

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 337
3050372

BETWEEN STEVEN GIBBS
Applicant

AND THE VICE CHANCELLOR OF
LINCOLN UNIVERSITY
Respondent

Member of Authority: Andrew Dallas

Representatives: Tim Twomey, counsel for the Applicant
Scott Wilson and Julia Hurren counsel for the
Respondents

Investigation meeting 30 and 31 July 2019

Submissions received 14 August for the Applicant, 28 August 2019 for the
Respondent with further information received up to and
including 4 December 2019

Determination: 25 August 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dr Steven Gibbs is a Senior Lecturer in Animal Science in the Department of Animal and Plant Sciences at Lincoln University (Lincoln), a position he has held since 2006. Prior to this, Dr Gibbs was as Post-Doctoral Fellow at Lincoln between 2004 and 2006. Dr Gibbs has also served as Lincoln's staff veterinarian. However, the employment relationship between Dr Gibbs and Lincoln has not been without its difficulties.¹

¹ *Gibbs v The Vice-Chancellor of Lincoln University* [2015] NZERA Christchurch 7 and *Gibbs v The Vice-Chancellor of Lincoln University* [2015] NZERA Christchurch 108

[2] Dr Gibbs' employment is regulated by the Lincoln University Academic Staff Collective Agreement (collective agreement).

[3] Dr Gibbs says as a result of an investigation into various performance and conduct matters commencing in late 2017, which included the removal of doctoral candidate supervision responsibilities (since rescinded), and culminating in an open-ended final written warning replete with a number of conditions, he has been, and is being, disadvantaged academically and professionally by Lincoln. Dr Gibbs seeks the removal of the warning and compensation for hurt, humiliation and injury to feelings in the amount of \$30,000.

[4] Lincoln strongly resists Dr Gibbs' claims and says its actions were open to a fair and reasonable employer following a comprehensive investigation into a series of concerns it held about his performance and conduct.

Issues

[5] The following issues were identified for investigation and determination:

- (i) Was Dr Gibbs subject to an unjustified action by Lincoln when it removed his supervisory capacity?;
- (ii) Was Dr Gibbs subject to an unjustified action by Lincoln through the imposition of a final written warning?;
- (iii) If Lincoln's actions were not justified should Dr Gibbs be awarded compensation under s 123(1)(c)(i) of the Act; and
- (iv) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[6] During the Authority's investigation meeting, I heard evidence from Dr Gibbs, Dr Terry Hughes, technical consultant, Nadessa Jayasinghe, doctoral candidate and Pezhman Roodposhti, doctoral candidate; and for Lincoln: Professor Grant Edwards, Professor Nicolas Dickinson and Tracey Nelson, the university's health, safety and compliance manager.

[7] Having regard to s 174E of the Employment Relations Act 2000 (the Act), I have not referred to all the evidence or other information provided to the Authority in this determination. However, I have carefully considered all material placed before the Authority. Further while I have also not referred to all submissions advanced by the representatives during my investigation, I record I have fully considered these.

[8] This determination is issued outside of the statutory three month timeframe provided by the Act. However, to the extent that exceptional circumstances are required to exist for this to be issued, these do exist. I apologise to the parties for the delay in issuing this determination.

What caused Dr Gibbs' employment relationship problem?

[9] By late 2017, Lincoln had formed the view that various concerns about Dr Gibbs' performance and conduct warranted investigation. Professor Edwards was appointed to carry out the investigation. During the investigation meeting an issue arose about Professor Edwards' appointment and whether this was in compliance with Lincoln's disciplinary policy and procedure. This is discussed further below.

Lincoln's allegations against Dr Gibbs

[10] On 5 December 2017, Professor Edwards wrote to Dr Gibbs and invited him to a disciplinary meeting. The allegations put to Dr Gibbs in the letter, in summary, were:

- (i) unsafe and unsecure management of veterinary drugs in Lincoln's "beef shed"; (allegation one)
- (ii) management of research animals (steers) resulting in a complaint by the SPCA – which was visiting Dr Gibbs at Lincoln for another private, purpose – and subsequent investigation by the Ministry of Primary Industries (MPI) (allegation two);
- (iii) student complaints about the non-delivery of lectures (allegation three);
- (iii) alleged misrepresentation of Lincoln's involvement in an independent external business relationship (allegation four);

- (v) failure as Veterinary Medicine Controller (VM Controller) to follow recording and auditing procedures for use of veterinary drugs as required by the Agricultural Compounds and Veterinary Medicine Act 1997 (allegation five);
- (vi) an Animal Ethics Committee (AEC) investigation after Dr Gibbs carried out “fistulation” procedures² on four steers before all the required approval steps had occurred (allegation six); and
- (vii) failure to complete an Ministry of Business, Innovation and Employment (MBIE) Project Report as requested by Lincoln which had the potential to require the university to repay research funding (allegation seven).

[11] The letter also advised Dr Gibbs that:

- a. he could bring a representative and/or support person to the meeting;
- b. due to the seriousness of the allegations suspension from the workplace while the investigation was being carried out was being considered; and,
- c. termination of his employment was a possible outcome of any disciplinary action.

[12] Lincoln said it provided Dr Gibbs was all relevant information. Dr Gibbs said he was devastated to be advised by Lincoln of the allegations.

Employment investigation

Suspension

[13] On 7 December 2017, a meeting was convened by Lincoln with Dr Gibbs and his representative to discuss the proposed suspension. On 8 December 2017, Dr Gibbs was suspended on pay by Lincoln.

² The creations of an “opening” in the side of a cow that allows researchers to access an animal's stomach via a cannula.

[14] Dr Gibbs alleged that Professor Edwards, who had previously been Head of the Department of Animal and Plant Sciences, and therefore his “line” manager, and subsequently Dean of Agricultural Life Science, of which the animal and plant sciences department was part, had “consistently displayed an overt and intense bias against [his] personal and professional reputation and advancement” throughout Professor Edwards’ tenure in both roles. Dr Gibbs would also allege that Professor Edwards had told the previous dean that he would resign from Lincoln if Dr Gibbs was reinstated by the Authority. This was denied by Professor Edwards.

[15] Dr Gibbs held firm to these allegations and they permeated through both Lincoln’s employment investigation and the subsequent investigation by the Authority.

[16] On 12 December 2017, Dr Gibbs lodged proceedings in the Authority in an attempt to overturn his suspension. Following discussion between the parties, it was agreed that the suspension would be lifted such that Dr Gibbs would be able to teach, supervise students with some restrictions and engage in some research activities. However, Dr Gibbs was prevented from undertaking veterinarian duties, handle or authorise the use of veterinary medicines and engage in research with animals including field and laboratory experimentation.

Meeting – 12 December 2017

[17] On 12 December 2017, Professor Edwards convened a disciplinary meeting with Dr Gibbs. Also in attendance were Dr Gibbs’ lawyers and two Lincoln employees supporting Professor Edwards’ investigation, Joe Tonner and Louisa Pilkington. The meeting was recorded and subsequently transcribed.

[18] Dr Gibbs responded to the various allegations put to him by Lincoln.

[19] In respect of allegation one, Dr Gibbs said the drugs found in the beef shed were contained in a “travel box” and were being stored appropriately.

[20] In respect of allegation two, Dr Gibbs contended that no animal welfare standards had been breached and the treatment in question was appropriate.

[21] In respect of allegation three, Dr Gibbs denied that he failed to deliver lectures. He said he was only delivering lectures to the course in the second half of the semester and that he had good engagement from the students. Dr Gibbs said he had been let down by another lecturer who turned up late for one lecture and failed to turn up at all for a further lecture. Lincoln said Dr Gibbs was, however, unable to explain why 27 students had signed a letter of complaint about his course delivery.

[22] In respect of allegation four, Dr Gibbs disputed the account given about the business relationship saying that it was a private arrangement and did not involve Lincoln.

[23] In respect of allegation five, Dr Gibbs said he had been responsible for tightening Lincoln's process and procedures around the recording and auditing of veterinarian drugs. Dr Gibbs confirmed that annual audits had been carried out, he had copies of these and that he had been requested to provide these by Ms Nelson. Dr Gibbs undertook to provide audit reports for 2014 onwards after the meeting.

[24] In respect of allegation six, Dr Gibbs accepted that he performed the fistulation surgical procedure before receiving formal AEC approval but said this was not deliberate, was due to an administrative oversight and that he had "verbal" approval to proceed. During the investigation meeting, Dr Gibbs gave evidence to the effect that the surgical procedure was painless, or relatively so, for the steers. This was rejected by Professor Edwards.

[25] In respect of allegation seven, Dr Gibbs suggested that the failure to provide the MBIE Project Report was occasioned by the default of other involved parties.

[26] Lincoln advised Dr Gibbs that a number of matters arising out of the meeting required further investigation and it was adjourned accordingly.

Events between meetings

[27] Lincoln's investigation was delayed by the Christmas/New Year holiday period. On 18 January 2018, Lincoln wrote to Dr Gibbs' lawyer requesting a copy of the register of veterinary drugs. This was not forthcoming.

[28] On 5 February 2018, Dr Gibbs provided a further response to Lincoln's allegations. The audit reports requested by Lincoln in December 2017 were also provided at this time. Despite a further request at or about this time, Dr Gibbs did not provide the register of veterinary drugs.

[29] Lincoln received further information requests from Dr Gibbs' lawyer during this period about several of the allegations. Requests were also made, and granted, to adjourn the next scheduled meeting between the parties. The meeting would ultimately take place on 9 March 2018.

[30] Lincoln then raised with Dr Gibbs concerns relating to his explanation about allegation one; concerns about the failure to provide the drugs register and requested and provided information about complaints received from two staff members about Dr Gibbs' behaviour towards them.

[31] On 7 March 2018, Dr Gibbs would also raise his concerns, and for the first time on Lincoln's account of the facts, about Professor Edwards' role as decision-maker. Dr Gibbs' in contrast would say he raised these concerns "all the way along".

[32] On 8 March 2018, Lincoln, through its lawyers, wrote to Dr Gibbs' lawyer and rejected his concerns about the impartiality of Professor Edwards. Lincoln declined Dr Gibbs' request to change decision-makers and noted that, despite the investigation commencing in December 2017, this was the first time the impartiality of Professor Edwards had been called into question.

Meeting on 9 March 2018

[33] On 9 March 2018, Professor Edwards convened a further meeting with Dr Gibbs. Attending with Dr Gibbs was his lawyer and Dr Hughes. The meeting was recorded by agreement and subsequently transcribed.

[34] Dr Gibbs provided extensive comment on the allegations. Lincoln said his response to a majority of the allegations were similar to the previous meeting.

[35] In respect of allegation six, Lincoln said Dr Gibbs conceded that there had been a breach in relation to the fistulation procedure but that it was not deliberate. Dr Gibbs maintain his position that he had verbal approval to proceed prior to a meeting of the AEC to formally approve same.

[36] Dr Gibbs also responded to the new allegations about his behaviour towards the two staff members. Dr Gibbs denied the claims made and stated that he had, in effect, maintained appropriate professional relationships with both (behavioural complaint).

[37] In respect of Lincoln's request to be provided with the controlled drugs register, Dr Gibbs advised that his was in the custody of his lawyer, he had to take legal advice about it and it would be provided "in due course". Dr Gibbs would ultimately provide the register to Lincoln around 23 March 2018 after being formally instructed by Professor Edwards to provide same by 14 March 2018.

[38] The meeting concluded with Lincoln indicating that it needed to carry out further investigation. One line of inquiry would relate to Dr Gibbs' claim in respect of allegation three that he had organised for another lecturer to teach his class. Lincoln said that lecturer advised he told Dr Gibbs he was unable to provide cover because he would be at a conference.

Removal of PhD supervision on interim basis

[39] Seemingly as a result of the restrictions placed on Dr Gibbs' ability to supervise his students, Lincoln received a number of complaints that the situation was having an adverse impact on their research. Lincoln appointed an independent investigator to examine the complaints from the students. However, the research students refused to engage with the appointed external investigator and a meeting convened between them, their lawyer and Lincoln failed to yield a positive outcome.

[40] Lincoln then proposed to remove Dr Gibbs from supervising all research students and replace him with other supervisors under powers it said were available to it. After giving Dr Gibbs an opportunity to comment; which he did and in opposition, he was removed as supervisor of the students with effect from 11 April 2018.

Further complaint

[41] At or about this time, a complaint was received by Lincoln from a person external to the university about alleged inappropriate behaviour by Dr Gibbs towards a Lincoln staff member. Dr Gibbs would suggest this complaint had been solicited by Lincoln; which it denied.

Disciplinary process

[42] On 9 April 2018, Lincoln wrote to Dr Gibbs setting out its view as to where its investigation of the various allegation had got to, information relevant to this and also raising several further allegations, which included:

- (i) his conduct in relation to the controlled drug register constituted wilful disobedience; and
- (ii) he had misled his employer in relation to his responses regarding allegation six,

[43] Dr Gibbs was requested to respond to the additional concerns as well as clarify other points of concern. A meeting was also scheduled for 29 May 2018.

[44] Prior to the meeting occurring, veterinary drugs and drug paraphernalia (needles and syringes) were found on the concrete floor of the beef shed by Lincoln's health and safety team.

[45] Professor Edwards raised this further concern with Dr Gibbs via letter dated 22 May 2018 and asked him to respond to same at the meeting scheduled for 29 May.

Meeting on 29 May 2018

[46] On 29 May 2018, a meeting was convened by Lincoln with Dr Gibbs which continue to address the initial suite of allegations and the further allegations including that about the veterinary drugs and drug paraphernalia recently found on the floor of the beef shed; in relation to which Dr Gibbs denied any wrongdoing.

[47] Dr Gibbs disputed an account given to Lincoln about his interaction with the AEC (allegation six). Dr Gibbs said he had been given verbal authority to proceed at the meeting. There was also discussion at the meeting about whether Dr Gibbs had been on campus on 14 March 2018 being the final day by which he could comply with Professor Edwards' instruction to provide the controlled drugs register. Ms Nelson, for her part, gave evidence to the Authority that she observed Dr Gibbs on campus on 14 March 2018.

[48] Following the meeting, Dr Gibbs, through his lawyer, provided additional responses to Lincoln's allegation. Statements in support of Dr Gibbs were also provided by a number of people around such things as Dr Gibbs' professionalism and treatment of female work colleagues.

Preliminary decision regarding disciplinary action

[49] Following the conclusion of Lincoln's investigation into the various allegations made about Dr Gibbs, Professor Edwards said he carefully considered the information before him and arrived at a preliminary decision.

[50] Professor Edwards concluded:

- (i) allegation one: Dr Gibbs failed to comply with Lincoln's policy and procedures in respect of allegation one and his explanation for the state of affairs was designed to "mislead" his employer;
- (ii) allegation two: no finding was to be made but it was noted that the matter was subject to a Veterinary Council investigation;
- (iii) allegation three: the situation was poorly managed by Dr Gibbs and not managed in a way that the university required. And, concerns continued to exist about the quality of supervision given to one student;
- (iv) allegation four: Dr Gibbs' approach this situation appeared to have been intended to reinforce the involvement of Lincoln and this had the potential of putting the university at risk;

- (v) allegation five: Lincoln held serious concerns about Dr Gibbs' conduct and his action and inactions around the Controlled Drug Register were serious and constituted wilful disobedience;
- (vi) allegation six: the AEC concluded that there had been "an unambiguous breach" of the Code of Ethical Conduct arising out the fistulation procedures carried out of the steers and that Dr Gibbs' explanation(s) for same were "misleading" and unacceptable conduct.
- (vii) allegation seven: it was of grave concern that Lincoln had failed to meet its research reporting requirements which possibly impacted on the university's reputation with, and on future research funding from, MBIE; and
- (viii) behavioural complaint: one of the two complaints from Dr Gibbs' co-workers was substantiated and his conduct towards that person was found to a breach of Lincoln's Code of Conduct, Ethical Behaviour Policy and Harassment Policy.

[51] Professor Edwards' ultimate conclusion was that Dr Gibbs actions, conduct and behaviours constituted serious misconduct warranting disciplinary action. Professor Edwards did not specify what disciplinary action was necessarily being considered but he did state that dismissal was open to him. Professor Edwards then offered Dr Gibbs a further opportunity to provide any further information that he thought Lincoln should be aware of before the decision about disciplinary action was made.

[52] In response to Professor Edwards' preliminary decision, Dr Gibbs and his lawyer sought a further meeting with Lincoln. This took place on 31 July 2018. During the meeting Dr Gibbs spoke to a prepared statement and subsequently provided a written statement. The fundamental thrust of Dr Gibbs in both the statement and the submission was that there was no basis to Lincoln's allegations or concerns about his conduct or performance.

Disciplinary action: final written warning

[53] Professor Edwards said that carefully considering the relevant information before him including the responses provided by Dr Gibbs and his lawyer he decided that an open-ended final written warning with conditions was the appropriate disciplinary action to take. Professor Edwards said, after considering Dr Gibbs' length of service and his role as an academic, he believed there was an ability to build the trust and confidence necessary for a productive and ongoing employment relationship. This outcome was communicated to Dr Gibbs by letter dated 20 August 2018.

[54] Professor Edwards said the conditions attaching to the final written warning, which would be reviewed 12 months hence, were instituted to ensure that Dr Gibbs comply with his employment agreement and Lincoln's policies and procedures. The conditions placed on the final written warning were for Dr Gibbs:

- (i) to report to the Dean of the Faculty of Agricultural and Life Sciences (AGLS) on a fortnightly basis until further notice;
- (ii) to ensure that all lectures, laboratories and examination processes are properly and effectively delivered;
- (iii) to develop and maintain constructive working relationships with colleagues reinforced by a requirement to attend external counselling;
- (iv) to have the Dean of AGLS approve any AEC applications before they are submitted;
- (v) comply with Lincoln's policies and procedures for the safe and secure management of veterinary medicines;
- (vi) to obtain the approval of the Dean of AGLS before entering into any commercial contracts with external parties;
- (vii) to obtain the approval of the Dean of AGLS before embarking on commercial activities which may be seen as relating to his role at Lincoln;
and
- (viii) Ensure that all of Lincoln's requirements in relation to research activities are met and complied with.

Subsequent events

Reinstatement as PhD supervisor

[55] Professor Edwards subsequently reviewed his decision to remove Dr Gibbs as a PhD supervisor and reinstated his right to do so.

Meetings with Dean of AGLS

[56] In his evidence, Professor Edwards said that in his (then) capacity as Dean of AGLS he began meeting with Dr Gibbs on a fortnightly basis. The evidence clearly demonstrated a dissatisfaction with the way Dr Gibbs approached the meetings, including attempting to re-litigate matters which led to him receiving a final written warning in the first place. Professor Edwards said he approached the meetings in a professional manner with a view to building a relationship with Dr Gibbs.

Personal grievance raised

[57] On 13 September 2018, Dr Gibbs, through his lawyer, raised a personal grievance claiming that the final written warning was not substantially justified and that Lincoln did not meet the standard of a fair and reasonable employer when it carried out its investigation. Dr Gibbs also alleged that due to Professor Edwards' relationship with him, Professor Edwards did not genuinely consider his explanations in relation to the allegations.

[58] Lincoln responded to Dr Gibbs letter through its own lawyers on 21 September 2018. Lincoln denied that Dr Gibbs had grounds for a personal grievance. Lincoln rejected both Dr Gibbs' criticisms of its investigation. Lincoln also rejected Dr Gibbs' assertions about Professor Edwards who it said approached the investigation in a fair and reasonable manner. Lincoln also observed that Professor Edwards believed he had grounds to summarily dismiss Dr Gibbs but decided not to do so.

[59] In his evidence, Professor Edwards further rejected any notion that he had “targeted” Dr Gibbs, was involved in earlier redundancy process for Dr Gibbs as alleged by him, or subjected him to disparate treatment. Professor Edwards also observed that Dr Gibbs made a number of sweeping allegations in his written evidence which lacked specificity, making them difficult to respond to. Dr Gibbs evidence on these issues was very forthright.

The Authority’s view of Dr Gibbs’ employment relationship problem

[60] As set out in paragraph [4] above there are two issues that fall to be decided by the Authority. In the event, that Dr Gibbs is successful with either or both, then a further issue is one of remedies. Before doing so, it is necessary to address the issue of the appointment by Lincoln of Professor Edwards as investigator into its concerns about Dr Gibbs.

Lincoln’s appointment of Professor Edwards as investigator

[61] As outline in paragraph [8] above, during the investigation meeting an issue an arose about whether the appointment of Professor Edwards as investigator by Lincoln was made in compliance with its disciplinary policy and procedure (policy) which appears to form part of the collective agreement.

[62] Clause 5 of the policy relevantly provides, among other things:

5. Responsibilities

....

- Normally the direct line manager of the employee will be responsible for conducting the disciplinary investigation.
- The Director of Human Resources may appoint a manager other than the direct line manager of the employee to conduct the investigation in circumstances where there may be a conflict of interest, or to protect the interests or privacy of individuals, or to ensure the reputation of the University is protected.

....

[63] At time of the commencement of the investigation in Dr Gibbs conduct, Associate Professor Graham Barrell was the Head of Department (HoD) for Department of Agricultural Sciences and, therefore, was Dr Gibbs “direct line manager”.

[64] At the end of the investigation meeting, the Authority requested that Lincoln's provide information about the appointment of Professor Edwards by the Director of Human Resources. Submissions were ultimately provided by Lincoln and Dr Gibbs was given an opportunity to respond to these.

[65] Lincoln said that while it was correct that Associate Professor Barrell was HoD at the relevant time, the position of HoD is a "temporary academic appointment" and Lincoln's normal practice is that line management responsibility lies with the Dean of AGLS. Lincoln conceded that the appointment of Professor Edwards as investigator was not made in writing by the Director of Human Resources.

[66] Dr Gibbs said that the Director of Human Resources has not provided any explanation as to why it was necessary to appoint Professor Edwards and Lincoln breached its policy as a result. Dr Gibbs said he was unfairly targeted by Professor Edwards, who was biased against him, and his appointment as investigator by Lincoln cannot be properly explained or justified.

[67] In response to this, Lincoln said the policy did not create a "mandatory" requirement for the direct line manager to conduct the investigation in all circumstances. Lincoln also said Professor Edwards did not appoint himself as investigator and that while his appointment was not recorded in writing by the Director of Human Resources, there was actually no requirement for it to be in writing.

[68] This matter was raised with Lincoln by the Authority and not by Dr Gibbs or his lawyer. Adherence by an employer to its own disciplinary policy is necessary for it to justify under s 103A of the Act any disciplinary outcome achieved under such a policy, However, the Court of Appeal has also said disciplinary processes by employers should not be subject to undue pedantic scrutiny.³

³ A Limited v H [2016] NZCA 419 (CA)

[69] The policy is clear on its face that the appointment of Professor Edwards need not be made in writing by the Director of Human Resources. Through the policy, Lincoln also reserved the right to appoint someone other than Dr Gibbs' line manager as investigator; as it did. Ideally it would have recorded this in writing and clearly articulated its reason or reasons under the policy for doing so. And, it would have been good human resources practice to do so. Ultimately, however, I find, other than a potential technical breach of the policy which was strongly contested by Lincoln, nothing turns on this issue.

Was Lincoln justified in removing Dr Gibbs' supervisory responsibilities on an interim basis?

[70] Lincoln said that Dr Gibbs was removed from supervisory responsibilities due to concerns and complaints received about the effect that the other agreed limitations had on his ability to conduct appropriate supervision.⁴

[71] Lincoln said before making the decision, it provided Dr Gibbs with an opportunity to comment, carefully considered the same, and also considered alternatives to suspension but concluded these were not viable. Lincoln claims the decision was open to a fair and reasonable employer at the time it was made and Dr Gibbs has now been fully reinstated to supervisory duties.

[72] Dr Gibbs said the actions of Lincoln here could not withstand objective analysis and were not open to it as a fair and reasonable employer. Dr Gibbs' said Professor Edwards effectively re-characterised his students' "plea" for him to be fully reinstated to his role, preferring to rely on the situation "more generally" and considering animal welfare and performance issues. Dr Gibbs said the impact on him and his PhD students was "calamitous".

[73] Having considered the evidence and the submissions of the parties, I find that Lincoln was justified in removing Dr Gibbs' supervisory responsibilities on an interim basis while it continued to investigate a number of concerns, including several presenting concerns, which had a direct bearing on his capacity to undertake such responsibilities.

⁴ See, paragraph [15]

[74] Lincoln's reinstatement of Dr Gibbs to supervisory responsibilities even after making a finding of serious misconduct against him was both to its credit and plainly beneficial to both Dr Gibbs and his research students.

[75] However, Lincoln's actions here affected, for a time at least, Dr Gibbs' research students. Lincoln was under an obligation to ensure they could be effectively supervised by Dr Gibbs. Whether allowing the supervision to continue or preventing it from doing so, Lincoln was required to assume the risk. Lincoln did attempt to mitigate the effect on the research student by undertaking an independent inquiry. It is not entirely clear why Dr Gibbs was unwilling or unable participate in this process.

Final written warning with conditions

[76] During the investigation meeting. Dr Gibbs relied on all previous submissions and representations made during Professor Edward's investigation. The crux of Dr Gibbs' case before the Authority was that (a) none of the allegations levelled at him by Lincoln constituted "serious misconduct" (including seemingly because they were not specifically listed as example of serious misconduct in Lincoln's disciplinary policy) and (b) Professor Edwards was significantly biased against him, did not undertake a fair and reasonable investigation and pre-determined the outcome.

[77] Dr Gibbs said there was no deliberate, intentional or repeated conduct. At most, it was submitted, Dr Gibbs' was found to be "negligent" by an independent investigation undertaken by the AEC for failure to provide a signature on the biometrics certificate to the AEC (allegation six). As to the balance of the allegations these were effectively cast as makeweights: either overblown by Professor Edwards for his own ulterior purposes or, when viewed in context, explicable in favour of Dr Gibbs.

[78] Lincoln said it complied with its statutory obligations set out in s 103A of Act in investigating Dr Gibbs' alleged misconduct. Lincoln said a lot of Dr Gibbs' evidence made a number of objectively unsupported and broad statements, assertions, allegations and comments. It said much of this evidence was irrelevant to the matters to be decided by the Authority. Lincoln denied bias or predetermined on the part of Professor Edwards and strongly defended the integrity of its investigation.

[79] Even on Dr Gibbs' "at most" case, where negligence was conceded, a finding of serious misconduct was open to Lincoln in respect of allegation six. During the investigation meeting, Dr Gibbs gave evidence to the effect that the surgical procedure carried out on the steers was straightforward and effectively painless, or relatively so.

[80] This characterisation was rejected by Professor Edwards who said the surgical procedure was not straightforward and that specific training was required. Professor Edwards also said that the requirement for a signature on the biometric certificate was part of a compliance requirement in and around animal health and wellbeing and the surgical procedure was not carried out with AEC approval as a result.

[81] I accept Professor Edwards' evidence here. I also accept that it was open for Lincoln to conclude these actions and inactions by Dr Gibb amounted to serious misconduct including in circumstances where it was not specifically listed an example of serious misconduct in Lincoln's disciplinary policy.

[82] Additionally, even if Dr Gibbs' explanations were accepted by the Authority for the remaining allegations substantiated by Professor Edwards, I separately, and additionally find, that it was reasonably open to Lincoln to conclude that Dr Gibbs's conduct in relation to allegation five was also serious misconduct. Dr Gibbs's actions and/or inactions around the provision of the Controlled Drug Register meant it was reasonable for Lincoln, having investigated the same, to conclude these constituted wilful disobedience. Dr Gibbs simply had no plausible explanation for his conduct here.

[83] Ultimately, insofar as two of the substantiated allegations – indeed, the most serious ones – is concerned Lincoln was on solid ground in finding serious misconduct against Dr Gibbs. Having done so, the door was open for it to consider and impose disciplinary action. Even if the balance of the allegations were set aside by the Authority as being unavailable to Lincoln, and I find, for completeness, having carefully considered the same, they were available, there would be no salvation for Dr Gibbs given the findings in respect of allegations five and six.

Duration of the warning

[84] While I have found that Lincoln were justified in giving Dr Gibbs' a final written warning, its apparent open ended nature is potentially cause for concern. I raised this with the parties during my investigation and encouraged the parties to specifically address this in their submissions. Both have done so.

[85] Lincoln submitted that the purpose of a warning is to give an employee an opportunity to improve or otherwise allay an employer's concerns. Lincoln said it carried out a full and fair investigation and included conditions with the warning to assist Dr Gibbs' address concerns about his conduct, actions and behaviour. It also asserted that Dr Gibbs' personal grievance only related to the issuing of the warning itself and not the length thereof. Lincoln placed some store in the fact that while open-ended, the warning was subject to a review after 12 months.

[86] Lincoln said there were no set rules for the duration of written warnings and its policies and procedures and Dr Gibbs' employment agreement were silent on the issue. Lincoln submitted that in the absence of a policy requiring a fixed duration, a warning would remain current.

[87] Lincoln cited several decisions which it said supported its position. First, *Northern Clerical etc. Union v GNB New Zealand Limited*⁵, where the court held that for a warning to effective, the parties must allow sufficient time for it operate. Second, *Robertson v Honda Cars New Zealand Limited*⁶ where the Employment Tribunal found that a period of 12 months was not an "unduly lengthy period to reflect back on".⁷ Third, Lincoln referred to the court's decision in *Hayne, Vice Chancellor of Otago University v ASG*⁸ where a full court held that the imposition of a final written warning without specified duration could be justified under s 103A of the Act. However, the court went on to observe that a warning should not be open-ended and should lapse through the passage of time.⁹ The court also observed in that case that the warning's effect on the employment reduced over time.¹⁰

⁵ [1991] 1 ERNZ 1125

⁶ [1991] 3 ERNZ 451

⁷ At 455.

⁸ [2014] NZEmpC 208

⁹ At [61]

¹⁰ At [27]. See also, *Hayashi v SkyCity Management Limited* [2018] NZEmpC 14 at [78]

[88] As previously stated, Dr Gibbs sought the removal of the warning *in toto* and, indeed, this was his primary position. However, he also referred to *Hayne* and submitted this was authority for the proposition that a written warning should not be open-ended and should lapse through effluxion of time.¹¹

[89] Dr Gibbs also said he suffered significant disadvantage as a result of his employment being under scrutiny as a result of the conditions Lincoln attached to the warning.

[90] While Lincoln said that the findings of its investigation justified the summary dismissal of Dr Gibbs, it refrained from this course and imposed an open ended final written warning with conditions. On one view, this decision casts Lincoln in a very favourable light. A more jaundiced view might suggest this decision was tempered with an appreciation that Dr Gibbs had already been reinstated by the Authority to Lincoln and the decision to walk back from his dismissal was one cloaked in pragmatism.¹²

[91] Regardless of the ultimate reason or reasons for Lincoln's final decision about the level of disciplinary action to be taken against Dr Gibbs, he was not dismissed in circumstances where he had been found to have seriously misconducted himself. It ought to be of some comfort to Dr Gibbs that the curtain was not drawn on his academic career at Lincoln, and perhaps, more widely. Further, applying *Hayne*, Dr Gibbs may also be comforted by the very real likelihood that the potency of warning has been significantly reduced with the passage of time.

[92] Again, given the passage of time I think it would be reasonable and appropriate for Lincoln to review the remaining conditions attached to the warning to determine their ongoing relevance or currency. For example, several appear to merely reinforce existing policies and procedures and Dr Gibbs employment agreement. It is also important that Dr Gibbs employment is not subject to unreasonable and undue scrutiny by Lincoln which may give rise to further disputation between the parties. No doubt Lincoln is also cognisant of Dr Gibbs' academic freedom within recognised ethical boundaries,

¹¹ Above n 7

¹² Above n 1

[93] Given this is an ongoing employment relationship, it may be worthwhile for the parties to consider attending mediation to discuss these matters further. The Authority would be content to facilitate such a referral if one was sought by either or both parties.

Costs

[94] Costs are reserved. However, again recognising this is an ongoing employment relationship, this may be a matter where costs should lie where they fall.

[95] If Lincoln does decide to seek costs from Dr Gibbs it should apply to the Authority for timetable directions for an exchange of costs memoranda within 21 days of the date of this determination.

Andrew Dallas
Chief of the Employment Relations Authority