

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 107  
3023308

BETWEEN            PETER MYLES GEORGE  
Applicant

AND                    THE VICE-CHANCELLOR OF  
THE UNIVERISTY OF OTAGO  
Respondent

Member of Authority:    Helen Doyle

Representatives:        Jeff Goldstein, Counsel for Applicant  
Barry Dorking, Counsel for Respondent

Investigation Meeting:    12 March 2018 at Christchurch

Submissions received:    19 March, 28 March and 30 May 2018 from Applicant  
and various email exchanges  
23 March and 14 May 2018 from Respondent and  
various email exchanges

Determination:            30 July 2018

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**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

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- A     Dr Peter George was unjustifiably dismissed from his employment with  
The Vice-Chancellor of the University of Otago.**
- B     The Vice-Chancellor of the University of Otago is ordered to pay to Dr  
Peter George the following:**
- (i)     Reimbursement of lost wages in the sum of \$2197.71 gross under  
s 123(1)(b) of the Employment Relations Act 2000.**
  - (ii)    There is no interest awarded on this amount.**

**(ii) Payment of compensation of \$7000 without deduction under s 123(1)(c)(i) of the Employment Relations Act 2000**

**C There is no order made for reinstatement.**

**D Costs are reserved and failing agreement a timetable has been set.**

### **Employment relationship problem**

[1] Dr Peter George specialises in clinical biochemistry and molecular pathology of human disease.

[2] In 1988 he commenced employment with the Vice-Chancellor of the University of Otago (the University) initially as a Lecturer and then from October 2003 as a Clinical Professor in biochemistry based in Christchurch. His position with the University was a 0.2 full time equivalent (FTE).

[3] The Otago medical school is part of the University of Otago and has three campuses based in Dunedin, Christchurch and Wellington. Its purpose is to train doctors and other health professionals. The University of Otago's Christchurch campus (UOC) has about 300 medical students for the final three years of the six year programme and a similar number of medical students from the University are based in each of the campuses in Dunedin and Wellington. Additionally UOC has approximately 700 postgraduate students from a variety of health professions.

[4] Dr George's duties included teaching and clinical supervision of students and continued involvement in research. He was also the sub-speciality convener for the 4<sup>th</sup> and 5<sup>th</sup> year medical student biochemistry programme.

[5] Employment was by way of a succession of fixed term employment agreements and Dr George initially claimed that the requirements of s 66 of the Employment Relations Act 2000 ("the Act") had not been met. The University in its statement in reply accepted that Dr George was a permanent part-time employee and had been treated as such in the events leading to termination of his employment. Accordingly that is not a matter that formed part of the Authority investigation and it does not require determination.

[6] The latest employment agreement between Dr George and the University commenced on 1 January 2016 and was to expire on 31 December 2018. It contained the following clause under the heading Terms and Conditions:

This agreement is effective from 1 January 2016 and will continue until 31 December 2018, subject to your continued employment with and support from the District Health Board as your employer.

[7] From May 1986 until May 2017 Dr George's main employer was the Canterbury District Health Board. On 15 May 2017 Dr George's employment with the CDHB ended due to his retirement. At the time he retired he was the Clinical Director of the Canterbury Health Laboratories (CHL) and had overall responsibility for the diagnostic services undertaken by the CDHB. His role with the CDHB was 1.4 FTE made up of 0.4 FTE Clinical Director, 0.1 FTE Lipid Clinic work and 0.9 Pathologist.

[8] CHL is an operating unit of the CDHB. It provides a full range of pathology and laboratory testing services for patients in hospital and community settings in Canterbury on a 24/7 basis. CHL is a key contributor to tertiary and professional training for pathology and labs and to the medical workforce. The UOC pathology and undergraduate courses are provided by the senior medical officers (SMOs) also known as pathologists from CHL.

[9] The University heard that Dr George may have retired from the CDHB and when this was confirmed by him on 26 June 2017 there was a process involving written correspondence between the University and Dr George to ascertain if he could still meet the key clinical requirements of his position. The end result was that Dr George's employment was terminated. He says that this was unjustified and that there were breaches of the obligations of good faith by the University.

[10] Dr George seeks reinstatement to the Clinical Professor role with the University, reimbursement of lost wages and other contractual benefits from 1 November 2017 to the date of the investigation meeting on 12 March 2018, interest and compensation.

[11] The University says that the dismissal was justified as Dr George's retirement and subsequent employment in the private sector would not enable him to fulfil the requirement of his University appointment or meet the needs of the students. Further it says that the process

adopted was fair and reasonable and that it gave him a reasonable opportunity to find alternative employment.

[12] There was initially an application for interim reinstatement but a prompt date for a substantive investigation was able to be given and both parties agreed to the matter proceeding on that basis. Since then matters were delayed when further information and submissions were provided.

### **The issues**

[13] The Authority needs to determine the following issues in this matter:

- Was there a full and fair process at the conclusion of which a fair and reasonable employer could have formed a view that Dr George's retirement from the CDHB meant he was not able to fulfil the requirements of the University role?
- Was the decision of the University to dismiss Dr George justifiable in all the circumstances?
- If Dr George was unjustifiably dismissed then what remedies should be awarded and is reinstatement practicable and reasonable?

### **Was there a full and fair process in accordance with the obligations of good faith?**

#### *The test of justification*

[14] The Authority is asked to consider whether Dr George was justifiably dismissed. In doing so it is required to apply the justification test which is set out in s 103A of the Act. The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of the University and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[15] The Authority must consider the four procedural fairness factors set out in s 103A (3) of the Act as they apply to a no fault dismissal. The Authority may take into account other factors as appropriate and must not determine a dismissal to be unjustified solely because of

defects in the process if they were minor and did not result in Dr George being treated unfairly.

[16] A fair and reasonable employer could be expected to comply with good faith obligations as set out in s 4 of the Act.

*The possibility of a review of Dr George's position*

[17] The University confirmed to Dr George that if his employment with the CDHB was not ongoing then it was the intention of the University to review the Clinical Professor agreement.<sup>1</sup> Dr George confirmed in response that he had retired from the CDHB but that he was having continuing discussions with the CDHB regarding resuming his work at the Lipid Clinic as he had only wanted the retirement to be from the laboratory component of his employment with the CDHB.

*Professor David Murdoch takes over discussions*

[18] Professor David Murdoch took over discussions with Dr George. Professor Murdoch is a registered medical practitioner specialising in microbiology and infectious diseases. He was Professor and Head of the Department of Pathology at UOC from November 2002 until August 2016. He has been Dean and Head of UOC since September 2016.

*Request for Dr George's views about continuing to meet the key clinical requirements of the role and whether there may be special circumstances*

[19] Professor Murdoch wrote to Dr George on 6 July 2017. He noted the terms of the Clinical Professor agreement being subject to continued employment and support from the CDHB as employer. He set out in his letter the key requirements of the position including clinical supervision of students, continued involvement in research and a clinical research programme in bio-chemistry and molecular pathology.

[20] Professor Murdoch wrote that given Dr George was no longer an employee of the CDHB it appeared that he would be unable to meet the key clinical requirements of the

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<sup>1</sup> Letter from Professor Martin Kennedy who is the Head of the Pathology Department at UOC to Dr George dated 19 July 2017

Clinical Professor position and the University was considering terminating his employment in accordance with the provisions of the employment agreement.

[21] Professor Murdoch indicated in the letter that he wanted to hear Dr George's views on the matter and determine whether there may be special circumstances that needed to be taken into account. He referred to any decision about Dr George resuming work in the Lipid Clinic as a factor that may be relevant. He wrote that it was necessary to know what decision had been made about that matter. He also wrote that there would need to be information about whether there were other circumstances that Dr George considered relevant to the decision given the nature of the position.

[22] Professor Murdoch asked for a response in writing in the first instance but wrote that it seemed likely that they will also need to meet to discuss any issues raised once Dr George's response is available. Dr George was advised that he may wish to consider taking independent advice before responding and be represented at any meetings. The University's employment assistance programme was also offered. A response was requested by 14 July 2017.

[23] On 14 July 2017 Dr George asked for an extension to the timeframe to respond to Professor Murdoch's letter to 19 July 2017. That was agreed to by Professor Murdoch on 15 July 2017.

*Dr George responds and explains that he can meet the key clinical requirements of the Clinical Professor position*

[24] On 19 July 2017 Dr George wrote to Professor Murdoch by way of email. He noted at the start of his communication that Professor Murdoch had said that it appeared he would be unable to meet the key clinical requirements of the Clinical Professor position and the University is considering termination. He wrote that was quite distressing but he was confident that he can continue to fulfil all of the requirements. He referred to several matters that I have set out below:

- A hope to resume working for the CDHB through the Lipid Clinic with the next meeting to discuss this scheduled for 21 July 2017.

- An intention to continue in the practice of pathology working with some of the other existing providers and aiming to develop new services within the private sector.
- Noting that whilst it is not immediately possible for him to be involved in bedside teaching of medical students that this was never a part of his role.
- Setting out the key duties of the role being the teaching of 4<sup>th</sup> and 5<sup>th</sup> year medical students, postgraduate teaching and clinical research in biochemistry and molecular pathology.
- That he was continuing to provide the teaching programme in a timely and professional manner, was currently marking and co-ordinating examinations and recently offered to contribute to the Dunedin based pathology teaching programme.
- That his postgraduate teaching is continuing and he had three students submit thesis that year and that he is involved in two summer studentship projects for the 2017-18 program.
- Dr George said that his own clinical research continued. He summarised his key research projects and advised in his response that he had several active research grants and one application pending. Further that he continued to publish in high quality peer review journals and was confident that he would maintain his current ranking.
- He stated that since he had more flexible time he is keen and available to increase his commitment to the university.

*24 July and 1 August 2017*

[25] Professor Murdoch in an email dated 24 July 2018 noted the meeting about the Lipid Clinic on 21 July 2017. He asked for an update of the preliminary outcome of the discussion and/or a likely timeframe for a final decision to be made. He also set out details about the employee assistance programme in the email acknowledging that it may be a distressing time for Dr George.

[26] When no response was received to that email Professor Murdoch followed it up with another email to Dr George dated 1 August 2017 requesting a time frame for the final decision. Dr George responded by email the same day and advised that the meeting occurred as planned and he hoped to get some clarity by meeting with the service manager early the next week.

*31 August 2017 letter*

[27] Professor Murdoch wrote again to Dr George on 31 August 2017.

[28] He noted that although Dr George hoped to resume working for the Lipid Clinic if this was his only employment at CDHB it would not satisfy the requirements for a clinical appointment. Mr Goldstein raised an issue about this as a change but as there was no evidence Dr George actually resumed working at the Lipid Clinic I do not need to consider this further.

[29] Professor Murdoch also set out that Dr George had stated in his email that he was confident that he could fulfil the requirements of the Clinical Professor appointment despite not being employed by the CDHB and that this was a view he found difficult to share. The letter is important because it sets out in more depth than earlier correspondence what the University needs for its clinical academics. To that end Professor Murdoch set out in the letter the following:

- Clinical Professors' agreements are in place with individuals because of their active roles within the health sector.
- The main responsibility of the Clinical Professor positions is to provide clinical teaching to undergraduate students as much as possible in an apprenticeship type model and that exposure to practising clinicians in their working environments is a vital part of medical student education.
- That the need for clinical academics to be active in their speciality applies equally to those involved in direct patient care and to those in other specialities who may not have direct clinical care of patients.

- That in Canterbury the CDHB is the University's most important partner in the provision of health education and research.
- There are concerted efforts to co-ordinate and integrate activities, including physical co-location and aligning of activities.
- The University needs clinical academics for medical student education with primary appointments within the CDHB (with the exception of general practice) in order to maximise clinical education opportunities, to provide appropriate and supportive clinical supervision of students, and to co-ordinate the integration of service and education activities.
- In response to Dr George's intention to work with existing providers other than CDHB and the aim to develop new services within the private sector Professor Murdoch referred to a key requirement of the Clinical Professor Agreement to provide postgraduate teaching. This supervision for laboratory based students' needs to occur in an adequately supportive research environment with appropriate supervision such as CHL. There are no agreements in place currently within the private sector in Christchurch.
- Given that Dr George's Clinical Professor Agreement is to provide teaching for students and trainees at the UOC any work undertaken for the Dunedin based pathology teaching programme referred to in Dr George's email would require a separate agreement and would have to be managed separately with the appropriate parties in that location.

[30] Professor Murdoch set out the various exchanges had taken place with Dr George requesting an update on his meeting with the CDHB so that he could understand whether Dr George's employment status with the CDHB had changed or was likely to in the near future. He noted that Dr George had been unable to confirm that his employment status with the CDHB has changed and he was not able to provide a firm timeframe in which it may do so.

[31] He set out that the Department of Pathology must ensure teaching can commence in 2018 without disruption and that it was essential that Dr George confirm by no later than

16 October 2017 that he had been re-engaged by CDHB in a position which enabled him to provide the necessary clinical experiences for students as is envisaged by the terms of his employment agreement. Professor Murdoch wrote towards the end of the letter:

We consider it to be unlikely in Christchurch that employment outside of the CDHB would satisfy the requirements. At this time, should we not have received formal confirmation that you will be employed in a suitable position by the CDHB (or by an acceptable alternative employer) at the material time our view is that you will have failed to meet the terms of your Clinical Professor employment agreement, and accordingly you will be provided one month's notice of termination of your employment with the University of Otago.

[32] I do not find that extending consideration to employment with an acceptable alternative employer is a formal variation of the employment agreement as submitted by Mr Goldstein. Rather the University was open to considering the broader circumstances at the time and in so doing did not restrict itself to the contractual requirement of employment by CDHB in reaching a decision as to whether Dr George could fulfil the requirement of the University role. That was fair and reasonable. Professor Murdoch did caution in his 31 August 2017 letter that it was unlikely in Christchurch employment outside of CDHB would satisfy the requirements. I accept Mr Goldstein's submission that any assessment of whether Dr George could fulfil the requirements of the University role including in a position outside of CDHB had to be fair and reasonable and in accordance with good faith requirements.

*Dr George's email of 16 October 2017*

[33] By email dated 16 October 2017 Dr George responded to Professor Murdoch to confirm his current employment status. He advised that he has not been able to arrange to resume working for the CDHB in the Lipid Clinical Service.

[34] He wrote that he remained confident that he could fulfil all of the requirements of his Clinical Professor appointment. He referred to Professor Murdoch's letter of 31 August 2017 implying that it is important that medical students are exposed to practising clinicians in their working environment. He wrote that this has never been a feature of the clinical biochemistry and molecular genetics components of the Pathology course.

[35] In respect of the provision of postgraduate teaching Dr George wrote that he remains active in this area and noted that in the past he supervised the students who were not employed at the CDHB and this has never caused any difficulty.

[36] Dr George further wrote that he could confirm he was now working for Healthscope (Southern Community Laboratories) with a role across the wider Healthscope group. He wrote that this would allow him to promote the University's postgraduate courses through the various Healthscope laboratories.

[37] Further he stated that Healthscope is contracted to the CDHB to provide pathology services within the service level alliance which includes both CHL and Southern Community Laboratories (SCL) together with CDHB planning and funding as well as local clinicians and patients in both public and private sectors. He wrote that he was in effect actually working for the CDHB. I have from here on used Healthscope and SCL interchangeably although I am referring to the same organisations Dr George undertook work for.

[38] Dr George stated that the current Pathology Head of Department (HoD) in Wellington and the previous Pathology HoD in Dunedin are employed by both Healthscope and the University and he noted that across the three clinical schools a number of other key individuals are employed in that way.

[39] Dr George wrote that these precedents were seen by him as evidence that he will be able to comfortably fulfil all of the requirements of his Clinical Professor role. Dr George wrote that if Professor Murdoch continued to doubt this he was happy to discuss the situation in a face to face meeting which should include senior representatives of the Pathology Department as well as appropriate representation of the wider University.

[40] The letter concluded that if notice of termination without holding such a meeting was given then Dr George would consider that to be unlawful termination and would pursue all available remedies through the relevant authorities.

[41] An issue arises from the applicant's submissions whether the focus for the University in the 31 August 2017 letter was on Dr George's employment with an "acceptable

alternative employer” or employment in a suitable position with an “acceptable alternative employer.”

[42] Mr Goldstein submits that the focus is on Healthscope as an acceptable alternative employer and not on the suitability of Dr George’s position with that organisation. He submits that the issue about the suitability of the position Dr George held was never raised and that there was a change in the focus and Dr George was unaware of this.

[43] I accept Mr Dorking’s submission as supported by the letter of 31 August 2017 that the focus for the University was on the suitability of the position Dr George was employed in by either the CDHB or the alternative employer. The whole sentence in the letter from Professor Murdoch dated 31 August 2017 has to be read as follows not just the part in brackets “At this time, should we not have received formal confirmation that you will be employed in a suitable position by the CDHB (or by an acceptable alternative employer) at the material time...”. I do accept that after the letter of 31 August the position held by Dr George with Healthscope did not feature in correspondence from Professor Murdoch.

*30 October 2017 and advice of termination of employment*

[44] Professor Murdoch acknowledged receipt of the letter from Dr George in a letter dated 30 October 2017. He reiterated the view of the University as contained in the 31 August 2017 letter.

[45] He stated that whilst the email sent on 16 October explained that Dr George was confident of his ability to fulfil all the requirements of his Clinical Professor appointment he did not explain how that was to be achieved in relation to the express contractual requirement that his employment with the CDHB would continue.

[46] Professor Murdoch stated that explanations about exposure to practising clinicians and post graduate teaching had been offered previously and rejected for reasons earlier given.

[47] He did state that further consideration was given to the proposition that Dr George’s recent employment with Healthscope would enable him to meet the terms of his Clinical Professor agreement but “we disagree”.

[48] Professor Murdoch stated that whilst Healthscope may be contracted to the CDHB to provide pathology services the previously expressed view remains that employment in the private sector will not enable Dr George to fulfil the requirements of his University appointment or to meet the need of the students.

[49] The letter set out that Professor Murdoch had reviewed the preliminary decisions and explanations and Dr George's explanations and responses since the matter was first raised. In all the circumstances it was considered the reasons given in support of employment at the University continuing were not compelling and were outweighed by the need to provide students with clinical experience which required the clinical appointment at CDHB to be re-established as required by the employment agreement.

[50] It was set out that the letter was notice that Dr George's last day of employment at the University of Otago would be 1 December 2017. The offer of Dr George to meet and discuss was acknowledged by Professor Murdoch but he stated there were no new matters raised in the email and this would not be necessary.

[51] Mr Goldstein then raised a personal grievance on 9 November 2017 that Dr George was unjustifiably dismissed.

[52] Before reaching conclusions about the justification of the dismissal I will refer to some further information that was provided for the first time at the investigation meeting. This caused a request for further information and then further submissions were provided. Although recognising that this could be relevant if the Authority reached the position of determining remedies Mr Dorking also submitted that it went to the justification of the dismissal.

#### *Further information and submissions*

[53] After the investigation meeting Mr Dorking in final submissions and in a memorandum accompanying final submissions raised some evidential issues about two matters that had arisen on the day of investigation.

[54] Dr George had produced for the first time at the investigation meeting a letter from Dr Peter Gootjes Chief Executive of SCL. Mr Dorking said the contents of that raised issues about the nature of Dr George's relationship with SCL and work he undertook.

Mr Dorking drew a distinction between everyday pathology work and work in the nature of reviewing molecular services for the organisation.

[55] Dr George had also made statements when he gave his evidence reading from a document headed “Who can see my health information in HealthOne” that he had the same access to the HealthOne system for patients test information as he did while working for CHL. Mr Dorking provided an email trail from Ms Elizabeth Spooner the person from CDHB who oversees the setup of access to clinical systems. The emails did not support Dr George had the ability to log into the system and that he did not have access to either HealthOne or to another system known as Éclair.

[56] In light of these matters the Authority asked for the following information:

- (a) Whether Dr George agreed with or took issue with the information provided by Ms Spooner and whether he has access to HealthOne or Éclair so as to see not only the result of the tests SCL worked on but also test results provided by CHL labs? The importance was that Dr George in his evidence said that for the purposes of teaching medical students what is important is access to a complete record of tests performed for each patient.
- (b) Given the second issue was what work Dr George is engaged in at Healthscope and the nature of his relationship with that organisation the Authority asked that a copy of Dr George’s employment agreement or contract with Healthscope be provided.

[57] Mr Goldstein duly took instructions and provided an email dated 26 April 2018 to the Authority and Mr Dorking. He stated in the email that Dr George took issue with what Ms Spooner had said and that as a pathologist working for SCL or elsewhere in the Canterbury system he is entitled to access these results. He had not accessed the system recently as he had no current need to do so but if the CDHB had cut off his logon that it could easily be restored.

[58] Mr Goldstein said that his client was prepared to supply the Authority with a copy of his agreement with SCL and set out that this is not the only work as a pathologist that Dr George is doing. Mr Goldstein wrote that Dr George was working part-time for a large

pathology laboratory in Sydney (Medlab) as a Chemical Pathologist undertaking the typical clinical work undertaken by a pathologist. He noted that the agreement and work with Healthscope is continuing. I shall come shortly to why that may be important.

[59] Mr Goldstein said that Dr George was concerned that the agreement with SCL would be disclosed to the University as it has some sensitive material in it that Professor Murdoch is likely to share with CHL. Mr Dorking did not accept that the services to be provided attracted commercial sensitivity and said in his email response the presumption that Professor Murdoch would automatically share information about the duties with CHL is “unnecessarily offensive.”

[60] I was not satisfied that the duties as set out are commercially sensitive to the extent that they should not be shown to Professor Murdoch with the usual disclosure limitations. Broadly the duties involve Dr George, as Dr Gootjes stated in his letter, reviewing the molecular services being offered by the wider Healthscope International Group and SCL. This includes equipment, staffing, range and volume of tests. Those matters aside I will not refer in this determination to some of the more detailed aspects of the duties the review entailed in schedule A.

[61] Until the agreement with SCL was supplied the Authority considered the nature of the relationship was employment. It had been described as such in the statement of problem, evidence of Dr George and in final submissions lodged on his behalf. When the agreement was provided it was between SCL and a company, Pathogene Limited, of which Dr George is the sole director and engaged Pathogene Limited as an independent contractor. I recognise that the distinction between employment and a contracting relationship is not always clear for those who do not deal with such matters on a regular basis. The more significant matter for current purposes is the limited nature of the contract and the duties.

[62] The agreement between SCL and Pathogene Limited was for a fixed term to start on 2 October 2017 and continued in force until 22 December 2017 or until it is terminated. It was to be a 12 week project to be paid at 3 days per week up to a total of 36 days. When Dr George was asked at the Authority investigation meeting whether his employment with SCL was fixed term or permanent he responded that it was permanent part-time and my notes record reference by him to “over a 52 week period.” It must therefore have been extended but the Authority was not provided with a further contract or employment agreement.

[63] Following the provision of that information both counsel provided further submissions. Attached to Mr Goldstein's additional submission was a request completed by Dr George for access to CDHB information systems for non-CDHB staff.

[64] Once in receipt of those submissions the Authority advised Counsel in an email dated 5 June 2018 that it believed it could proceed to determine the matter.

[65] Mr Dorking in an email dated 6 June 2018 agreed that the Authority had before it the evidence necessary to determine the question of whether Dr George's dismissal was justified. He then wrote amongst other matters that the HealthOne and Éclair access issues are important and unresolved and will become important if reinstatement falls to be considered and in all likelihood will require further evidence.

[66] Mr Goldstein raised concerns that Mr Dorking was giving evidence. Mr Dorking responded that with one exception there is no evidence and that he was prepared to withdraw the sentence that he considered was evidence.

[67] To the extent that there is evidence in the email dated 6 June from Mr Dorking the Authority shall disregard it. Further in its determination of this employment relationship problem the Authority will remain open to whether or not further evidence is required about access to HealthOne and Éclair.

*Conclusions about the fairness of the process*

[68] Dr George was alerted to the intention of the University to review his Clinical Professor agreement if his employment with the CDHB was not ongoing at an early stage. He was given an opportunity to provide information that he could meet the key clinical requirements of the Clinical Professor appointment in the knowledge that the University was considering terminating his employment. Time was given to see if Dr George could secure other employment with the CDHB. The letter of 31 August in particular set out what the University needed of its clinical academics. There can be no criticism of the early stages of the process.

[69] The final stages require closer examination. Dr George was asked to confirm by no later than 16 October 2017 that he had been re-engaged by CDHB in a suitable position by the CDHB or by an acceptable alternative employer. There was some criticism that he had

left responding until 8.45pm on 16 October 2017 when he knew he would be working for Healthscope from 2 October 2018. He did however respond within the timeframe set by Professor Murdoch albeit at the last moment.

[70] Dr George put forward the reasons in his letter why in his view working at Healthscope would enable him to comfortably fulfil all of the requirements of his Clinical Professor role. Importantly he wrote that if there is continued doubt about this then he was happy to discuss the situation in a face to face meeting and he wrote that this should include senior representatives of the Pathology Department as well as appropriate representation of the wider University. His final sentence was that if he was issued with notice of termination without such a meeting then he would consider it to be unlawful termination.

[71] Mr Dorking submits that Dr George did not provide any facts to support the proposition that he had found suitable employment. I agree that Dr George did not address all of the University requirements for its clinical academics as set out by Professor Murdoch in his 31 August 2017 letter. Dr George did however refer to some reasons why he considered Healthscope to be suitable employment and stated if there was doubt in Professor Murdoch's mind then he indicated that he was happy to attend a meeting.

[72] There clearly was doubt in Professor Murdoch's mind. A meeting would have been the opportunity to put to Dr George why that was so and investigate further the nature of Dr George's position with Healthscope which in fact remained unclear until after the investigation meeting. The likely need for a meeting was raised by Professor Murdoch in his letter of 6 July 2017 to Dr George at the start of the process.

[73] In his evidence Professor Murdoch explained why weight was not placed on Dr George's statement that there was a precedent because a number of other key individuals are employed by both Healthscope and the University across the three clinical schools. In Christchurch the public hospital diagnostic laboratory, CHL, is an operating unit of the CDHB. The public health laboratories in Wellington and Dunedin are operated by SCL which is the independent organisation owned by Healthscope. The situation is therefore different in Wellington and Dunedin than it is in Christchurch for employment of clinical teachers. There was however no further discussion with Dr George about that.

[74] Professor Murdoch stated in his letter advising Dr George that his employment was terminated that there were no new matters raised in Dr George's email so a meeting was not necessary. A fair and reasonable employer approaching the matter with an open mind would have wanted to know what position Dr George held with Healthscope to assess whether it was a suitable position. In good faith Professor Murdoch should have then put to Dr George any concerns it had about the employment with Healthscope meeting the needs of the University and those of its students to enable him to comment before employment was terminated.

[75] Mr Dorking submits that Dr George engaged in misleading conduct that should be assessed in an s103A analysis. He refers to the contract with SCL and submits that Dr George in not advising the University of the limited tenure of his SCL contract as at 16 October 2017 which would end before he would be performing his clinical teaching duties in 2018 was deliberately misleading. Further that Dr George "hid" the fact that the role did not begin to satisfy the requirements of Professor Murdoch.

[76] The Authority is required to objectively assess under s 103A whether the actions of the University and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred, not at a later time. In the absence of a fair process the Authority cannot be satisfied Dr George would not have disclosed the information about the nature of his relationship with Healthscope and his duties.

[77] Dr George was entitled to a fair process in which he could state his best case for continuing employment with the University. He was deprived of that opportunity. The failure to investigate further by the University was not a minor defect and it did result in unfair treatment. The factors in s 103A (3) of the justification test were not satisfied. There was insufficient investigation about Dr George's position with Healthscope and whether it was a suitable alternative employer. The concerns about Dr George's employment with Healthscope not enabling him to meet the needs of the University and its students but these were not put to him and therefore Dr George did not have an opportunity to respond and have that response genuinely considered.

*Substantive justification*

[78] I now consider whether if there had been a proper process as part of which Dr George had disclosed details of his work with SCL a fair and reasonable employer could have concluded it would have satisfied the requirements for the Clinical Professor agreement.

[79] I have taken into account the requirement in the employment agreement the University had with Dr George that it was subject to continued employment with and support from CDHB as his employer. At that time in late October 2017 a fair and reasonable employer could have concluded that Dr George was no longer employed by the CDHB.

[80] Professor Murdoch set out to Dr George that the University wanted its clinical teachers to have primary appointments within the CDHB. He set out in his 31 August 2017 letter amongst other matters that this was in order to maximise clinical education opportunities, provide appropriate and supportive clinical supervision of students and coordinate the integration of service and education activities. Further that pathologists who are clinical teachers need to be actively practising as a pathologist in an appropriate diagnostic laboratory. He described in his evidence that the public health laboratories are the only laboratories that can provide the necessary breadth of experience for the training of doctors.

[81] Professor Murdoch also set out that there was a key requirement to provide postgraduate teaching and that this needed to occur in an adequately supportive research environment with appropriate supervision such as CHL. He wrote that there are no agreements in place currently within the private sector in Christchurch.

[82] As a result of the loss of his employment with CDHB Dr George lost access to the CHL diagnostic laboratories and was no longer working and engaged with the clinical teams for his convenor role.

[83] Dr George had secured work through his company with SCL. A fair and reasonable employer could conclude it did not satisfy the requirement that Dr George be actively practising as a pathologist in an appropriate diagnostic laboratory. Secondly a fair and reasonable employer could have concluded the engagement was for a limited period only and was not at that time to continue into the 2018 academic year. Thirdly it would not provide the same opportunity for appropriate clinical supervision of students.

[84] I find objectively assessed a fair and reasonable employer could have concluded that Dr George was no longer employed by CDHB and that his work outside of CDHB with SCL would not enable him to fulfil the requirements of his Clinical Professor appointment or the clinical experience needs of the students.

[85] I find in conclusion that there was substantive justification for the dismissal.

**Was the decision of the University to dismiss Dr George justifiable in all the circumstances?**

[86] I have found that the process was unfair. The decision to terminate employment was premature. The unfairness was such that I have found a fair and reasonable employer could not conclude at the time the decision was made that Dr George's retirement from the CDHB and his work outside of the CDHB meant he was not able to fulfil the requirements of the University role.

[87] I do not find that the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances.

[88] Dr George has a personal grievance that he was unjustifiably dismissed and he is entitled to consideration of remedies.

**Remedies**

**Reinstatement**

[89] Dr George wants to be reinstated back to his Clinical Professor role with the University.

[90] Section 125 (2) of the Act provides that the Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so. Reinstatement is firmly opposed by the University.

[91] The Employment Court has stated the remedy of reinstatement under s 125 of the Act has no more or less prominence than the other statutory remedies for a personal

grievance.<sup>2</sup> That is not to say that reinstatement may be the most important remedy to an applicant as it is in this case to Dr George.

[92] The Employment Court stated that the approach to consideration of reinstatement as with other aspects of employment law, is not a matter of laying down rules about onuses and burdens of proof but rather:<sup>3</sup>

...on a case by case basis, of the Court or the Authority weighing the evidence and assessing therefrom the practicability and reasonableness of making an order for reinstatement. 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.

*Allowed to continue with Clinical Professor role notwithstanding no longer employed by the CDHB*

[93] Mr Goldstein submits that reinstatement is practicable and reasonable. He places reliance on the last five months of Dr George's employment when Dr George was able to continue his Clinical Professor role without issue even though he was not employed by the CDHB. He submits that "Plainly this arrangement was reasonable and practicable to both parties for the last 5 months of his employment." He refers to that continuation notwithstanding the retirement from the CDHB as a variation of Dr George's employment.

[94] Once the University had confirmation in late June 2017 from Dr George that he had retired in mid-May it carried out a process to review his Clinical Professor agreement. Dr George was on notice from 6 July 2017 that his employment could be terminated. The process took time and for some of that period Dr George was in discussions about a role with CDHB at the Lipid Clinic and awaiting an outcome. On 30 October 2017 Dr George was advised his employment was terminated with one months' notice. Professor Murdoch in his evidence said that the work requirements vary significantly over the year and that during the period June to December 2017 Dr George had little or nothing to do and others were available to cover.

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<sup>2</sup> Angus v Ports of Auckland Ltd (No 2) [2011] ERNZ 466 at [61]

<sup>3</sup> Above n 2 at [68]

[95] For these reasons I do not find that the fact that Dr George continued in his Clinical Professor role with the University after he had retired from the CDHB should be a determinant factor in an assessment as to whether reinstatement is practicable and reasonable.

*Practicability and reasonableness*

[96] I have referred above to the need to consider for reasonableness the prospective effects of an order for reinstatement. As to practicability the Court of Appeal in *Lewis v Howick College Board of Trustees*<sup>4</sup> endorsed a legal test in an earlier Court judgment and stated:

...It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[97] The provision of the contract with SCL and issues with accessing HealthOne means that some of the original submissions made on behalf of Dr George no longer apply or have less strength. Dr George was not for example at the time of his dismissal an employee for SCL.

[98] More fundamentally it is not as submitted “undisputed” that Dr George is maintaining his clinical practice as a pathologist in a diagnostic laboratory at least with SCL. Rather it is unclear. Mr Goldstein in an email to the Authority and Mr Dorking dated 26 April 2018 writes that Dr George’s role with SCL includes expanded services which are different to those in the contract.

[99] It seemed unusual if Dr George was working as a pathologist in a diagnostic laboratory that he was unaware that his access to HealthOne had been disabled when he retired from the CDHB in May 2017 until that matter was raised by Mr Dorking in or about 23 March 2018. He did though confirm in his written evidence in reply at [15] that access to pathology results is required for the teaching of chemical pathology to medical students.

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<sup>4</sup> *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at [2]

[100] The Authority also heard from Kirsten Beynon who is the General Manager at CHL, CDHB and West Coast DHB laboratory. Ms Beynon gave evidence in part to address Dr George's statement during the disciplinary process and in his affidavit evidence that because of the pathology funding arrangements through the Canterbury laboratory service level alliance he was "effectively employed by CDHB" when employed by SCL. Ms Beynon did not accept that. She said that all additional pathologist positions are discussed and agreed with CHL and Planning and Funding and notified to Service Level Alliance group (SLA) and that she had not been notified of any involvement of Dr George in the SLA as a pathologist employed with SCL in Canterbury.

[101] An assessment of practicability involves consideration whether the employment relationship is capable of being carried out successfully.

[102] I have given consideration to the duties of a Clinical Professor and whether these can still be carried out in a way that meets the requirements of the University and needs of the students when Dr George is not still employed by the CDHB. The material Clinical Professor Agreement between the University and Dr George refers to the typical duties under the agreement consisting mainly of teaching and clinical supervision of students. There is a list of duties attached to the back of the agreement which includes a convenor role for 4<sup>th</sup> and 5<sup>th</sup> year medical students.

### *Teaching Philosophy*

[103] Dr George accepted Professor Murdoch's evidence that it is appropriate as much of the medical students learning as possible be embedded within real-life clinical environments. He said that had not been a feature of the biochemistry teaching nor more generally of pathology teaching. He set out his responsibility was to co-ordinate and deliver two years of undergraduate teaching in Clinical Biochemistry involving a series of about 8 one hour and 11 half hour lectures over a two year period to medical students during their 4<sup>th</sup> and 5<sup>th</sup> years. Dr George said that such lectures were delivered in the lecture theatres without patients present and examinations did not include reliance on real patients.

[104] I accept Professor Murdoch's evidence that there is an expectation by the University that teaching delivery includes laboratory sessions. Dr George may not have adopted that approach whilst he was employed but it is clear that was what the University

wanted. That presents some practical difficulties when Dr George is no longer employed by CDHB as he can no longer access CHL diagnostic laboratories for the purpose of clinical supervision. Dr George did in his evidence advance the University laboratories as an alternative however Professor Murdoch in his evidence said they are scientific laboratories and not medical diagnostic laboratories. I prefer his evidence about that as he was more certain about that than Dr George.

#### *Sub-speciality convenor*

[105] Dr George's evidence is that the role of the convenor is simply a matter of agreeing a schedule and roster for the delivery of teaching sessions and the setting of annual examinations which he could still undertake. Professor Murdoch in his evidence does not agree that is the extent of the role and that Dr George was required to coordinate and organise his programme and the scheduling of mainly CDHB staff to ensure teaching delivery was timely and professional. Ms Beynon said in her evidence that in order to be a convenor the person needed to be engaged and working alongside the clinical teams.

[106] Dr George said in his evidence that in Canterbury the convenors of the teaching in Anatomical Pathology and Clinic Microbiology are not employed by the CDHB. There was evidence about the different employment arrangements for clinical teachers. Some are primarily CDHB employees as was Dr George and some are primarily University employees but undertake work for the CDHB. Others are joint clinical staff who come under a specific employment agreement created by UOC and CDHB academic staff. In respect of their CDHB duties the joint clinical staff are treated the same as CDHB staff and still undertake work for the CDHB. Unlike Dr George therefore the convenors work at the CDHB. I do not find from the evidence presented that sub-speciality convening would be a task that would be straightforward to undertake on an external basis.

#### *Accessibility to students*

[107] There seemed no dispute students do require access to their clinical teachers even by appointment and not immediately. After the investigation meeting Mr Goldstein by email dated 26 April 2018 advised that Dr George continued to be based in Christchurch and worked 0.1 FTE for SCL. Further that Dr George is currently working for Medlab in Sydney as a chemical pathologist. The role was described as "fly in and fly out" that is undertaken

between 2 and 4 days a week. When the above is considered there are some practical difficulties with ease of access by students to Dr George when compared to his previous role with the CDHB.

*Active practice in the specialist field*

[108] A requirement for the University is that the clinical teacher is actively practising in his or her specialist field. That was what Dr George was doing when he worked for the CDHB. For reasons set out above it is unclear if Dr George is directly involved in undertaking and interpreting laboratory tests for individual patients when he undertakes work for SCL. It appears from Mr Goldstein's email that he may be performing that sort of work for Medlab but that is work in Australia. It is difficult to align that overseas work with the requirement set out in Professor Murdoch's letter of 31 August 2017 that the main responsibility of the [Clinical Professors] position is to provide clinical teaching to undergraduate students, as much as possible in an apprenticeship type model. It would also appear from Mr Goldstein's email of 26 April 2018 that Dr George is only working for Healthcare for 0.1FTE. Previously it was understood to be 0.2 FTE but in any event that is a significant reduction to the period he worked whilst employed by CDHB. I accept Mr Dorking's submission that it is work for a very limited period each week and in terms of the contract the work is terminable on two months' notice without cause. That would create serious uncertainty for the University even if Dr George may be able to reinstate his access to HealthOne.

*Research and supervision of postgraduate students*

[109] Dr George says that the research and supervision of postgraduate students does not require access to CDHB laboratories and that some previous students have completed their requirements without this access or accessed other laboratories. Professor Murdoch says that the students need access to the CHL laboratories for their work and further that the postgraduate students work as part of a suitable research group. I accept that there may be ways around Dr George accessing CHL laboratories in the sense of it could perhaps be possible. I am not however satisfied from the evidence that the research and supervision of most postgraduate students without access to the CDHB facilities would be practicable or reasonable.

### *Conclusions about reinstatement*

[110] Dr George's employment with the University ended through no fault of his own. He found other work that he considered would still meet the requirements of the University and says that his reinstatement would be practicable and reasonable.

[111] Practicability should not be narrowly construed in a technical way. The relationship if reinstated must be able to be capable of being carried out successfully, not simply carried out but in a manner that may not result in its success.

[112] I am not satisfied that the employment relationship if reinstated would be able to be carried out in a manner that would mean it is successful for all of the reasons set out above.

[113] Reinstatement is not practicable and reasonable and I decline to make an order.

### *Lost Wages*

[114] I have found that the process was unfair but that there was substantive justification. I do however accept that a fair process would have required more time and any award of lost wages must be limited to that period. In all the circumstances I find that a fair and reasonable award would be three weeks lost wages.

[115] Mr Goldstein sets out that Dr George received \$38,094 gross per annum which is \$732.57 per week. \$732.57 multiplied by 3 weeks is \$2197.71 gross.

[116] I order The Vice-Chancellor of the University of Otago to pay to Dr Peter George the sum of \$2197.71 gross under s 123 (1) (b) of the Act.

### *Interest*

[117] I am not minded in this matter to exercise my discretion under clause 11 of the second schedule of the Act and order the inclusion of interest on the above award. Both parties co-operated for a prompt investigation meeting date and the only delay was caused by further information being supplied.

### *Compensation*

I heard extensive evidence from Dr George about the effect of both the process leading to the dismissal and the dismissal itself. As I have found the dismissal substantively justified any award is limited to the impact of the process. Dr George said that the process was distressing and that he believed it was unusual with no discussion about what was possible. He had worked for the University since 1988 and felt cast aside with a resulting loss of esteem and self-worth. There was difficulty he said shutting his mind off from the process.

[118] Dr George had worked for the University for about 30 years and I accept there was considerable distress for him at not having an opportunity to meet and explain why he considered he could still fulfil the requirements of his role with the University. It was not a dignified end to a very long period of employment.

[119] In all the circumstances I consider a fair and reasonable award would be the sum of \$7000.

[120] I order The Vice-Chancellor of the University of Otago to pay to Dr Peter George the sum of \$7000 under s 123 (1)(c)(i) without deduction.

### *Contribution*

[121] I do not find that Dr George contributed to the situation that gave rise to his personal grievance which was the failure to undertake a fair process. There is no reduction to the above awards.

### **Costs**

[122] I reserve the issue of costs. Failing agreement being reached Mr Goldstein has until 14 August to lodge and serve submissions as to costs and Mr Dorking has until 28 August 2018 to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority