

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 524
3148584

BETWEEN

DAVID COXHEAD
Applicant

AND

EASTERN INSTITUTE OF
TECHNOLOGY LIMITED
Respondent

Member of Authority: Claire English

Representatives: Alex Kersjes, advocate for the Applicant
Hamish Kynaston and Jessica Taylor, counsel for the
Respondent

Investigation Meeting: 14 September 2022 at Napier

Submissions received: 14 September and 22 September 2022 from Applicant
14 September, 19 September, and 5 October 2022 from
Respondent

Determination: 11 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant was employed as a tutor by the respondent. His employment came to an end following complaints about his use of language, and the applicant forgetting to attend a night class.

[2] The applicant states that his actions were not sufficiently serious to justify either the resulting suspension or his dismissal. He raises claims of unjustifiable disadvantage

in relation to his suspension, and unjustified dismissal. He seeks remedies of lost wages, and compensation for hurt and humiliation.

[3] The respondent denies the claims. It says that its actions were justified, because the applicant was in breach of the respondent's codes of conduct, and also its reasonable expectations of professional conduct in the workplace. In respect of the claim of unjustified disadvantage relating to the applicant's suspension, it states that this was raised for the first time in the statement of problem, and is therefore out of time.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from the applicant, and his support person Mr Mike Dyer, as well as from Mr Frederick Koenders, who was the decision-maker for the respondent. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received.

The issues

- [6] The issues requiring investigation and determination were:
- (a) Is the applicant within time to raise a claim of unjustified disadvantage regarding his suspension? And if so, is this claim made out?
 - (b) Was the applicant unjustifiably dismissed?
 - (c) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act
 - (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to grievance?
 - (e) Should either party contribute to the costs of representation of the other party.

Background

[7] The applicant, Mr David Coxhead, was employed by the respondent (EIT) as a plumbing tutor, as he has significant experience in the plumbing industry.

[8] He began working as a tutor for EIT on 18 May 2020. His role was focused on teaching plumbing apprentices at Level 3 and Level 4. Part of this work required the teaching of “block courses”, which are specific periods of intensive course-work completed by the apprentices, involving both theory and practical work. These were funded by the Industry Training Organisation (ITO), and ITO provides the specific curriculum, and sets minimum hours for the teaching of their block courses.

[9] Mr Coxhead was also responsible for other general teaching duties, including lesson planning, student assessments, marking, and pastoral care and support.

[10] On Wednesday 7 October 2020, Mr Coxhead was teaching a block course. He explained that he had been teaching a “practical”, and that at about 3.15 pm, the students had completed this. He allowed them to leave early.

[11] He then left work. He ended up at a nearby pub. He found some of the older students already there, and he sat with them and had two beers, before continuing on home at around 5pm.

[12] He was then invited to a disciplinary meeting by Mr Koenders. There were two concerns: first, that he had finished teaching and allowed the students to finish class, at 3.15 pm rather than the required 4.00 pm. Second, that he had been seen drinking in a pub with students, which EIT viewed as unprofessional behaviour.

[13] At the investigation meeting, Mr Koenders made it clear that the requirement for Mr Coxhead to teach from 8.00 am to 4.00 pm was a requirement of the block course, as ITO, which required minimum teaching hours for their courses. While teaching a block course, Mr Coxhead was required to ensure that he provided active teaching time to the students from 8.00 am until 4.00 pm, and that even if the students had finished the “practical” component scheduled for that day, there was an expectation from both EIT and ITO that the remaining time for that day would be filled with other teaching and learning activities.

[14] In contrast, Mr Coxhead's response was that he had finished early at 3.15 pm on that day, because the practical course work was completed early. He emphasised that finishing early was common practice, and the other plumbing tutors would often finish and leave at 2 or 3 pm, especially on Fridays.

[15] Mr Koenders accepted that this might well be the case, as EIT required its tutors to work a minimum of 36 hours per week, and these hours may well have been reached by a Friday afternoon, particularly if a tutor had been working long hours marking, teaching night classes, or teaching a block course, earlier in the week. He said that he would have no concerns if a tutor left early on a Friday, and indeed, he would expect this if they had already achieved the required 36 hours work. In saying this, Mr Koenders also explained that this was not the expectation when a tutor was teaching a block course, which was to be taught for the hours of 8.00 am to 4.00 pm, for the duration of that specific course.

[16] Mr Coxhead drew no distinction between the hours requirements for teaching a block course, and otherwise. Rather, his view was that he had observed other plumbing tutors leaving early, particularly on Fridays, and did not understand why he was being criticised for doing the same thing.

[17] In respect of the concern around drinking with the students, Mr Coxhead explained to Mr Koenders that, at the time, he was not aware that it was against EIT's code of conduct. The meeting notes suggest that Mr Coxhead's view was because this occurred off campus and after work hours. The meeting notes, which were confirmed by Mr Coxhead at the time, record that Mr Coxhead, after having the code of conduct explained to him, accepted that this was wrong, and apologised to his manager about this.

[18] Mr Koenders issued Mr Coxhead with a written warning about these two matters. He explained that he did so because he felt at the time that these were matters which could be rectified by Mr Coxhead going forwards, and he had every hope and expectation that Mr Coxhead would act professionally in the future. He also said that he had chosen to issue a written warning because he was concerned that Mr Coxhead had not fully appreciated the seriousness of his conduct, and he (Mr Koenders) wanted to emphasise the seriousness of EIT's expectations to Mr Coxhead.

[19] The written warning was dated 30 October 2020, however, Mr Koenders recalls that he handed the written warning to Mr Coxhead directly on 5 November 2020.

[20] On 6 November 2020, Mr Koenders received a complaint about Mr Coxhead from one of Mr Coxhead's fellow tutors, that on 28 October 2020, Mr Coxhead had not arrived to teach a night class that he had agreed to teach.

[21] On 10 November 2020, Mr Koenders received another complaint about Mr Coxhead, from an apprentice who stated that over the course of a week-long block class "my peers and I were continuously verbally abused", that "profanity was often extreme" and that "many people in the class were told they would never become qualified tradesmen, were told they were idiots and losers", and telling one apprentice in particular he "was a bum". The complaint said "The learning environment that Dave creates is not one that I want to be in ever again".

[22] Also on 10 November 2020, Mr Koenders received an email from a local company Devine Plumbing, which said:

We no longer want any of our apprentices attending trade school if David is the tutor, his level of professionalism is no existent he is derogative, aggressive and his language is absolutely shocking [sic]. Two of my boys returned back to work on Monday shocked at there experience last week and had zero good things to say about there week of learning [sic].

We have 5 apprentices that attend eit currently with a further 2 going to start in the New Year at this stage none of them feel comfortable returning to Daveys class [sic].

I am well aware we are not the only company that is unhappy with how there staff are being treated, this is an issue that needs to be resolved asap.

[23] On 10 November 2020, Mr Koenders wrote again to Mr Coxhead, setting out the two new concerns, being first the apparent failure to teach a night class, and second, the use of "foul language directed at students". The letter went on to refer to comments on a student evaluation completed on this block course that raised similar concerns.

[24] The letter proposed suspension, on pay, and invited feedback on the proposed suspension by 11 November.

[25] It also invited Mr Coxhead to a meeting to discuss, advising that his “behaviour could be considered serious misconduct and justify termination with or without notice. I note that you are already on a first written warning.”

[26] On 11 November 2020, Mr Coxhead emailed Mr Koenders, stating he “did not agree with these allegations”, and “I will defend my self and bring along a support person / witness” to the scheduled meeting. Mr Coxhead made no comment on the proposed suspension.

[27] Mr Koenders suspended Mr Coxhead on pay.

[28] On 12 November 2020, Mr Coxhead and his support person met with Mr Koenders. I was provided with the notes from this meeting, that were confirmed by Mr Coxhead at the time.

[29] On the allegation that he had failed to turn up to teach a night class as agreed, Mr Coxhead explained that he simply forgot, as there was no schedule, and he had an appointment about his health. He also said that this class was voluntary. He did agree that he had verbally agreed with the other tutors that he would teach that particular class, but forgot.

[30] Mr Koenders pointed out that the class was taught every Wednesday at the same time and place, so in his view, there was a schedule for this class. He was also of the view that all tutors were required to share the teaching of this class between them, so it was not “voluntary”, and in any case, Mr Coxhead had agreed to teach the night class on that particular week.

[31] There was significant discussion about the second allegation about the use of foul language to students. Mr Coxhead confirmed to Mr Koenders that he had called one student ‘a bum’ and “an effing idiot”. He said to Mr Koenders that he “knew how to deal with these ratbags”, and that he did say to one student that he would never become a tradesman with that attitude. Mr Coxhead said that there were two boys in particular in that class that were causing problems, which led to this incident.

[32] In relation to the student evaluation survey results, which indicated that Mr Coxhead had sworn and “spoken disrespectfully” to students and “verbally abuses us”, Mr Coxhead said that “student[s] can say what they like on survey monkey”. Mr

Coxhead also said he hadn't seen the evaluation results, which had been sent to him by email, but he had not opened the email.

[33] The meeting ended with Mr Coxhead commenting that "it seems quite clear and we have spoken at lengths".

[34] On 18 November 2020, Mr Koenders wrote to Mr Coxhead with his preliminary decision. The letter records that Mr Coxhead did not deny that he had agreed to take the night class, and that Mr Koenders considered that his explanation that he forgot because he had a private appointment was not acceptable. The letter also noted that "you admitted the use of derogatory, foul and profane language with students".

[35] The preliminary decision was that the behaviour was serious misconduct in breach of EIT's code of conduct. In addition, Mr Koenders noted that he had taken into account that Mr Coxhead was "already on a written warning for breach of two of the Code of Conduct principles". Termination with immediate effect was proposed.

[36] On 20 November 2020, Mr Coxhead wrote to Mr Koenders saying: "It appears that I am being singled out and that Chris and Johnny can make the same supposed breaches, and not be pulled up for these." He then asked to receive his termination letter by both email and post.

[37] On the same day, Mr Koenders wrote back, terminating Mr Coxhead's employment with immediate effect.

Findings

[38] I will first deal with the claim of unjustifiable disadvantage in relation to Mr Coxhead's suspension. Mr Coxhead was suspended on 11 November 2020. This claim was first made in the statement of problem, dated 16 August 2021, and is therefore out of time. I note that even if this claim had been raised within time, the contemporaneous correspondence from Mr Coxhead did not raise any objection to the proposed suspension. Accordingly, this claim is dismissed.

[39] I now turn to consider the claim of unjustified dismissal. Mr Coxhead was summarily dismissed for serious misconduct on 20 November 2020, following a written warning given to him on 5 November 2020.

[40] I must consider whether EIT's actions, and how EIT acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. In applying this test, I must consider whether:

- a. EIT sufficiently investigated the allegations against Mr Coxhead before dismissing or taking action against him; and
- b. EIT raised the concerns that it had with Mr Coxhead before dismissing or taking action against him; and
- c. EIT gave Mr Coxhead a reasonable opportunity to respond to its concerns before dismissing him; and
- d. EIT genuinely considered Mr Coxhead's explanations in relation to the allegations against him before him; and
- e. any other factors I think appropriate.

[41] The first question is whether EIT sufficiently investigated the allegations. The allegations may be summarised as follows:

- a. First, the allegations that Mr Coxhead left class/ceased teaching early; and that Mr Coxhead was engaging inappropriately with students by drinking at a pub with some students. These were the two events that lead to the issuing of the written warning.
- b. Second, the allegations that Mr Coxhead failed to teach a night class; and that he was engaging inappropriately with students by swearing and using derogatory language. These were the two events that lead to dismissal.

[42] I find that EIT did sufficiently investigate these allegations. These allegations were not complex. They were specific instances, on specific dates, that were put to Mr Coxhead in concrete terms for his comment. Mr Coxhead recognised and understood the alleged events, and was able to respond substantively to them.

[43] The next question is whether EIT properly raised the concerns it had with Mr Coxhead, before taking action. The letters sent by Mr Koenders to Mr Coxhead set out the concerns that EIT had. In those letters, Mr Koenders did more than simply repeat the alleged events. He linked those events to the relevant codes of conduct, attempting to explain the depth of his and EIT's concerns. In relation to the second set of allegations, Mr Koenders further explained he was concerned about the impact on EIT's reputation with the plumbing industry, and with one of EIT's funders, Skills ITO.

[44] EIT gave Mr Coxhead a reasonable opportunity to respond to its concerns. In both instances, Mr Koenders met with Mr Coxhead in person, and encouraged him to bring a support person, which Mr Coxhead did. Notes were taken and emailed out after these meetings. Mr Coxhead was asked to confirm the accuracy of the notes, which he did by email.

[45] These meeting notes show that Mr Coxhead did not deny that any of the alleged events occurred, and made an effort to engage with Mr Koenders about these issues. In relation to the allegation that he had stopped teaching early at 3.15 pm instead of the scheduled 4.00 pm finish time, he explained that this was because the students had finished the work planned for that day, and he did not understand this to be problematic.

[46] In relation to the allegation that he went drinking with some students off campus, he did not deny this and said instead that he had not thought it of much moment at the time, but now that EIT's expectations on such matters had been brought to his attention, he accepted that he should not have done it. In relation to the allegation that he missed a night class, he admitted this, saying that he forgot, and that it was a voluntary and/or non-scheduled class. In relation to the allegations that he had used "foul language" towards students, he admitted to using a variety of different words including calling a student an "effing idiot¹" and saying words to the effect that he would end up as a "bum".

[47] These were his explanations given to Mr Koenders at the time, and to the extent that Mr Coxhead's explanations were different at the investigation meeting, I discount them. EIT can only be expected to make its decisions on what was known to it at the

¹ This phrase is recorded in the contemporaneous meeting notes.

time. It is relevant that Mr Coxhead admitted all the allegations, and there was no particular dispute as to the facts.

[48] I must also consider whether EIT genuinely considered the explanations that Mr Coxhead gave. In this respect, Mr Coxhead continued to feel aggrieved that he had been subject to sanction in relation to ending class early, whereas in his view, the other plumbing tutors would often leave early in the afternoons, and especially on Fridays.

[49] At the investigation meeting, Mr Koenders made a distinction between working hours in a normal week, which in his view were 36 hours per week, and staff were free to leave if they had met these hours, and working hours during a “block course” which in his view were mandatory from 8.00 am to 4.00 pm for the duration of that course. In contrast, Mr Coxhead made no distinction between expectations for a normal week and expectations while teaching a block course.

[50] In my view, Mr Coxhead did not properly understand that there were different expectations around the strictness of work hours depending on whether the tutor was teaching a block course, or otherwise. This contributed to his view that the two instances of non-teaching (that is, ending class 45 minutes early, and missing a night class) were not as important as Mr Koenders found them to be. The evidence suggests that this potential difference in understanding was not fully discussed, leading to the possibility that Mr Coxhead and Mr Koenders were “talking past each other” on this point. However, the essential allegation of ending a specific class 45 minutes early was not disputed. In addition, Mr Coxhead was not dismissed for this incident, and he raised no claims regarding the written warning that resulted.

[51] I also consider that the situation with regard to the allegations around Mr Coxhead’s use of “foul language” towards and in front of students is clear. Mr Coxhead admitted at the time, that he had used strong language with students, including the phrase “effing idiot²”, and admitted to telling a student he would be a loser and would not succeed.

[52] Mr Coxhead went further than this at the investigation meeting and gave evidence that he had spoken to a student in terms robust enough to make that student cry. Mr Coxhead explained this by saying that strong language is a feature of the

² At the investigation meeting, Mr Coxhead recollected that the word he used was “frickin”. I do not find this difference to be material.

plumbing workforce, and that this was nothing more than the students could expect to be exposed to when they began work. Mr Koenders by contrast, saw it as vital that students were treated with respect, and was also concerned about the prospect that EIT's public reputation might be tarnished.

[53] This was a reasonable stance for Mr Koenders to take, including in light of complaints from two employers, and the student evaluation forms which consistently reported that Mr Coxhead had used both strong language, and had spoken in ways which the students themselves described as abusive and disrespectful³.

[54] Mr Koenders also explained that one of the reasons he decided that termination of Mr Coxhead's employment was necessary (as opposed to some lesser sanction) was, in his view, a lack of indication that Mr Coxhead would change. Rather it appeared to Mr Koenders that Mr Coxhead expected others to change for him.

[55] The key question in this matter is whether dismissal was an action that a fair and reasonable employer could have taken at the relevant time. The answer, in all the circumstances I have set out above, must be "yes". Use of foul and/or abusive language can constitute behaviour that justifies dismissal. The nature of the work environment and the respective positions of the parties will be relevant factors⁴. In this instance, Mr Coxhead was a tutor, exercising a position of power and influence over the students he was employed to teach, and the language that he used was towards those students.

[56] I find that it was not just the use of swear words that was important here, but rather, that Mr Coxhead's language towards students was harsh, disrespectful, and did not fit with Mr Coxhead's duties of teaching, mentoring and supporting students in their learning. In addition, Mr Coxhead's use of language did cause harm to EIT's reputation among employers of students in Mr Coxhead's class, as shown by the two complaints received by EIT. There was no dispute as to the types of words Mr Coxhead used, and Mr Koenders undertook a procedurally fair process in checking with Mr Coxhead as to what had happened, before reaching the decision that Mr Coxhead's employment could not continue.

³ Student evaluation forms, 4M6 Plumbing Block Course November 2020, on page 3.

⁴ *Canterbury Boilermakers etc IUOW v Canterbury Steel Fabricators Ltd* [1985] ACJ 422; *Prebble v Coastline FM Ltd* [1992] 1 ERNZ 52 (EmpT).

[57] I also find that Mr Koenders was entitled to take into account his concerns about Mr Coxhead's future conduct, and the prospect that Mr Coxhead might not modify his behaviour in the future⁵.

[58] At the investigation meeting, it came to light that there were multiple student surveys commenting on Mr Coxhead's teaching, as there was a student survey taken for each of the several block courses Mr Coxhead had taught. Mr Koenders indicated that these other surveys, which had not been put to Mr Coxhead, also supported his view that Mr Coxhead regularly used "profane" language. It is submitted for Mr Coxhead that this renders the resulting dismissal unjustified, as this was not disclosed at the time.

[59] I note that the letter dated 18 November 2020, setting out a preliminary view that dismissal would be appropriate, does state "Further, there is part of pattern behaviour", but it does so with direct reference to the student survey and student comments for the particular block course in question. These were what was discussed at the meeting on 12 November 2020. The contemporaneous documents and notes make it clear that the student survey discussed was the survey for the block course in question. This survey, and the two complaints, were discussed in detail, and I have found that there was no unfairness to Mr Coxhead in this process, given the specificity of the allegations and the lack of dispute between the parties as to what had happened (as opposed to a dispute about the seriousness and weight to be given to those events).

[60] In considering both Mr Koenders' evidence at the investigation meeting, and the contemporaneous documentation, I am of the view that, on balance, Mr Koenders did not in fact take into account other student surveys that he did not put to Mr Coxhead. Rather, his letter of 18 November 2020 sets out his views at the time and his reasons for them. In that letter, he refers to his findings of "pattern behaviour" and "widespread use of foul and profane language", which findings he explains he has based on the two complaints, the student survey for the relevant block course, and Mr Coxhead's own explanations at the meeting on 12 November 2020. Mr Koender's reference to patterns of behaviour and widespread (or repeated) use of what EIT considered unacceptable language, was consistent with what was discussed in the meeting on 12 November 2020

⁵ *Coffey v Christchurch Press* [2008] ERNZ 385.

and were reflected in language used by him in the letter of 18 November 2020, rather than new or additional matters of concern⁶.

[61] I find that Mr Coxhead's dismissal was a decision that EIT, as a fair and reasonable employer, could have reached in all the circumstances at the time.

[62] It follows that Mr Coxhead's claims are dismissed.

Costs

[63] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[64] If they are not able to do so and an Authority determination on costs is needed the respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[65] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁷

Claire English
Member of the Employment Relations Authority

⁶ An employer has a duty only to carry out inquiries to a reasonable extent in all the circumstances of the case, see *Man O'War Farm v Bree*, 1 ERNZ 83.

⁷ Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>