

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 205
3076593

BETWEEN	MARK SCHOLLUM Applicant
AND	INTERNATIONAL EDUCATION GROUP (NZ) LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Mako Schollum, advocate for Applicant Margaret Baker for Respondent
Investigation Meeting:	9 March 2020
Further Information Received:	11 March 2020
Determination:	21 May 2020

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Mr Schollum’s employment were affected to his disadvantage by the unjustified actions of International Education Group (NZ) Limited.**
- B. International Education Group (NZ) Limited is ordered to pay to Mr Schollum the following amounts within 28 days of the date of this determination:**
- a) \$200 under s 123(1)(b) of the Act; and**
 - b) \$7,000 under s 123(1)(c)(i) of the Act.**

C. Mr Schollum's claim for arrears of wages is declined.

D. Costs are reserved.

Employment relationship problem

[1] Mr Schollum is a teacher of English for Speakers of Other Languages (ESOL) working for the International Education Group (NZ) Limited (WIE). He started working for WIE on a part time basis in September 2016 moving to full time on 29 May 2017. Mr Schollum is also an official International English Language Testing Systems (IELTS) examiner conducting IELTS tests in the University of Waikato.

[2] In early August 2019 Mr Schollum reported a student for cheating in an exam. The student admitted cheating and was issued with a warning by WIE. At the same time the student made allegations that Mr Schollum had provided answers to students during an assessment. The incident was investigated by WIE and Mr Schollum was issued with a final written warning.

[3] Mr Schollum claims the warning was unjustified and he has been disadvantaged in his employment. He also claims arrears of wages for overtime worked, sick leave and reimbursement of annual leave. Further Mr Schollum has asked the Authority to determine an entitlement to payment for stress leave taken on 21 and 22 August and for the period 9-19 September 2019.

Issues

[4] In order to resolve Mr Schollum's application I must determine:

- a) Whether one or more conditions of Mr Schollum's employment were affected to his disadvantage as a result of the actions of WIE when it issued Mr Schollum the final written warning and if so, what if any remedies should be awarded;
- b) Whether Mr Schollum is owed any arrears of wages for:
 - i. overtime worked;
 - ii. stress leave; and

iii. annual leave.

[5] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence received I have carefully considered everything.

Events leading to the warning

[6] On 29 July 2019 Mr Schollum conducted a listening assessment for his class. The course he was teaching was part of WIE's New Zealand Certificate in English Language – Level 4. The programme is approved and accredited by the New Zealand Qualifications Authority and is deemed a “high risk” qualification[MU1]. It is high risk because the qualification is a pathway for graduates to undertake higher-level study.

[7] The listening assessment is to assess a student's understanding of spoken interactions. The assessment requires students to listen to spoken text and correctly answer questions about the text.

[8] On 6 August 2019 a student, who had been caught cheating attended a meeting with Ms Margaret Connelly-Bakker, Director of Studies, where he admitted cheating in Mr Schollum's class.

[9] The student accepted his conduct was wrong but complained the punishment meted out by Mr Schollum was unfair. Mr Schollum had told the student he would have to complete all assessments not just the offending assessment[MU2]. In fact the student was only required to resit the offending assessment.

[10] At the same time the student alleged Mr Schollum had given answers to students during an assessment on 29 July 2019 and advised Ms Connelly-Bakker that he had three recordings where Mr Schollum had provided answers to questions during assessments.

[11] On 8 August 2019 Mr Schollum met with Ms Connelly-Bakker and was advised of the student's allegation that he had given guidance on exams and that Mr Schollum had preceded his guidance by advising the students “I shouldn't be telling you this ...”.

[12] While it is not apparent from the notes of the meeting that Mr Schollum was told about the recordings I have concluded it is more likely than not that he was made

aware of their existence. This is because over the next few days Mr Schollum made several requests for copies of the recordings.

[13] On 9 August 2019 Ms Ada Bently, General Manager, invited Mr Schollum to attend her office. When he arrived Ms Bently handed him a note informing him of the allegation that he [Mr Schollum] had given answers to students while they were undertaking an assessment.

[14] Mr Schollum was advised WIE was investigating the matter and he would be provided with any results of the investigation at a meeting scheduled for 12 August. Mr Schollum was advised that he could have a support person or legal representation at the meeting and if misconduct or serious misconduct was established disciplinary action including summary dismissal may be the result.

[15] Later that day (9 August) the student provided a USB device containing copies of two recordings. The USB was given to Ms Connelly-Bakker. One recording was more than three minutes in length while the other was much shorter at about 30 seconds. The recordings were date stamped 29 July 2019^[MU3].

[16] In the longer of the two recordings Mr Schollum can be heard telling his students:

I don't really know the answers. I haven't got the answers with me, [laughter from a female student] but just thought I'd give you 'A' cos some people have got it blank and some people have got the wrong answer, so we want to start with 'A'. We've got to get 'A' right, and then continue getting them right. So don't tell anyone I did that, ok?

[17] Later in the recording two students whisper to each other "...*how are you*". This is the answer to question 1a. of the assessment.

[18] He was then recorded telling his students:

[m]an, I am so busy, busy, I hate how busy I am, very busy. What does busy start with? B, yes!

[19] The answer to question 1b. of the assessment was – he is very busy.

[20] In the shorter recording Mr Schollum can be heard telling his students:

It's um...yeah...number... what is it. G? I'm not gonna tell you what it is but I'm gonna give you a clue... ok. Sounds like driving. Don't anyone say anything out loud...but it sounds like driving.

[21] The answer to question 1g. of the assessment was – diving. One student answered the question with “sounds like driving”.

[22] At the scheduled 12 August meeting Mr Schollum was supported by his wife. He was given copies of the two recordings that had been provided to WIE. To allow him time to review the recordings a further meeting to hear Mr Schollum's explanation was scheduled for 14 August.

[23] On 13 August Mr Schollum emailed Ms Bently having listened to the two recordings. He told Ms Bently he could not recall the detail in the shorter recording but noted the noise in the background which indicated the recording was not made during the assessment.

[24] Mr Schollum explained that the second recording was of a hangman game he played after the listening test had finished and to fill the void before the morning break. He denied the allegation that he was giving students answers to the assessment.

[25] At the scheduled meeting on 14 August Mr Schollum repeated his explanations set out in his 13 August email. By this time WIE had reviewed copies of the transcripts from the 29 July assessment. Two of the transcripts contained answers that mirrored words used by Mr Schollum in the recordings. In one paper the answer given by the student was not correct but WIE was concerned the student had answered question 1g. with the phrase “sounds like driving”. Mr Schollum was provided with copies of the two offending transcripts and a further meeting was scheduled for 16 August 2019 to seek Mr Schollum's further explanation.

[26] At the meeting on 16 August 2019 Mr Schollum repeated the explanation he had given in his 13 August email and on 14 August. He told Ms Bently all transcripts had been handed up when he played the hangman game and he used one or more answers from the transcripts to prompt him in the game.

[27] WIE wrote to Mr Schollum on 20 August setting out its preliminary decision to issue him with a final written warning. WIE did not accept Mr Schollum's explanation that he was playing a game of hangman. Ms Bently concluded that in order for the

student to have answered question 1g. the way he did, he would had to have had his assessment form in front of him at the time of Mr Schollum's disclosure.

[28] WIE advised Mr Schollum that giving students answers to assessments was below the standard of ethics, honesty and integrity expected of a teacher. WIE was concerned that Mr Schollum's conduct went to the core of his academic integrity and undermined the integrity of WIE's assessment system. It proposed a final written warning as a step less than dismissal but made it clear that any future similar conduct would result in summary dismissal.

[29] WIE also proposed an action plan to move forward which included:

- a) no retaliation could be taken against the complainant;
- b) future assessment activities, including marking would be supervised by another academic staff member;
- c) The listening assessment was to be redone;
- d) Previous assessments would be investigated;
- e) Mr Schollum was to identify in his weekly lesson plans how tasks and activities contribute to the development of the relevant programme learning outcomes;
- f) Mr Schollum was to develop and host a professional development session for all academic staff on "Ethical Assessment Conduct and Assessment Rules".

[30] Mr Schollum was invited to provide feedback on the proposed outcomes which he did on 23 August 2019. In his letter of response Mr Schollum raised a personal grievance for unjustified disadvantage. He claimed he was overloaded with work, there had been unnecessary pressure in the past couple of months and claimed the process used by WIE in carrying out its investigation was unfair.

[31] After considering Mr Schollum's feedback on the proposed outcome, he was issued with a final written warning on 27 August 2019. WIE advised Mr Schollum that it did not accept his explanations. It was satisfied Mr Schollum had given the students

tips and hints during the assessment which he intended would assist them in correctly answering the questions. WIE found this conduct to be inappropriate and unethical and constituted serious misconduct.

[32] As well as the final warning it was proposed Mr Schollum would be subject to the action plan set out in the proposed outcome letter dated 20 August. At the investigation meeting Mr Schollum and WIE confirmed that the proposed actions were never implemented.

Unjustified disadvantage

[33] Mr Schollum claims the final written warning was unjustified and resulted in one or more conditions of his employment being affected to his disadvantage.

[34] The onus of establishing whether one or more conditions of his employment were affected to his disadvantage lies with Mr Schollum in the first instance. If he establishes disadvantage the burden moves to WIE to establish on the balance of probabilities that the disadvantage Mr Schollum suffered was justified.

[35] The justification test in s 103A of the Act is to be applied by the Authority in determining justification of an action. 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 WIE's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[36] The action of imposing a final warning is an action constituting a disadvantage for Mr Schollum. This is because it made Mr Schollum's continued employment less secure.¹ The question is whether WIE's actions and how it acted in issuing the warning were justified.

[37] The final written warning was issued on the basis that Ms Bently was satisfied Mr Schollum had provided answers to students during an assessment and that this constituted serious misconduct. Central to this conclusion was the content of the recordings provided by the student and at least one assessment paper that reflected words used by Mr Schollum in the recording. That is "...sounds like driving".

¹ *Van Der Sluis v Health Waikato Ltd* [1996] 1 ERNZ 514.

Does the content of the recordings reasonably support WIE's conclusion Mr Schollum provided answers to the students?

[38] Ms Bently did not accept that the recordings disclosed Mr Schollum playing a game of hangman with his students^[MU4]. Hangman is a game where the participants guess a word by suggesting letters. For each wrong letter an element of a hangman's gallows is drawn. Ms Bently accepted that hangman is an appropriate teaching tool which is used by other Teachers. I find there were clear elements of the game apparent from the longer of the two recordings. Ms Bently's conclusion ignores the fact that at the beginning of the longer of the two recordings Mr Schollum invites the students to give him letters for hangman.

[39] Ms Bently did not accept that the game was played after the transcripts had been handed up to Mr Schollum at the end of the assessment. At the beginning of the longer of the two recordings Mr Schollum refers to some students having a blank answer to "A" and others having the wrong answer. I have concluded on balance that in order for Mr Schollum to have reached conclusions about what was in the transcripts he would have them in front of him.

[40] Ms Bently did not speak with any students other than the student who had made the allegations. Those students may have been able to clarify whether the hints given by Mr Schollum had been given after the assessment transcripts had been handed up or during the assessment. Surprisingly, Ms Bently says she believed interviewing more of Mr Schollum's students would have been unfair to him as it would have caused severe and unnecessary damage to his reputation if it turned out he had done nothing wrong. I find the failure to interview the students to clarify the timing of the recordings is a serious flaw in the process used by WIE^[MU5].

Were the recordings made during the assessments?

[41] It was common ground at the investigation meeting that assessments are undertaken in a quiet environment. Mr Schollum was critical of Ms Bently not taking into account the noise that can be heard in the background of the shorter of the two recordings. This was something Mr Schollum raised on 13 August in his email to Ms Bently. While there is background noise apparent in the short recording, it is not so apparent in the longer of the two recordings.

[42] There was agreement between Ms Bently and Mr Schollum at the investigation meeting that Teachers may provide some guidance to students before they undertake the assessment. I accept the situation where the student wrote "...sounds like driving" in his transcript would raise a concern for Ms Bently, having read the transcript, listened to the recordings and read Mr Schollum's explanation that he read the phrase from the transcript the conclusion reached by WIE was not one a fair and reasonable employer could make.

[43] Both parties confirmed at the investigation meeting that during assessments mobile phones are either placed at the front of the class room or in a box provided by Mr Schollum. The recordings were allegedly made by a student during an assessment. WIE has not explored with the student how he accessed his mobile phone during an assessment.

[44] Further the recordings do not appear to be complete recordings. There has been no explanation from WIE as to why the recordings were in two parts and only recorded three minutes of the classroom session.

[45] Mr Schollum is critical of WIE for accepting the recordings from a student who had been caught cheating in his class on at least three separate occasions in a situation where the recordings could have been doctored and in a situation where the student had been angry with Mr Schollum for reporting his cheating. WIE has provided no response to these criticisms.

[46] These flaws in WIE's process were not minor and resulted in Mr Schollum being treated unfairly. The action by WIE in issuing Mr Schollum with a final written warning was not the action an employer acting fairly and reasonably in all the circumstances could take. The final written warning was unjustified. WIE is not able to rely on it and it should be removed from Mr Schollum's file.

Remedies

[47] Mr Schollum has established a personal grievance and is entitled to a consideration of remedies. In his statement of problem Mr Schollum sets out a number of remedies he has asked the Authority to award but which are outside the jurisdiction of the Authority. Remedies for Mr Schollum's personal grievance are limited to those set out in s 123 of the Act.

[48] Section 123 (1)(b) of the Act provides for the reimbursement of a sum equal to the whole or part of the wages or other money lost by Mr Schollum as a result of his personal grievance.

[49] I have received a copy of Mr Schollum's wages and time record and have concluded that he did not lose any wages. However, Mr Schollum told me he lost \$200 as a result of his personal grievance when he was unable to undertake work as an IELTS examiner because he had to be available for mediation which did not take place. I am satisfied the \$200 was other money lost by Mr Schollum as a result of his personal grievance and he is entitled to be reimbursed the \$200 under s 123(1)(b).

[50] Mr Schollum claims \$10,000 compensation for humiliation, loss of dignity and injury to feelings. Mr Schollum described the affect the final written warning had on him. He told me he became stressed and had to take time off work.

[51] I have concluded \$7,000 is an appropriate award in all the circumstances of this case.

[52] Section 124 of the Act requires me to consider the extent to which Mr Schollum's actions contributed to the situation that gave rise to his personal grievance, and if required, to reduce the remedies accordingly.

[53] Contribution denotes blameworthy conduct that has been proven on the balance of probabilities. No blameworthy conduct has been established and I do not consider Mr Schollum's remedies should be reduced under s 124 of the Act.

[54] International Education Group (NZ) Limited is ordered to pay to Mr Schollum the following amounts within 28 days of the date of this determination:

- c) \$200 under s 123(1)(b) of the Act; and
- d) \$7,000 under s 123(1)(c)(i) of the Act.

Arrears of wages

[55] In his statement of problem Mr Schollum claims he is owed \$5,000 for working over-time from 24 June to 9 August 2019. He also claims payment for stress leave, sick leave taken as a result of being overloaded with work and reimbursement of half a day annual leave which he took on 16 August.

[56] Mr Schollum has also raised concerns about payment of his KiwiSaver contributions. At the investigation meeting WIE and Mr Schollum agreed that WIE would calculate and resolve the KiwiSaver issues. If that has not happened leave is reserved for Mr Schollum to return to the Authority to have the matter determined.

Overtime

[57] Mr Schollum says he was contracted to work 25 teaching hours each week but during the seven weeks leading up to the complaint he worked between 39 and 47.5 hours each week. In his letter to WIE dated 23 August 2019 Mr Schollum claims he worked an additional 130 hours during a seven week period.

[58] Mr Schollum's employment agreement provides for hours of work in the following terms:

4.1 You are employed for 40 hours per week to be carried out between 8.30 and 5.00 pm Monday to Friday for the duration of this agreement. Your position entails a maximum of 25 Teaching Hours per week.

...

4.3 You agree to perform such overtime as is reasonably required to fulfil your duties. You acknowledge that your salary and other benefits fully compensate you for all time worked.

[59] I am satisfied Mr Schollum's employment agreement provides for him to work at least 40 hours each week and that his salary covers any additional hours he may be required to work. Even if Mr Schollum worked 47.5 hours each week (he is not claiming he did as he says he worked various hours between 39 and 47.5) from 24 June to 9 August this would equate to a total of 52.5 hours and not the 130 claimed in his statement of problem.

[60] Mr Schollum has the onus to prove his claim for arrears of wages in the first instance. Mr Schollum has not established to my satisfaction that he is owed arrears of wages for overtime worked and his claim is declined.

Payment for stress leave

[61] Mr Schollum says the allegations made about him, the way he was treated and the threat by WIE to impose an action plan caused him stress and he had to take stress leave under his doctor's advice. He says his stress was exacerbated by the delay between asking for mediation in September and it not taking place until February 2020.

[62] Mr Schollum claims payment for two days taken on 21 and 22 August and for the period 6 – 16 September. Mr Schollum was paid sick leave for 2 days in the pay period ending 30 August. He was paid sick leave for five days for the pay period ending 13 September. At this time his entitlement to paid sick leave was exhausted and he was required to take four days sick leave without pay for the pay period ending 27 September 2019.

[63] Mr Schollum's employment agreement does not provide for paid stress leave. His leave on 21, 22 August and 6 – 16 September was treated appropriately as sick leave both on pay and without pay. No further amounts are due to him and his claim is declined.

Reimbursement of annual leave

[64] Mr Schollum claims reimbursement of half a day's annual leave he took on 16 August. There is no proper basis for the claim and it is declined.

Costs

[65] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Schollum shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. WIE 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.

[66] 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