Mr Smith told me no report had been written. I am satisfied it is more likely than not that there was never a written report seeking approval for a restructuring or even work area review.

[106] I am satisfied there was no documented review of the work area and that all interactions between Mr Smith and Ms Barton were verbal. No formal signature confirming approval of a work area review was obtained by Mr Smith which is a breach of the stated principles for the use of delegated authorities.

[107] The restructuring process guidelines for managers indicates that it may be appropriate to let affected employees know that there may be a need for review which provides an opportunity to seek ideas, options or solutions from the affected employees.

[108] This process was not followed by either Ms Barton or Mr Smith. The first Dr Milham was told about a work area review was in December, the day before work was to finish for the 2014 year. The comment was made by Mr Smith almost as an afterthought at Dr Milham's performance review rating meeting. Mr Smith advised Dr Milham that he wanted to meet with Dr Milham the next morning at 9.00am to discuss a proposed restructuring.

Reasons for the restructuring

[109] A proposal document dated 19 December 2014 was emailed to Dr Milham on 14 January 2015. The rationale for the proposed change was set out in the document which stated:

The introduction of a Team Manager position in 2011 has meant Academic Staff Members are disconnected from the Centre Director. The Team Manager role in the Centre is seen as a potentially unnecessary layer of management. The Centre will benefit from Academic Staff Members reporting directly to the Centre Director. The Centre is small enough to allow for direct reporting and has seniority levels with the academic roles (Senior and Principal) to assist in the leadership of the Centre. Communication lines could be more efficient with direct interaction between the Centre Director and Academic Staff Members.

The Centre Director can be more “hands on” with a greater focus on people management while at the same time reducing the staffing level and cost for the Centre. Direct communication lines from the Centre Director to Academic Staff Members and programme leaders would enable better execution of strategy, namely flexible delivery, development of staff capability, employment partnership groups and industry engagement. Product development will be more effective as strategic and operation aspects can be considered simultaneously.

[110] In the background section of the proposal Wintec cites the need to meet its funding cap and in particular states that there was a need to reduce costs within Wintec and the Centre to ensure Wintec operated within its set budget for the 2015 academic year.

[111] By August of each year the Wintec’s annual budgets are reforecast for the following academic year and are approved in November or December. Ms Barton was unable to confirm whether or not Dr Milham’s salary was included in the budget for the 2015 academic year. Dr Milham was responsible for the operation budgets for the centre. He told me there were no discussions between him and Mr Smith during the budgeting process about achieving efficiencies in the costs of the Centre or the need to achieve efficiencies. As far as Dr Milham was aware his salary was included in the 2015 Academic budget.

[112] In the absence of any evidence to the contrary I have concluded that it is more likely than not that Dr Milham’s salary was included in the 2015 budgets which were confirmed in December 2014. Any changes to the budget after December of any year were generally only related to student numbers.

Ulterior motives

[113] Dr Milham claims Mr Smith had ulterior motives for terminating his employment and it was not related to the purported restructuring.

[114] In considering this issue I have taken into account the discussion Mr Smith had with Dr Milham on 18 December 2014. This discussion arose in the context of Mr Smith discussing Dr Milham’s overall performance rating for the year. Dr Milham covertly recorded the meeting and I have been provided with a transcript of the recording.

[115] During the meeting Dr Milham sought further information to help him understand why Mr Smith had rated him as not being effective in the area of leadership and people management.

[116] In response Mr Smith referred to Dr Milham's relationship management and the management of his staff. Mr Smith also referred to the outstanding allegations and the case that sits around it (I have taken this as a reference to Dr Milham's personal grievance) as contributing to his finding that Dr Milham's management of staff hasn't been effective. Mr Smith advised Dr Milham that over the previous two weeks he had been asked by a number of staff to manage them directly. Mr Smith told Dr Milham that on some occasions his management of the staff has not been effective and they feel that it was difficult to make progress. Mr Smith told Dr Milham the information was anecdotal and would not expand on who had provided the feedback or provide Dr Milham with examples.

[117] The transcript of the meeting shows that Mr Smith was largely influenced in his rating of Dr Milham's performance by the issues he had had to deal with in relation to the allegation made by Mr Paterson, the disciplinary process and Dr Milham's challenge to Wintec's decision to retain the documents setting out the outcome of the disciplinary process being retained on his file when no disciplinary action was taken against him.

[118] Further discussion ensued including discussions about the facilitated process undertaken by Dr Milham and Mr Paterson and the cancelled session between Dr Milham and Mr Smith. Dr Milham commented that he didn't fully trust Wintec's process relating to issues being resolved which is why he wanted to have the facilitated session with Mr Smith. Dr Milham's view, which he voiced, was that a facilitated session would allow honest and open conversation.

[119] Mr Smith's response is surprising. He told Dr Milham that he did not feel any element of trust and felt there had been a loss of trust between them. He then referred to the fact that Dr Milham, in challenging the disciplinary process had legalised the process and it had led to a great deal of note taking and nit picking. Mr Smith told Dr Milham that because of the trust issues he chose not to engage with him and that it had become a major barrier.

[120] Dr Milham did not disclose to Mr Smith that he was recording the meeting on 18 December 2014. If Dr Milham was serious in his desire to engender trust between himself

and his manager, this discussion about trust was the opportune time for him to disclose to Mr Smith that he was recording their conversation. However, there were failings on both sides in this regards.

[121] The rationale provided by Mr Smith for the restructuring includes that academic staff members were disconnected from the Centre Director and Dr Milham's role was seen as a potentially unnecessary layer of management.

[122] During the meeting on 18 December 2014 Mr Smith omitted to tell Dr Milham that from May or June 2014 he had been meeting regularly with a group of program leaders to the exclusion of Dr Milham. All these senior team leaders reported directly to Dr Milham and not to Mr Smith.

[123] During these meetings Mr Smith discussed with the senior team leaders where the team was going and wanted to better understand their drivers and capabilities. Mr Smith told me that when he decided to restructure he took into account the information he received from the meetings with his senior team leaders. He described the meetings as informal although the whiteboard was used and the participants would discuss matters over coffee. During these meetings Mr Smith was told by some staff that they did not wish to report to Dr Milham.

[124] Mr Smith has kept both the fact of the meetings he held with staff who reported to Dr Milham secret and failed to disclose the information gained in the meetings even though he was relying on the feedback he received from staff to inform his decision about Dr Milham's ongoing employment.

Process of restructuring

[125] Dr Milham was unable to meet with Mr Smith on 19 December 2014 and with the interruption of the Christmas New Year holiday period the parties were unable to meet until 11 February 2015. At that meeting Dr Milham requested further information. To avoid any doubt Dr Milham confirmed in writing on 13 February 2015 the further information he was seeking.

[126] On that same day (13 February 2015), Wintec wrote to Mr Milham expressing its disappointment that Dr Milham attended the 11 February 2015 meeting requesting further

information when he had been provided the opportunity to request further information prior to the 11 February 2015 meeting.

[127] That complaint was not a reasonable response from Wintec. Until the meeting on 11 February 2015 Dr Milham received only the proposal document and had not had the opportunity to discuss the rationale for the restructuring. While Dr Milham was on sick leave and before he had had an opportunity to fully understand the proposal Wintec altered the consultation process.

[128] I have read the transcript of the 11 February 2015 meeting. During that meeting Mr Smith expanded on the reasons for the restructuring. It is during those discussions that Dr Milham requested more information. That information was not immediately available but was provided to him on 13 February 2015. The consultation period was extended to 25 February 2015. The information included a copy of Wintec's "Restructure Process Guidelines for Managers".

[129] After receiving the documents Dr Milham requested that the consultation period be extended a further week to allow him the opportunity to fully consider the information and provide feedback on the proposal. The request was initially declined and then extended to 27 February 2015 despite sending a further bundle of documents on 20 February 2015.

Conclusions

[130] Wintec has failed to follow its processes with respect to the restructuring. I am satisfied the restructuring was not genuine but was a guise for ending Dr Milham's employment.

[131] Ms Barton provided verbal authority for Mr Smith to undertake a review of the work area for the centre. Mr Smith did not ensure that Ms Barton's signature was obtained as required in the delegations policy. The lack of any documentation around the reasons and need for the review and ultimately for the restructuring support a finding that Mr Smith had an ulterior motive in disestablishing Dr Milham's role and terminating his employment.

[132] Mr Smith's initial approach to Ms Barton was in September 2014 and coincides with the disciplinary process with Dr Milham. No other employees were spoken to about the possible restructuring or any impact the changes would have on other roles including the Office Manager role which would increase from 0.5 to 0.7.

[133] Mr Smith held meetings with Dr Milham's direct reports and purposefully excluded him. The feedback he received in these meetings informed his decision to disestablish Dr Milham's role. The feedback, including the fact of the existence of these meetings was not given to Dr Milham and he never had an opportunity to respond to this information.

[134] The decision to dismiss Dr Milham was made before the 9 March 2015 meeting. According to Wintec's guidelines, the 9 March 2015 meeting should have been to convey the decision to disestablish Dr Milham's role and to discuss options going forward one of which was an option of redundancy. Instead, Wintec gave Dr Milham notice of the termination of his employment by reason of redundancy. Dr Milham was not given a proper opportunity to consider any other options at that point in time.

[135] The way Wintec acted and its actions in terminating Dr Milham's employment were not the actions a fair and reasonable employer could have taken in all the circumstances of this case. Dr Milham was unjustifiably dismissed by reason of redundancy and is entitled to a consideration of remedies.

Remedies

[136] Dr Milham seeks reinstatement to a position no less favourable than the position from which he was dismissed. If he is reinstated Dr Milham seeks reimbursement of the wages he lost from the date of his dismissal until the date of reinstatement. If he is not reinstated Dr Milham seeks payment of lost wages from the date of dismissal until 15 August 2017 which is the date Dr Milham says he would have retired.

[137] Dr Milham also seeks the payment of compensation for humiliation, loss of dignity and injury to feelings and a contribution to the costs incurred in bringing these proceedings to the Authority.

Reinstatement

[138] Under section 125(2) of the Act the Authority may, whether or not it provides for other remedies provide for reinstatement if it is practicable and reasonable to do so.

[139] The Employment Court in *Angus v Ports of Auckland Limited(No 2)* stated:⁴

[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament had now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

[66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[68] ... The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.

[140] The position of Team Leader in the Sports Science and Human Performance Centre has been disestablished. I have found the restructuring process used by Wintec in disestablishing the Team Leader role was flawed and the decision to terminate Dr Milham's employment by reason of redundancy was unjustified. The role was disestablished in March 2015, more than 12 months prior to the investigation of this employment relationship problem. Dr Milham put Wintec on notice on 16 April 2015 that he was seeking reinstatement to his former role. He did not seek interim reinstatement and reinstatement was not pursued with any vigour until Dr Milham lodged his application in the Authority on 24 December 2015 some eight months later.

[141] Evidence on behalf of Dr Milham shows that Dr Milham was looking to exit from his role in Wintec before the incident with Mr Paterson arose. I have taken that evidence into account in determining whether reinstatement is practicable and reasonable.

[142] I have also taken into account that Dr Milham expressed no interest on 9 March 2015 in any of the vacant roles available at the time he was given notice of redundancy. It was his desire to exit the organisation as quickly as possible. This is evidenced by his expressed desire not to work out his notice period and to receive payment in lieu.

⁴ [2011] NZEmpC 160, [2011] ERNZ 466.

[143] Dr Milham has claimed that if he is not reinstated that he be reimbursed lost wages from the date of his dismissal until 15 August 2017 which is the date of Dr Milham's 65th birthday and the date he says he would have retired.

[144] I have taken into account the evidence given by Dr Milham about his relationships with his key managers at Wintec. Dr Milham has very little regard for Ms Barton or Mr Smith. Dr Milham clearly has difficulties in trusting Mr Smith. If there was trust in that relationship it was severely damaged in March 2015 when Mr Smith discovered Dr Milham had covertly recorded the meeting on 18 December 2014.

[145] In all the circumstances I find it is neither practical nor reasonable to order Dr Milham's reinstatement.

Lost wages

[146] Dr Milham seeks the reimbursement of wages lost as a result of the unjustified dismissal. Dr Milham has an obligation to mitigate his loss.

[147] On 9 March 2015 Mr Smith outlined nine vacancies which were available as redeployment. The information about these roles was incomplete and at the time Dr Milham was told about them he had already been given notice that his employment was terminating.

[148] Of the nine roles it appears that three may have been suitable for Dr Milham, but Dr Milham was given no information about what the roles entailed or what terms and conditions would apply to him if he accepted redeployment. There was no obligation on Dr Milham to consider these roles given that he had already been dismissed.

[149] Dr Milham has given uncontested evidence as to the steps he took to mitigate his loss. Dr Milham gave evidence that he has applied for 41 jobs but has been unsuccessful. It is possible that his age is counting against him in his efforts to obtain alternative employment.

[150] Taking into account that Dr Milham has not achieved reinstatement I consider it fair to exercise my discretion to award more than three months lost wages under section 128(3) of the Act. I will not award lost wages to the date of Dr Milham's retirement but consider it just to award him lost wages up to the date of this determination.

[151] Wintec is ordered to calculate and pay Dr Milham lost wages pursuant to section 123(1)(b) from 9 May 2015 (the date at which his notice ended) to 29 July 2016. Payment is to be made within 28 days of the date of this determination.

[152] If the parties are unable to agree on the quantum of lost wages I reserve leave for them to return to the Authority for that matter to be determined.

Compensation

[153] I have found Dr Milham was both unjustifiably disadvantaged and unjustifiably dismissed. He seeks the payment of compensation for each of his personal grievances. I have taken a global approach to the issue of compensation.

[154] Compelling evidence of the impact the disciplinary process and the dismissal had on him was given by Dr Milham and Ms Sheryl Richards, a company director and a past Senior HR Advisor for Wintec.

[155] Dr Milham was hospitalised in late 2014 prior to the restructuring but after the disciplinary process had concluded. Dr Milham's recovery longer than expected and this has been attributed to the emotional stress Dr Milham was experiencing following the disciplinary process. This was then exacerbated by the pending restructuring process advised to Dr Milham on 18 December 2014.

[156] Ms Richards told me that Dr Milham's physical and mental health have suffered and he was experiencing difficulty in sleeping. Ms Richards noted changes in Dr Milham's behaviours and moods and he was struggling to cope. Dr Milham sought counselling to assist him.

[157] I am satisfied Dr Milham has suffered considerable emotional distress as a result of his unjustified disadvantage and unjustified dismissal and consider a global award of \$15,000 under section 123(1)(c)(i) of the Act appropriate.

[158] The Chief Executive of the Waikato Institute of Technology is ordered to pay to Dr Milham the sum of \$15,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Contribution

[159] Section 124 of the Act obliges me to consider the extent to which Dr Milham's actions contributed towards the situation that gave rise to his personal grievances. If I consider his actions so require I must reduce his remedies accordingly.

[160] I am satisfied Dr Milham has not contributed to the actions giving rise to his personal grievances and no reduction to his remedies will be made.

Costs

[161] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Dr Milham shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Wintec shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[162] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority