

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 185A/09
5153623

BETWEEN BRENDAN BURNS
 Applicant

AND MEDIA DESIGN SCHOOL
 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: K Nicolson, Counsel for Applicant
 S Langton, Counsel for Respondent

Investigation Meeting: 3rd, 4th and 5th August 2009 at Auckland

Submissions received: 27 August and 21 September 2009 from Respondent
 11 September from Applicant

Determination: 2 November 2009

DETERMINATION OF THE AUTHORITY

The Claims

- [1] In an amended statement of problem dated 31st March 2009, the applicant, Mr Brendan Burns, claims that on 25th March 2009, he was unjustifiably dismissed from his employment with the respondent. Mr Burns also pursues further claims relating to various actions by the respondent which, he alleges, occurred prior to his dismissal. They are:
- (a) That his employment was affected to his disadvantage by an unjustified action by his employer;
 - (b) That there was a breach of his employment contract;
 - (c) That there was a breach of s.4 of the Employment Relations Act 2000 (“the Act”); and

- (d) That the suspension of his employment, effective from 27th February 2009, was unjustified.

The applicant asks the Authority to uphold his claims and award him various remedies pursuant to the respective provisions of the Act.

- [2] For completeness, I record that the applicant has withdrawn his claim of breach of privacy (the Authority does not have jurisdiction) and that he no longer seeks the remedy of reinstatement to his previous position.

The Response

- [3] The respondent, Media Design School Limited (“MDS”/“the School”) denies all of the claims advanced by the applicant and pursues various counterclaims against him based on alleged breaches by Mr Burns of various terms and conditions of his employment agreement and breaches of s.4 of the Act. The respondent claims that it has incurred certain expenses (damages) due to the actions of the applicant and seeks recovery orders accordingly.

Background Facts and Evidence

- [4] The parties have provided the Authority with a plethora of background evidence, all of which has been considered. It is not possible (or required¹) to summarise the totality of the evidence but I have set out below the evidence pertaining to the key events which led to the dismissal of Mr Burns.
- [5] Mr Burns commenced his employment at MDS in February 2006. He has an honours degree in Applied Computer Science and a Masters of Science in Computing and Design. Mr Burns was recruited from Ireland, initially to teach the Diploma of Interactive Gaming (“IG”), an NZQA level 6 course.
- [6] The Chief Executive Officer of MDS is Ms Elizabeth Valintine. She opened MDS in 1999. Mr Paul Millett is the General Manager of MDS. He was appointed to his position in January 2008.

¹ Section 174 (b) Employment Relations Act 2000

- [7] Mr Burns was initially employed as a tutor then promoted to Senior Tutor in March 2006. This appears to have come about due to the sudden departure of the incumbent Senior Tutor, Mr Ben John, after about two months in employment. It appears to be generally accepted that MDS was satisfied with the work which Mr Burns was doing as in 2007, he was promoted from Senior Tutor to Course Leader. In December 2008, Mr Burns, along with two other MDS staff, was promoted to the role of Faculty Director. Mr Burns received a \$15,000 increase in salary then and he became part of the MDS management team. There is an issue about whether Mr Burns still held the role of Faculty Director at the time of his dismissal. This will be discussed later in this determination.
- [8] During the material times relating to his claims, Mr Burns supervised three other staff; Mr Steffan Hooper, Mr Kyle Thompson and Mr Darius Molloy.
- [9] While Mr Burns was initially employed to teach the Diploma of Interactive Gaming (“IG”), upon the unexpected departure of Mr John, MDS was left with two groups of Game Development Diploma (“GD”) graduate students which required teaching and production mentoring. Mr Burns says that he reluctantly took over these duties in addition to his IG course responsibilities. It appears he received some assistance from Mr Molloy and Mr Frank Borkin for a relatively short period of time. Mr Burns says that having taken on the GD students he found that there was a lack of existing teaching material. Apparently, Mr John had discovered the same problem when he arrived at MDS, having succeeded Mr Lorin Jameson, who had left after being employed at MDS for less than a year. The evidence is that until Mr Burns arrived, MDS had a high turnover of GD senior tutors whom appear to have left little in regard to teaching materials for the course.
- [10] Mr Hooper says that in October 2006, he was employed to teach the IG course allowing Mr Burns to work solely on the 64 week duration, NZQA level 7, GD course. The evidence of Ms Valentine is that Mr Hooper was employed in July 2006 and therefore Mr Burns had approximately 2 years and 8 months to focus on the developing the GD course (from July 2006 to February 2009). Given the evidence of Mr Hooper, it was probably a few months less than that.

But either way, it seems that Mr Burns had more than two years to concentrate on developing the course.

- [11] Despite some initial difficulties, it appears that Mr Burns achieved some success with the development of the GD curriculum, as in 2007, five out of six students received job offers prior to graduation. Furthermore, Mr Burns had been promoted and had the respect of management and most of his peers, along with apparently being held in high regard by industry players, as recorded in the evidence of Mr David Jefferies, Director, Mere Mortals Asia Pacific, and Mr Kingi Gilbert, Director, Ignite Studios.

The Turn of Events 2008/2009

- [12] A number of events occurred within the space of a year culminating in the dismissal of Mr Burns on 25th March 2009. It would seem that the first of these events was in February 2008, when a total of nine programming students commenced their study on the GD course, eight of whom had completed the undergraduate IG course taught by Mr Hooper. The previous year Mr Burns had only two graduate students from the IG course. It is the evidence of Mr Hooper that his previous students began to raise concerns with him about the GD course. In particular, that they were not being taught any advanced gaming and that the GD course was not, as anticipated, a step up from the IG course they had just completed. Mr Hooper also related problems which arose when Mr Burns taught the IG students while Mr Hooper was absent for various reasons. The evidence of Mr Millett is that up until August 2008, the Gaming Department appeared to run effectively under the leadership of Mr Burns, including the team socialising regularly out of work hours.
- [13] However, around about April/May 2008, some cracks began to appear in the GD team structure. Mr Burns told the Authority about some tension that arose between him and Mr Hooper regarding an “oversight” in Mr Hooper’s employment contract that, in the view of Mr Burns, left Mr Hooper only accountable to himself. Mr Burns raised this with Mr Millett which upset Mr Hooper. Mr Burns also related to some difficulties he was having getting Mr Hooper to assist him with the GD course, how Mr Hooper wanted to be paid

more money before he would do this, and that Mr Hooper was looking at the possibility of employment elsewhere. There was also an issue about how Mr Hooper viewed Mr Molloy being brought in to help with the CD course. Mr Burns says that Mr Hooper saw Mr Molloy as a rival and was concerned that the presence of Mr Molloy would remove his “leverage” to be paid more by MDS.

[14] Mr Burns gave further evidence of other conflict with Mr Hooper and Mr Thompson relating to a new intake of students proposed for October 2008. Mr Burns was of the view that there were not enough physical teaching resources to enable an extra student intake as he had been “begging” for more resources since January 2008. Mr Burns says that he managed to persuade Mr Millett that another intake of students was not feasible but was criticised for doing so by Mr Hooper and Mr Thompson. They felt that the action of Mr Burns had denied them the opportunity to demand more money from MDS for teaching the proposed extra intake of students.

[15] There is evidence from Mr Burns about further conflict with Mr Thompson around August/September 2008. Mr Thompson was seeking a promotion and an increase in salary. Mr Burns undertook to discuss this with Mr Millett who indicated that he was planning to implement such in October 2008. But subsequently, Mr Thompson was denied a promotion and/or a salary increase. Mr Burns says that Mr Thompson blamed him for the lack of promotion and salary increase.

[16] The evidence of Mr Millett is that around November 2008, Mr Burns complained to him that there was a “fever of entitlement” within the GD team and that Mr Hooper was “poisoning” the other team members against Mr Burns. However, Mr Millett says that he considered the issues to be personality conflicts rather than anything of a nature which required his direct involvement. There was also a more substantial issue that arose relating to the gathering and analysis of student feedback which occurred in November 2008. I will present a further analysis of this matter later in this determination.

- [17] The further evidence of Mr Burns is that in December 2008, he had occasion to complain to Mr Millett about the behaviour of Mr Thompson who had told Mr Burns to “wrack off”. This incident was in the presence of students.
- [18] While the above matters, taken as separate incidents, appear to be reasonably minor, they are all symptomatic of a continuing breakdown in the relationship between Mr Burns and two of the three staff he had responsibility for. This breakdown continued into 2009 when a demeaning photo of Mr Burns was used on his new ID card. Apparently, this was orchestrated by Mr Thompson and Mr Hooper who may have simply seen it as a New Year joke, but Mr Burns took exception to what he saw as a lack of respect for his position. He says there was also a mock photo of a leprechaun (or an elf) on the shared whiteboard. He complained to Mr Millett and pressed him to issue a verbal warning to the people responsible for the mockery. Mr Burns complains that while Mr Millett was sympathetic, no action was taken but I find that this is not so. While Mr Millett did not see fit to take any formal disciplinary action, I find that it is most probable that he did speak to Mr Hooper who subsequently apologised to Mr Burns.
- [19] Following earlier requests from them and at the further insistence of Mr Thompson, Mr Burns attended a meeting with his three staff on 3rd February 2009. There is scant evidence from Mr Burns as to what was discussed at this meeting. Mr Hooper says that he and the other two staff voiced their concerns to Mr Burns about a number of issues. The abbreviated notes compiled by Mr Hooper confirm this.
- [20] The evidence of Mr Millett is that Mr Burns came to see him after the meeting and reported that: his staff were insubordinate, that Mr Hooper had turned them against him and that they were questioning the authority of Mr Burns. Mr Millett subsequently consulted with Ms Valintine and they met with the four GD staff on 4th February. Mr Millett says that the meeting was “fairly positive” and while he and Ms Valintine were aware that there was some discontent among the team, they believed that they could assist Mr Burns in making his team functional. Mr Burns also felt the meeting was positive albeit

there were still some “hang-ups,” although he went further and stated that Mr Thompson was “stressed out” about a lack of teaching resources.

[21] However, on 10th February 2009, Mr Thompson came to Mr Millett and Ms Valintine with the intention of handing in his resignation, saying he could no longer work with Mr Burns. When pressed further to explain why he wished to resign, Mr Thompson cited various issues; including the deletion of student feedback, not being able to see the student feedback which had been taken in November 2008, an inadequate curriculum, problems with scheduling and lateness, non-communication by Mr Burns with his staff, Mr Burns starting his classes extremely late, and keeping students back after the class should have finished. Mr Thompson also told of a general lack of administration of the department by Mr Burns and of his concern that the students felt intimidated by Mr Burns. Mr Thompson told Mr Millett and Ms Valintine that they should look at the recent student feedback which would most likely illustrate the level of student discontent.

[22] Ms Valintine says that she looked at the November 2008 student feedback and was concerned by the content. Her evidence, in summary, is that the student feedback revealed:

- (a) That students cited topics that the course outline said would be covered for two weeks but were only being taught for one day, or just a few hours;
- (b) That students complained about Mr Burns not being present to teach them or keeping them waiting for hours before he eventually arrived to teach them;
- (c) The students complained that Mr Burns’ course appeared to have guidelines unique to it which did not reflect school-wide guidelines; and
- (d) That Mr Burns was not knowledgeable in the topics he was meant to be teaching.

[23] The Authority has viewed the written student feedback from 11 students. It reflects an overall general dissatisfaction about the presentation of the GD course. Some of the feedback is particularly negative towards Mr Burns and

goes further than the summary provided in Ms Valintine's statement of evidence.

[24] Ms Valintine says that following her review of the student feedback, on 11th February 2009, she and Mr Millett meet individually with Mr Burns and his three staff for the purpose of discussing the feedback. While the feedback was completed in November 2008, Mr Burns had not given a copy of it to his staff nor had there been any discussion about its content.² Ms Valintine says that the staff were "less than happy" and they confirmed some of the comments made in the student feedback. In particular they cited examples of Mr Burns arriving late for class on a regular basis and the curriculum being "in a state of disrepair." Mr Thompson and Mr Hooper expressed a fear that Mr Burns might leave and that they would be left to try and teach GD without lesson plans or sufficiently developed materials. They also spoke about the "disregard" that Mr Burns had for his colleagues. The evidence of Mr Millet is slightly different in that he says that he and Ms Valintine looked at the student feedback after meeting with each of the GD team, but nothing hinges on this.

[25] The further evidence of Mr Millett is that when he and Ms Valintine met with Mr Burns on 11th February, the focus of Mr Burns was "very much on himself" and how he was being undermined rather than being focused on how to resolve the staffing issues and improving the course and curriculum, as the other staff were. Mr Millett was so concerned about the overall circumstances, he cancelled the first leg of a planned conference trip he was due to leave on, in order to meet again in an attempt to resolve the issues which had arisen with the GD department, albeit he came to appreciate that matters were more complex than he may have initially anticipated.

The 13th February meeting

[26] The evidence of Mr Burns is that on 13th February 2009, without any advance notice, Mr Millett informed him he had to come to a meeting as soon as possible. About 11:30a.m, Mr Burns met with Ms Valintine and Mr Millet. Mr Burns says in his written statement that the meeting was about his graduate

² The staff received the feedback on 11th February 2009.

course curriculum. He says that he was told that Ms Valintine and Mr Millet had met with his staff, viewed the student feedback, and had now decided to investigate the curriculum as they had concerns that the course curriculum might put MDS at risk. The evidence of Ms Valintine is in a similar vein. She says that as she and Mr Millet were not convinced that the opinions of the students and Mr Burn's colleagues reflected reality, they wanted to look at the curriculum to judge whether Mr Burns was working to the required standards.

[27] The oral evidence of Mr Burns, as to his perception of the meeting, was more graphic. Mr Burns said that when he met with Ms Valintine and Mr Millet they were "primed" and "defensive." Mr Burns says that the language which was used during the discussion disturbed him. He related that words such as; "allegation," "investigation" and "complaints" were used. He says that he was told that there would be a "difficult process" - a "painful process." Mr Burns said that he felt as though he had "been hit on the head with a shovel" and that he had; "a picture of a crisis being painted."

[28] The evidence of Ms Valintine and Mr Millet pertaining to the meeting was more circumspect. They portrayed a more measured approach as if the meeting was simply a discussion in order to get to the bottom of potential issues concerning the curriculum. Ms Valintine's evidence was that when Mr Burns was asked for a copy of the curriculum he became very upset. She says that Mr Burns said that he couldn't return and work in the games office with his colleagues. The common evidence of all three participants is that, Mr Burns was so upset during the meeting that it had to be adjourned for 10-15 minutes to allow him to compose himself. The meeting then continued albeit it seems that Mr Burns was still upset. The evidence of Ms Valintine is that there was some further discussion relating directly to the teaching curriculum that Mr Burns had planned for the new intake of students, due to come into the School on 2nd March 2009.

[29] At the investigation meeting, when questioned by Mr Langton about the content of the curriculum, Mr Burns referred to the document titled *Graduate Diploma of Game Development with Specialisation in Programming or Game*

Art, dated 2nd August 2006.³ While in technical or academic terms, this document could be seen as a general curriculum or course guide, what Ms Valintine and Mr Millett were seeking from Mr Burns was information about how he planned to deliver the relevant lessons to the students or, at least, an outline of the lessons. I find that Mr Burns would have, or should have, fully understood the type of information that was required from him by his managers and it was revealing that he should refer only to this document.

[30] The further evidence of Ms Valintine is that when asked about his curriculum, Mr Burns informed that it was all on the MDS computer server but then he said that not all of the materials were on the server and that some of his lesson plans and other information was stored at his apartment and that he would need a week to collate them. Ms Valintine says that Mr Burns was informed that she and Mr Millet were not concerned about the collation of the materials, they just wanted Mr Burns to bring them the curriculum so they could review it. Ms Valintine also says that she became concerned when Mr Burns was asked to provide his curriculum materials, he informed that some of it was at home. Ms Valintine's concern was that while it was common for tutors to work on an aspect of their curriculum at home she found it "bizarre" that Mr Burns would store large parts of a two year curriculum at his home rather than on the MDS server. She was also alarmed that the only copy of the course curriculum, or parts of it, would be held "off-site" and that Mr Burns would require a week to collate it.

[31] The meeting on 13th February concluded with an understanding that Mr Burns would leave, go to his apartment, and then return to the school to drop off the rest of the curriculum materials by 2:00p.m. that day. Ms Valintine says that it was hoped that Mr Burns would be in a position to "walk me through" the curriculum then. Her evidence is that Mr Burns agreed to do this and I accept that this is most probably so.

³ Document 1 of the respondent's bundle.

Provision of the Curriculum by Mr Burns and Special Leave Absence

- [32] It seems that Mr Burns arrived at a different conclusion after he left the meeting. His evidence is that he was; “put on special leave and told to remain at home for the following week.” Mr Burns also says that: “I did not understand why I needed to be sent away just so they could look at my curriculum.” I do not accept that this is an accurate portrayal of the context in which special leave was mentioned. Rather, it seems more probable that the matter of special leave arose after Mr Burns became upset during the initial discussion surrounding the production of the curriculum. The evidence of Ms Valentine is that: “We let him [Mr Burns] know that it was perfectly fine for him to take some time out from School to give himself some space. We offered “special leave” to assist him.” And further: “We made it clear that, although he was absolutely free to leave School following our meeting, we did need copies of the curriculum.” The urgency of providing the curriculum was reinforced by the evidence of Mr Millet when he attested that the next course intake was due at MDS in two weeks. Mr Millet also says that Mr Burns was told that he could; “take a few days if he wanted” but this was on the condition that Mr Burns should be available to come in to MDS and help with the review of the curriculum or answer any questions which might arise. It is commonly agreed that Mr Burns was also offered counselling.
- [33] Mr Burns did not come back to the School at 2:00p.m, as had been agreed. Rather, he phoned Mr Millet just prior to this time and told him that he wanted to delay meeting again until the following week. Mr Millet says that Mr Burns was clearly “rattled and upset.” It was subsequently agreed that Mr Burns would meet with Mr Millet and Ms Valentine at 2:00p.m, Tuesday, 17th February 2009. However, Mr Millet still made it clear that he wanted any material that Mr Burns had at home returned to MDS that day [13th February] so that the curriculum could be reviewed with the assistance of another staff member. The evidence of Mr Millet is that Mr Burns agreed to come in that afternoon but subsequently failed to do so.
- [34] The evidence of Mr Burns is that he rang Mr Millet on 13th February to change the meeting day as he wished to have a representative present. Mr Burns says

that during this call, Mr Millet stated to him that: "... this is now a formal investigation." Mr Millet denies saying this. He also denies that Mr Burns made any mention of representation. Mr Millet says that the first he knew of Mr Burns requiring representation was when later that day, he received a text message from Mr Burns' lawyer, Mr Nicolson, informing that he was now involved.

[35] The further evidence of Mr Burns is that during the aforementioned phone call with Mr Millet, he asked Mr Millet for: "... written clarification about this investigation, the allegations, the process, the precedent where curriculum has been used as a basis for disciplinary or investigatory procedures, potential outcomes, timeframes, as well as minutes or records of any meetings held with staff or students regarding this investigation and its allegations." Having heard from Mr Burns about his knowledge of employment law, as at 13th February, I conclude that it is most unlikely that Mr Burns would have asked Mr Millet for such information during this phone call or at all. I find that Mr Millet's recollection of the discussion is more probable, albeit I accept that at some point on the 13th February, Mr Burns sought legal advice from Mr Nicolson, whom was then instructed to act for Mr Burns.

[36] It subsequently transpired that Mr Burns failed to deliver the materials that he said that he had at his home. The evidence of Mr Millet is that because Mr Burns failed to deliver any curriculum material as had been agreed, the rest of the GD team had to work "around the clock" to bring the curriculum up to an acceptable standard in time for the new intake of students.

[37] As Mr Millet had departed for his pre-arranged trip overseas, Ms Valintine assumed the communication with Mr Burns. She wrote to him on Monday 16th February. In this letter Ms Valintine canvassed matters leading up and including the meeting on 13th February. Given that this letter is the first proximate record of what was happening at this point in the proceedings, I record the salient content. Ms Valintine informed that:

"I want to be quite clear Brendan that what is occurring at present is not a disciplinary dispute but as we have said an enquiry into allegations and concerns that have been raised. This is the initial process we follow and it is only after this process having attained a clear picture as to whether there is any basis to the various areas that we

can determine whether any action or further investigation is required. In order to assess the curriculum situation, we needed to have all the course material available. You said you have supporting material offsite and you had agreed to bring this back to MDS on Friday. It was to your advantage that this is brought in so we can then factor it into this process and at our Friday meeting you agreed to do this. However, despite agreeing to this, you did not do so. Clearly it is not unreasonable for MDS to ask and expect any of its property to be both located at and available to MDS so I am not sure as to why you didn't make this available on Friday.

As a consequence and for the sake of clarity, we are again, as your employers, asking you to return to MDS by tomorrow 2pm (17th February) the course material and resources that support the programming stream of the GD course so we can review it. This includes all updated information that you were preparing for the new intake that starts in about 2 weeks.

We will then go through that material and all other on MDS's servers etc then start the process of review and audit, identifying if any of the concerns/allegations have any merit and if so where any actions or improvements need to be undertaken."

And further:

"If during this process we find there are disciplinary issues to answer, then we can if required be in contact with your legal representative but at this stage it is an internal enquiry into the feedback and issues that have been raised. However I will need an email address if this process requires this to go further.

I hope that you will see fit to understand the importance of bringing in the required information by 2pm tomorrow and hope that you will sit with me and walk me through the information so I can better understand it."

[38] Ms Valintine also sent an email on 17th February (14.02) indicating that it was critical that Mr Burns provide the curriculum material by 5:00pm that day as it was only a matter of days before MDS had to deliver the course to the new intake of students. Ms Valintine also conveyed that:

"When we met last Friday, Paul and I could see you were upset and we granted you some immediate special leave. You are a key person in the department and we would welcome you back as soon as possible to help prepare for the new intake. Perhaps you can contact me and give me some indication when that might be."

[39] Mr Burns replied by email on the same day (14:32) informing that he had been advised that he should wait until his counsel is present before handing over any material and that the earliest availability would be Friday 20th February.

First Analysis of Curriculum Material

[40] As Mr Burns had failed to return any material, Ms Valintine asked Mr Hooper to review the GD curriculum material stored on the School's server and provide her with written reports regarding his findings. Mr Hooper subsequently provided Ms Valintine with three reports. Ms Valintine says that she noted that:

- a. The physics lesson plans contained no content;
- b. The mathematics for games lesson plans contained IG material;
- c. The nine "Design Patterns" lessons contained blank PowerPoint slides;
- e. The 19 "Shaders for Gamers" lesson plans contained blank PowerPoint slides; and
- f. Most of the "Diagrams" lesson plans were blank.

The evidence of Mr Hooper is that: "I could not find anything remotely resembling a coherent curriculum that someone else could pick up and teach from." And: "In essence there were no day-by-day lesson plans and I felt that a lot of content I would have expected to be there was lacking."

[41] On 18th February, Ms Valintine wrote again to Mr Burns. In summary she informed him that an overview of the game development programme, the programming stream course material, and information that is on the School's server and Mr Burn's computer had been completed. Ms Valintine further informed Mr Burns that:

"The results of our review of the course material on the computer shows the curriculum and lesson plans for the game programming stream it [sic] is incomplete (less than 50% of what is necessary) and is highly disorganised. Given the state of the course material that has been located, this requires MDS to immediately look at other ways the course material for the programming stream can be completed now for the pending intake. What has been located will not meet curriculum, quality and delivery standards. We cannot presume any school material you have at home will alter this situation but may add some content.

You will appreciate having now discovered what needs to be done we don't have any time left and must take steps to ensure quantity and quality to curriculum and audit standards, as a priority. While we would have preferred not to do this without

involving you, in the light of your decisions not to assist in this course appraisal until your support person is available, we have no choice but to immediately appoint persons to develop, write, organise the curriculum material and deliver the programming stream of this course. As we are running out of time, we will have to use staff from within the team, as it is almost impossible to get some external person at this late stage.

With the department expanding for this intake and rewriting the course and delivering the new course materials as they are developed, we have no option but to immediately appoint a person to lead the department. Our energies must now concentrate on organising and producing a full course programme and ensure the team work is allocated and course material is developed in an orderly and managed fashion.

The proposed meeting with you and your support person will include the effects of these changes on your job description and employment generally. Should you wish to involve yourself in the process of rewriting the programme, please contact me with any offer.

As this development includes matters affecting your employment, we copy this to your support person as he requested on your behalf so you may get advice on the necessary changes and ask him to advise a time this Monday suitable to meet.”

- [42] Mr Burns makes no comment about the content of this letter in his written statement of evidence but his oral evidence was that when he received the letter he was just “*coming down off a stress cloud*” and that the letter “*blew me out of the water*” because there was no mention of getting him back to work and his role as Head of Department now appeared to be in doubt. On 20th February, Mr Nicolson notified MDS that Mr Burns was raising a personal grievance on two grounds: “... for disadvantage in the first instance and now unjustified dismissal.”

23rd February Meeting

- [43] A meeting took place on 23rd February at the office of Mr Bruce Stainton, the School’s lawyer at that time. In addition to Mr Stainton, those present were Mr Burns, Mr Nicolson, Ms Valintine and Mr Millet. Mr Burns provided a disk. Mr Burns says that the material on the disk was a compilation of material that he had at his home. Ms Valintine and Mr Millet concur that a disk was received, however their evidence is at odds in regard to which of the disks it was of the three which have been provided to the Authority. Ms Valintine says

it was disk 1 and Mr Millet says disk 2. Having viewed all three disks and placing them in the context of the overall evidence, it seems that it was disk 2.

[44] The evidence of Ms Valintine and Mr Miller in regard to what was discussed at the meeting is relatively sparse. On the other hand, the evidence of Mr Burns is quite effusive in regard to one aspect of the meeting. The evidence of Mr Millet is that Mr Burns was informed that Mr Millet had assumed temporary responsibility for the Gaming Department. Mr Burns says that he understood that Mr Millet was saying that he [Mr Millet] was now the Faculty Director and that Mr Burns was effectively demoted back to Course Leader. I accept the evidence of Mr Burns that he was told that he was no longer the Faculty Director and that his role was now that of Course Leader. I also accept his evidence in regard to Mr Millet resiling from this position. But, it is also clear that, given the circumstances which had arisen concerning the production of a course curriculum by Mr Burns, Mr Millet had assumed responsibility for the supervision of the Gaming Department for the time being. Oddly, there appears to have been no discussion about the grievances which had been raised just a few days ago.

[45] It was agreed that Mr Burns would return to work the next day, 24th February, on the understanding that he would work solely on reviewing and building the GD curriculum. However, there is conflict in the evidence in regard to what was accepted relating to where Mr Burns would be working upon his return to work. While Mr Millet says that it was discussed that Mr Burns would be working from an office on the 12th floor rather than in his usual office on the 11th floor of the building, Mr Burns says that there were no conditions attached to his return to work, except that he understood that Ms Valintine and Mr Millet wanted to go through the curriculum with him. Given that Mr Burns went to Mr Millet's office when he returned to work on the morning of 24th February, that his computer was set up in an office next to Mr Millet's office on the 12th floor and he made no protest to Mr Millet about the working arrangements, it seems more probable that he was aware that he would be working from the 12th floor office, at least until the curriculum issues had been

addressed.⁴ However, there does not appear to have been any agreement that Mr Burns would not be permitted to have contact with his staff or students.

[46] The evidence of Mr Millet is that following the meeting with Mr Burns on 23rd February, he went to the staff whom reported to Mr Burns and informed them that Mr Burns would be returning to work the following day, but that he would be working on the 12th floor to give him an opportunity to focus on developing specific aspects of the curriculum. Mr Millet says that the staff all expressed the view that they didn't want Mr Burns working in their office as he would be a distraction as they had all been working long hours to prepare the course materials ahead of the new intake of students which was only four days away. Mr Millet says that Mr Thompson told him he would leave if Mr Burns came back.

[47] The evidence of Ms Valintine is that after the meeting on 23rd February, she reviewed the material which Mr Burns had now provided and compared it to the information that was on the MDS server. She also asked Mr Hooper to review the information and prepare a report. Ms Valintine concluded that the combined information was collectively far from complete. She says that while the material received on 23rd February showed an improved structure or framework, there were no lesson plans or resources as required to support the delivery, both of which are fundamental to the course. The evidence of Ms Valintine is that:

“There were large gaps in the information, topics identified with no resources at all to support them, incomplete PowerPoint presentations that were meant to cover entire sections of the curriculum (even a complete PowerPoint presentation would have been insufficient material to cover an entire section of the curriculum) and a lot of muddle.” Ms Valintine attests that the information that Mr Burns had provided from his home had been: “... reordered and it was more obvious which information was meant to relate to which section of the curriculum but there was little value added and significant sections were incomplete, often with just a topic and no supporting information behind it all. I calculated this to be less than 50% complete and over a two year course of study this was significant and a considerable risk to MDS.”

⁴ See also “D” of the applicants’ documents.

Return to Work

- [48] Mr Burns says that upon returning to work on 24th February he was: “isolated by management from my team, my students and other staff” because of his location on the 12th floor. He also says that he was given the task of creating new teaching material as opposed to addressing the existing teaching curriculum and that the new teaching material would not be needed until 25 weeks after the start of the 64 week course.
- [49] Shortly after Mr Burns arriving back at work, Mr Millet received word that Mr Burns was back in his usual office and was acting aggressively and upsetting the GD team. Mr Millet subsequently received two emails from Mr Hooper. The second email (10:56a.m.) provided a report about the presence of Mr Burns in the GD office. It seems that Mr Burns had had upset the three staff whom reported to him. Having read Mr Hooper’s report of what seems to be a relatively minor exchange, I am inclined to the view that Mr Hooper may have overreacted somewhat. The outcome was that Mr Millet spoke to Mr Burns that afternoon and informed him that, given his earlier comments that he couldn’t return to his team, and now with the staff concerns about his behaviour that morning, it was best that he did not have contact with his team in the meantime. Mr Millet says that he asked Mr Burns not to contact his team and that he should speak to him if he wanted to communicate with the team members.
- [50] The evidence of Mr Burns on this episode is that he went to his 11th floor office to get some text books and other resources and he also wanted to see his staff. He says that he was met with “a barrage” of rude comments from his staff including: “*What are you doing here? We were told you were not ever coming back.*” Mr Burns says that he was surprised by this treatment. He also related in his written statement of evidence that he was later told by Ms Valintine, in front of his staff, that he was not to speak to the staff directly and that he was required to communicate with his staff through the management. Mr Burns says that he felt humiliated and belittled in front of his staff, felt isolated and shut off from the staff and students and was being actively prevented from doing his normal job. Ms Valintine says that Mr Burn’s evidence, about her

contact with him, is incorrect. She says that when she became aware that Mr Burns had gone to his office for the second time, and disrupted staff, she intervened. She says she met him at the door of the room as he exited and asked him if he could arrange through her to pick up any items. This appears to be largely confirmed by the oral evidence of Mr Burns.

Review of the Curriculum with Mr Burns

[51] In the meantime, Ms Valentine continued to review the curriculum materials and make enquiries. She met with Mr Burns on the afternoon of 24th February to discuss his curriculum. The evidence of Ms Valentine is that she informed Mr Burns that she had reviewed the curriculum that was held on the MDS server as well as the material he had provided from his home. She asked Mr Burns if he could locate the lesson plans as the material she had reviewed did not contain lesson plans. Ms Valentine says that Mr Burns was unable to locate any further material for her to review. The further compelling evidence of Ms Valentine is:

“As a starting point, we concentrated on one of the GD modules, GD110. I identified to Brendan that there were PowerPoint slides and copies of some research papers written by other tutors, but that I could not see any lesson plans and that it was not clear how he intended to structure and deliver ten days’ worth of lessons (lasting four hours each). Brendan was unable to provide me with any additional material to that which I already had reviewed and knew was significantly lacking.”

[52] Ms Valentine’s further evidence is that:

“I then asked Brendan to show me any lesson plans (for any module) that he had created for the course. Brendan used the PC to open the original curriculum framework document for the course as an example of a lesson plan. This document was by this stage, five years old and is merely a framework regarding how the lesson will be structured for the year. It is not capable of being used as a lesson plan, but lesson plans are developed from it. You can describe it as the index of a book as it lists which topics are covered. There was just no way this document could constitute lesson plans as it contained no information, other than a broad framework of topics.”

[53] Ms Valentine says that:

“I wondered whether Brendan had misunderstood my request to view his lesson plans so I rephrased my request and asked him to show me what a student would cover on a

day-to-day basis in GD. He tried to divert me away by explaining some in-depth area of GD as though he was somehow teaching me. I told him I didn't need this information as I wanted to view the structure and content of his course work, or understand where the structure and content could be sourced. Unfortunately, Brendan was unable to provide me with any further information and I left him to get on with his work."

[54] The evidence of Mr Burns on this aspect of matters is that on the afternoon of 24th February:

"I had all my material ready to be reviewed in great detail with the CEO. [The oral evidence was that he was; "*ready to rock and roll.*"] The CEO, Liz Valintine, stated that she was not interested in detail, that she was only interested in "structure." I went through the structure of my course and answered Liz's questions in full. Liz's questioning abruptly stopped when she herself realised that the graduate course's GD curriculum guide had been written and in existence for two years prior (2004) to the undergraduate course (IG) (2006) being written. This seemed to answer her questions regarding any minor overlap of material that is covered in both courses. I recall her commenting that GD was designed first and has been running for a while before IG came along and that she "*hadn't thought about that.*"

[Ms Valintine says that this conversation did not take place and even if it had, the explanation would not have been sufficient to justify why parts of the IG course were repeated in the GD materials.] Mr Burns says that after about 20 minutes, Ms Valintine left him and there was no further discussion about the curriculum at any time again.

[55] The next day, Wednesday 25th February, Mr Millet was informed that Mr Burns was present with the GD class and was conducting a leads meeting. Apparently, Mr Thompson and Mr Burns would have these regular meetings to allow students to update them on the progress of the group with its game development project. The evidence of Mr Millet is that it appeared to him that Mr Burns was intentionally being disruptive as he had been instructed that he was to be working only on the curriculum. The further evidence of Mr Millet is that he spoke to Mr Burns about the requirement for him to be working on the curriculum on the 12th floor and that it wasn't appropriate for Mr Burns to return to the class at this point. Mr Millet says that Mr Burns read to him from notes he had made and informed Mr Millet that the GD department and

students had been told he [Mr Burns] would not be coming back, that he was not allowed into his office, that his students had been surprised to see him and that his staff had asked him what he was doing there. Mr Millet says that he never communicated any of these things to the staff or anyone else, and that he did not tell the staff or the students that Mr Burns would not be coming back. It was the hope of Mr Millet that Mr Burns would: "... use his initiative and judgement and realise that it was inappropriate for him to return to the classroom when issues remained unresolved." Mr Millet says that he tried to explain to Mr Burns that he had spoken to the students acknowledging his absence for the last week and had informed the students that Mr Burns was on leave. Mr Burns was then permitted to return to the meeting with the students.

[56] The evidence of Mr Burns is that he had received emails from his students asking for help and he went to the 10th floor classroom to give some assistance to the students. Mr Burns says that upon the arrival of Mr Millet he left the classroom and there was a discussion between the two men. Mr Burns attests that Mr Millet told him that the students were not expecting to see him again and that they had been told that Mr Burns was on special leave and that he was not coming back; ever. Mr Burns says that when he queried why Mr Millet would have told the students that he was not coming back, Mr Millet replied: "I did not think you would be coming back." Mr Burns says that he was shocked by this revelation but also this explained why the students had looked so surprised but happy, to see him earlier.

[57] A further meeting took place on 25th February at the office of Mr Stainton but without his presence. Mr Millet attended along with Mr Burns and Mr Nicolson. An issue arose about whether Mr Millet deliberately or otherwise, recorded this meeting. I find the explanation given by Mr Millet to be less than convincing and I suspect that he most probably made a considered decision to record the proceedings but was subsequently "caught out." In the event the matter was dealt with in an expedient manner by Mr Stainton and Mr Burns was not disadvantaged. Nonetheless he was upset about this episode and was off work for a further two days on special leave with the intention being that he would return to work on Monday 2nd March. Apart from the matter of the recording of the meeting, all other discussion appears to have focussed on the

matters which Mr Burns had raised in the letters of 20th and 23rd of February regarding personal grievances and resolving the conflict which had arisen between Mr Burns and his staff, but no tangible outcome appears to have been arrived at.

Suspension from Employment

[58] Mr Burns did not return to work - as on Friday 27th February - via his lawyer, Mr Burns received a letter from Ms Valintine notifying him of the suspension of his employment. The letter sets out the background to events leading up to the return to work by Mr Burns on 24th February and the apparent grounds for the suspension:

“During Tuesday and Wednesday this week several problems arose when you engaged in contact with your team contrary to agreement and in discussions with other staff members and students, when asked not to. It has become clear that it is going to be difficult for you to continue working in the building during this process. Your actions during this sensitive and delicate situation were putting the School, the students and staff members at risk of becoming involved. We have also received letters from industry expressing their views on your being retained when no-one else should have been involved or known of these issues. This has put the School into a difficult situation. Unfortunately, the outcome was confusion, complaints of intimidation and spreading of disruption to other parts of the School during those 2 days.

Given this situation we have no choice but to suspend you from work on full pay pending the outcome of the investigation and any counselling requirement to manage professional relationships. Accordingly the School will not be advising any other person that you are suspended.”

[59] In addition to the stated reasons for the suspension, the evidence of Ms Valintine is that she was also concerned about the effect that the presence of Mr Burns would have on the new intake of students that was due to start on 2nd March, the day that Mr Burns would return to work.

Formal Disciplinary Process

[60] On Tuesday 3rd March, Mr Burns was notified by Ms Valintine that MDS was commencing a formal disciplinary process and that his employment could be affected. He was required to attend a meeting on 5th March. Ms Valintine informed that an explanation was sought in regard to the following matters (summarised):

(a) *Deletion of company property.*

Mr Burns was required to answer whether he had deleted student feedback without the knowledge of management. Under the same heading, he was required to answer whether he had stored or kept the only copies of game development resources offsite and apart from MDS and if so, why, when and what material.

(b) *Non-disclosure of key information.*

Mr Burns was required to answer whether he had prevented staff and/or MDS from gaining access to essential qualification information; i.e. course material, student feedback. The detail of the background to this issue was set out.

(c) *Failure to follow instruction and putting MDS at risk.*

Mr Burns was required to account for having “vital” course material at his home without written authority and why he failed to bring this information to MDS when requested on 13th February. Other comprehensive detail of the background to this issue was provided.

(d) *Important documents location and completion of important processes.*

Mr Burns was required to advise why MDS couldn't find:

- (i) one-on-one feedback sessions;
 - (ii) annual course reviews;
 - (iii) tutor observations;
 - (iv) student feedback as per the required schedule;
 - (v) meetings and minutes of reviewing student feedback with department tutors;
 - (vi) management of course schedules;
 - (vii) daily lesson plans;
 - (viii) organisation and completeness of the course.
- (e) *Communication*

Mr Burns was required to answer if he had communicated with his staff in an inappropriate, aggressive or intimidating manner at any time. Comprehensive detail of other matters pertaining to communication with various individuals was provided and answers sought.

The letter concluded:

“After the meeting is concluded, the employer will carefully consider all information received including your explanations and will only then make a decision of findings and outcome in relation to your employment.”

[61] Within the very short time provided to him (albeit he was made aware he could have sought an extension of time), Mr Burns provided a comprehensive written response to the allegations which MDS was seeking answers to and summarised his position:

“I have no case to answer in relation to these allegations. They are either without foundation, outdated, and historic, as they have already been discussed and dealt with at earlier times.”

[62] A meeting took place on 5th March. There is no evidence from Mr Burns about this meeting but Ms Valintine is critical of his response to the questions that were raised with him. She says that when asked for clarification on a point, Mr Burns would refer to his written response and read from this. The meeting went for two hours and appears to have concluded on the basis that Ms Valintine would give further consideration to the written response of Mr Burns.

[63] The evidence of Ms Valintine is that following the meeting on 5th March, she spent some time reviewing the written response from Mr Burns and identifying where answers had not been provided by him and/or where his response was contradicted by what others had told her. Ms Valintine prepared a list of questions based on the discrepancies between what Mr Burns had provided and the information that had been provided by other staff during her investigation to date. Ms Valintine then arranged for these questions to be put to the relevant staff members (including Mr Millet and her) by an independent human resources consultant. The responses were compiled by the consultant and provided to Ms Valintine and subsequently to Mr Burns.

[64] A further meeting took place with Mr Burns and his lawyer took place on 12th March. Ms Valintine says that the purpose was for MDS to obtain more detailed answers from Mr Burns to the questions he had failed to answer or clarify in some areas, and for Mr Burns to provide a response to the information elicited by the consultant. Ms Valintine attests that the response of Mr Burns was unhelpful and he refused to depart from his earlier written response or, answered her questions with a question. Ms Valintine accepts that there was some “without prejudice” discussion about other employment possibilities for Mr Burns but she says that Mr Burns never came back to her about a suggested option. But in any event, Ms Valintine says that she subsequently concluded that MDS had; “... lost faith, trust and confidence in Brendan” and that he was not suitable for any role within MDS and she made the decision to dismiss Mr Burns.

The Dismissal

[65] Via a comprehensive 18 page letter dated 25th March 2009, Mr Burns was dismissed. Rather than summarise the content of this letter it is useful to set out Ms Valintine’s evidence regarding her decision to dismiss Mr Burns. She says that the most significant (but not limited) grounds for the dismissal were:

(a) The deletion of student feedback without authorisation.

This occurred in November 2008. It was the conclusion of MDS that Mr Burns deleted student feedback that was negative towards him and the GD course.

(b) The failure to advise Mr Millet, Ms Valintine and the Academic Lead, Ms Rennie, that the student feedback contained critical items which reflected directly on Mr Burns and which should have been addressed as part of MDS requirements.

(c) The failure to return curriculum materials to MDS when instructed, and as agreed by him, from his home. This was when Mr Burns knew of the importance of ensuring that MDS was ready to deliver a curriculum for the new students on 2nd March 2009.

[66] The evidence of Ms Valintine is that:

“These three key events were exacerbated by the many instances of mis-management and failure to undertake or adequately complete administrative and Course Leader

duties, including but not limited to failing to organise one-on-one feedback, failing to carry out an annual course review, failing to observe game development tutors, failing to start and finish classes at correct times and failing to complete lesson plans. In addition, I considered that the conflict and disharmony between Brendan and his staff was irreparable. The trust that we were entitled to place in a senior member of staff was broken by Brendan concealing or diverting us from what was actually happening and not constructively engaging us during the preliminary process or the investigation.”

Events after the Dismissal

[67] On 3rd July 2009, MDS sought feedback from the students, which Mr Burns had responsibility for, on the final day of their course. Ms Valentine’s evidence is that it is standard practice to seek student feedback when a course is coming to an end. It is also a requirement of MDS and NZQA that, all course tutors are included on the student feedback forms. The feedback in regard to Mr Burns was also relevant as he was then seeking reinstatement to his position with MDS. The feedback has been provided to the Authority as well as direct quotes contained in Ms Valentine’s statement of evidence. I accept her evidence that the student feedback reveals a high level of dissatisfaction with the performance of Mr Burns. Specifically, 58% of students considered that Mr Burns was never well prepared for lectures and 75% of students did not consider that he was knowledgeable about the topics presented in the course. In terms of satisfaction levels, 67% of the students indicated that they were not satisfied with Mr Burns as a tutor.

Both parties have made submissions on this aspect of the evidence which I will address later in this determination.

[68] The evidence of Mr Jonathan Booth is that he commenced employment with MDS shortly after the departure of Mr Burns, having succeeded him. Mr Booth appears to be experienced in the programming of games and the requirements of teaching students in preparation for employment in the industry. The evidence of Mr Booth goes into some detail in regard to his analysis of the teaching materials left by Mr Burns. Much of this evidence is of a technical nature but most salient is:

“In reviewing the materials that Brendan had prepared, I discovered that not only was significant time allocated to essentially repeating material from the undergraduate year (IG), but longer periods had been allocated to teaching the same materials the second time around than had been allocated during the previous year. To my mind, this was a waste of the student’s time and it served no purpose. My opinion of the majority of the material is that it was suitable for a fast recap of existing knowledge of the students (perhaps lasting for two lectures), but there appeared to be little information to extend their knowledge and nothing game specific. Some basic materials that I expected to see simply were not there. There were no daily or weekly lesson plans and no marking guides.”

[69] Mr Booth says that while he expected to spend some time reviewing course materials and adapting certain aspects to suit his style and interests, he did not anticipate having to essentially develop the curriculum from “scratch.”

The Issues

[70] The issues that require determination are:

1. Prior to his dismissal, was the employment of Mr Burns affected to his disadvantage by some unjustifiable action by his employer, being the suspension from his employment and/or any other action?
2. Was the dismissal of Mr Burns unjustified?
3. Was there a breach of Mr Burns’ employment contract going to the good faith provisions of s.4 of the Employment Relations Act 2000 and/or any other term or condition?
4. Did Mr Burns breach the terms and conditions of his employment contract and if so, is MDS entitled to an award of damages?

[71] In relation to the first two issues, the Authority must consider whether the employer’s actions and how the employer acted, were what a fair and reasonable employer would have done in the circumstances.⁵

- 1. Was the employment of Mr Burns affected to his disadvantage by some unjustifiable action by his employer?**

⁵ Section 103A, Employment Relations Act 2000.

[72] The submissions for Mr Burns in regard to the issue of disadvantage contain a considerable overlap into the area of procedural fairness regarding the investigation conducted by MDS and the subsequent dismissal, rather than going to allegations of unjustified action/s creating a disadvantage for Mr Burns. I must also record now that while it has been claimed that Mr Burns was “sent away” on special leave from 13th February 2009, I do not find this to be so. Rather, I find that special leave was made available to Mr Burns because he was demonstrably upset at the meeting on 13th February. Counselling was also offered. Up until 27th February (the date of suspension), Mr Burns was free to return to work whenever he wished but he chose not to for various reasons. Indeed, he was invited by Ms Valintine on 17th February to indicate when he might be returning to help prepare for the new intake of students.

[73] In the round, I believe the disadvantage claims that require examination can be distilled down to the following matters:

(a) *An alleged unilateral variation of the employment contract.*

It has been submitted for Mr Burns that at the meeting on 23rd February 2009, he was informed that he was no longer a Faculty Director. Rather, he had been demoted to his previous role of Course Leader. It is claimed that this constituted a unilateral variation to Mr Burns’ employment contract. I have accepted that Mr Millet told Mr Burns that the role of Faculty Director no longer existed and that Mr Millet denied that Mr Burns had been appointed as a Faculty Director, but when confronted with incontrovertible evidence of the Faculty Director appointment, Mr Millet retreated from this denial. I am also aware of the further evidence that having announced the appointment of three Faculty Directors on 19th December 2008 (Mr Burns being one), on 1st April 2009, MDS decided not to implement the Faculty Director structure. However, I find that as at 23rd February, Mr Burns held the role of Faculty Director, Game and Interactive and he continued to be employed in this position as at the time of his dismissal on 25th March 2009, albeit the job description and some other details remained to be finalised.

[74] I accept that Mr Burns was justifiably upset about the insensitivity of Mr Millet in regard to the latter's stance pertaining to the position of Faculty Director. I also conclude that this action of Mr Millet was perverse in the circumstances. However, given that I have found that Mr Burns continued in his role as Faculty Director, without any loss of benefits, I do not find that there was any material disadvantage to Mr Burns in his employment.

(b) *Disadvantage upon returning to work on 24th February 2009.*

[75] While I find that it is more probable than not that Mr Burns was aware that he would be working in an office on the 12th floor of the School in order to work on the curriculum for the new student intake without distraction or interruption, I conclude that there was no agreement, or even an understanding reached, that Mr Burns would not be able to have contact with his staff or students. I find that Mr Burns was entitled to carry out his role in this regard, albeit the preparation of an acceptable curriculum for inspection by MDS was a priority. I do not believe that Ms Valintine or Mr Millet were entirely transparent with Mr Burns as to their intentions regarding him. On the one hand they were saying that Mr Burns should work on preparing an acceptable curriculum, whilst on the other, they had instructed the staff that reported to Mr Burns to do the same thing. The work that Mr Burns was asked to do was in regard to material which would not be applicable, apparently, until some 25 weeks into the course. It is also difficult to reconcile the work that the other staff was working on with the expectations that MDS had of Mr Burns. One would have thought that, notwithstanding the faults found with Mr Burns preparation, given the urgency of preparing an acceptable curriculum, there would have been a logical coordination of effort and resources. On the other hand, given the critical deadline that the School was working to, it was fair and reasonable for management to manage their resources to achieve an effective outcome. While it has been argued that Mr Burns was disadvantaged in regard to the circumstances imposed on him, I conclude that while the rationale of the management at the time may be questionable, I do not find that Mr Burns was disadvantaged to a degree which was unjustified in the circumstances.

(c) *The Suspension from Employment.*

[76] On 27th February Mr Burns was suspended from his employment. There was no prior indication given to Mr Burns that this was to occur. He anticipated returning to work on 2nd March 2009. The reasons given for the suspension were that problems arose when he engaged with his staff on 24th and 25th February, that it was going to be difficult for Mr Burns to continue working in the building, and that the School, the students and staff members would be put at risk by Mr Burns being present. The suspension letter refers to; “confusion, complaints of intimidation and spreading of disruption” to other parts of the School during these two days. Some mention was also made of industry contact from outside the School but this was not expanded upon.

[77] I find that the allegations made against Mr Burns in regard to his contact with them were overstated by Mr Hooper and probably Mr Thompson. I conclude that both of these men had formulated a negative and unhelpful approach to Mr Burns going back to the end of 2008, possibly earlier. Furthermore, any conflict between Mr Burns and his staff could have been avoided simply by Ms Valentine and Mr Millet being more forthright with Mr Burns about their expectations of him. It was not unreasonable that Mr Burns should be required to give priority to the curriculum nor was it unreasonable that he should do this in an area removed from the shared office on the 11th floor. But it was unreasonable that he was compromised in the manner that he was in regard to his relationship with his staff and his students. I find that Ms Valentine and Mr Millet made no reasonable effort to prevent this happening. This failure was then compounded by suddenly suspending Mr Burns from his employment without meeting with him and allowing him some input. At the very least he was owed an explanation as to why suspension was considered to be an option, and an opportunity to put his version of events. Having reached such conclusion in regard to the matter of contact between Mr Burns and his staff and students respectively, I have to say that I have more empathy for the position of MDS in regard to the impending arrival of the new intake of students on Monday 2nd March, given that Mr Burns was unable to produce a curriculum which could be presented to them. Nonetheless, this is a matter

which should also have been discussed with Mr Burns prior to making the decision to suspend him.

[78] Counsel for both parties referred the Authority to cases which support their respective arguments as to the justification or otherwise, to suspend Mr Burns' employment without his input in the circumstances. Mr Nicolson referred to *Tawhiwhirangi v A-G in respect of Chief Executive, Dept of Justice* [1993] 2 ERNZ 546, while Mr Langton pointed to *Graham v Airways Corporation of New Zealand* [2005] ERNZ 587. In the latter case, the Employment Court held that:

“Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so.”

The Court concluded that:

“Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others it may not.” [Para 104]

[79] Notwithstanding that Mr Burns' employment contract allows for suspension on pay,⁶ I conclude that this is a case that did call for advice and discussion before determining whether to suspend. I find that this is particularly so when a meeting was held with Mr Burns only two days before the decision to suspend was given. There was no mention that suspension was being considered. The suspension was completely unexpected by Mr Burns. I find that the suspension of Mr Burns from his employment, without any discussion with him about the reasons, was unfair and unreasonable in that the rules of natural justice were not complied with. He was unjustifiably disadvantaged in his employment. Mr Burns has a personal grievance for which a remedy is available.

⁶ Clause 35.

Remedy:

The suspension of Mr Burns from his employment was sudden and unexpected. I heard little evidence from Mr Burns about the affect of this on him. However, in his written statement of evidence [para 131] he attests that he was: “grossly and unjustly humiliated by my employer’s action throughout this entire process.” I conclude that part of the humiliation referred to by Mr Burns must be attributed to the unjustified disadvantage visited upon him by his sudden suspension from employment. I consider that in all the circumstances, an award of compensation of \$5,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 is appropriate.

2. Was the dismissal of Mr Burns Unjustified?

[80] While the evidence of Ms Valintine [para 65 above] is that there were three most significant grounds for the dismissal of Mr Burns, the extensive letter of dismissal dated 25th March 2009⁷ goes into considerably more detail regarding the totality of the issues which were considered. They are:

1. Failure to follow instructions and putting the School at risk.

This related to the failure of Mr Burns to provide curriculum material that he informed Ms Valintine and Mr Millet that he had at home and would deliver to the School by 2:00p.m. on 13th February. Ms Valintine did not accept that the explanation by Mr Burns that he was confused by the process or that he believed that returning this material would disadvantage him. Nor did Ms Valintine accept that Mr Burns had good reason to remain away from the School until his lawyer was available. I concur with Ms Valintine on these issues. I find that Mr Burns was evasive and unhelpful in regard to cooperating with his employer in regard to providing a curriculum for his course. This was particularly so given that he was a senior member of staff and the new intake of students was due to start in approximately two weeks time. Ms Valintine believed that it could be reasonably inferred that the actions of Mr Burns, regarding his failure to provide the requested material, and in delaying his return to work, was to avoid the assessment of the quality and quantity of the course material and the curriculum. I find that that this was an inference which could be reasonably be arrived at given the withdrawal of Mr Burns from what

⁷ Document 26 of the respondent’s bundle.

was a totally reasonable process which a responsible, senior and experienced employee should have had no difficulty complying with.

2. *Storing Games Development Course material on the home computer.*

I find that there was a considerable change of position by the MDS in regard to the fact that Mr Burns had curriculum related material at home. I accept that it was common for tutors to be working on material at home and it appears that the management of the School did not initially take issue with this. I find that it was unreasonable for the School to subsequently suggest that having material at home should suddenly become a breach of the rules and/or the terms of Mr Burns' employment contract.

3. *Prevented staff and the employer from access to course development files and resources for the GDD course.*

During the absence of Mr Burns from Friday 13th February, the School discovered that course development files and resources held on the School's server and Mr Burns' work computer were not accessible as access was password locked with only Mr Burns having knowledge of the password. The password was subsequently overridden by the IT Administrator on Monday 16th February. Ms Valentine says that the practice throughout the School is to put the course material into the respective department file on the server where it is accessible to all tutors within the department. On its own, this would not appear to be a matter of any real substance, but given the reluctance of Mr Burns to provide course material when requested, I find that it was reasonable for MDS to arrive at an inference that Mr Burns was shielding his failure to have appropriate course material readily available.

4. *Deleting student feedback.*

Written feedback from students was received in November 2008. As I understand it, this feedback was only for Mr Burns but should have also been provided for Mr Thompson and Mr Malloy. Consequently, the feedback format required a change to ensure that Mr Thompson and Mr Malloy were included. The feedback was then retaken by Ms Rennie on 19th November 2008. The evidence of Ms Rennie is that she was advised by Mr Hooper that Mr Burns had deleted the first feedback for November 2008 (the GDFeb08

class). The Authority heard evidence from Mr Anders Cai, IT Technician. He confirmed that Mr Burns asked him to create a new feedback format albeit he had already done so. Mr Cai says that he brought the original feedback out of the computer trash bin and Mr Burns who was sitting beside him, “*took over the mouse and clicked delete.*” Mr Cai says that he was “*surprised*” and found this “*shocking.*” Mr Cai says that Mr Burns said that he wasn’t happy with the original feedback and that’s why he deleted it. The position of MDS is that Mr Burns “forcefully” took over the technician’s computer and deleted the material. The proposition that force was involved is clearly unsupportable given the evidence of Mr Cai. Nonetheless, I accept that Mr Burns did not have permission or authority to make such deletion, but I do not accept that this was a breach of clause 28.4 of Mr Burns’ employment contract; this refers to the removal of material or equipment from the premises and is not applicable to these circumstances.

5. *Failure to advise senior management and tutors of important information obtained from student feedback.*

It is the position MDS that having obtained the second November feedback, Mr Burns failed to advise management of the more serious complaints made by the students and only brought attention to three more minor matters. MDS says that the selective reporting of Mr Burns misled management into believing that there were no critical quality issues to be addressed and reviewed. There is some conflict as to where the responsibility for reporting negative feedback lies. In the round, I accept the evidence from Ms Rennie that when she discussed the feedback with Mr Burns, in her role as Academic Lead, in late November 2008, he raised the three minor matters. In the light of this she was supportive and encouraging towards him. Ms Rennie says that Mr Burns; “... deliberately chose only to shed light on those issues which were not so serious and which would not raise any alarm bells for me about the quality of his teaching. In my view he misled me as to the growing level of discontent with students in his class.”

MDS concluded that the selective use of the student feedback by Mr Burns demonstrated a deliberate attempt to hide rather than disclose information critical of him. I find that this is a conclusion that was reasonably available to the employer.

[81] The dismissal letter then refers to performance issues under the heading of “**Important documents not filed and school processes not followed.**” This is then broken down into:

- a. One on one feedback sessions (Course Student and Tutor)
- b. Annual course review
- c. Tutor observations
- d. Record of meetings reviewing student feedback with department tutors
- e. Course scheduled classes
- f. Daily lesson plans
- g. Qualification structure of delivery and course material organisation on the school computer
- h. Record of meetings with department tutors
- i. Management of staff

The findings of MDS in regard to all of the above matters are comprehensively expressed.

[82] Under the heading “*PERFORMANCE FINDINGS*” the further shortcomings of Mr Burns and the conclusions reached are set out. Then finally: “It is further concerning that the chronic conflict and disharmony between you and your staff is not now repairable.”

[83] Ms Valintine concludes: “In the end I am left in a situation where the total trust and confidence of the employer in you as an employee has been completely lost, and the incompatibility with the GGD staff makes return to work in the position of course leader impossible.”

[84] Having weighed the totality of the evidence and submissions available to me, all of which is comprehensive to the point of being overwhelming, I conclude that the decision to dismiss Mr Burns was an option that was available to MDS as a fair and reasonable employer in all the circumstances. In coming to this conclusion I have only considered the evidence that was available to the employer at the time the decision to dismiss was made. I have not given any weight to the evidence which became available post-dismissal. For reasons of

completeness, I record that I find the dismissal to be justified on both procedural and substantive grounds. I find that MDS conducted a fair investigation into the matters which Mr Burns was held accountable for and that the concerns of the employer were put to Mr Burns and his representative for his response. Having received the response to its allegations from Mr Burns, MDS then made further enquiries and involved an independent consultant to interview various staff as to their version of the respective events.

[85] In summary, while I find that while there are some flaws in the actions of MDS and the conclusions which the School arrived at, on balance, these are not of such impact that they make the decision to dismiss unfair and/or unreasonable. Taken as a whole, I find that the combined deficiencies revealed by the investigation into the general conduct of Mr Burns and his failure to recognise or acknowledge any fault, were of such gravity that MDS was entitled to conclude that the situation was irretrievable and that termination of the employment relationship, on the basis of a serious breakdown in trust and confidence, was an option reasonably available.

This is particularly so given that Mr Burns held a responsible senior role within the School and was charged with ensuring that the Gaming Department met its curriculum and other responsibilities to the expectations of fee paying students and within NZQA requirements.

3. Was there as breach of Mr Burns’ employment contract going to the good faith provisions of s.4 of the Act and/or any other term or condition?

[86] The submissions for Mr Burns point to several incidents, including the taping of the meeting on 23rd February 2009 by Mr Millet, as matters going to a breach of the terms of the employment contract and hence a breach of the good faith provisions of s.4 of the Act. It is submitted that MDS “lied and deceived” in relation to a number of incidents. These are extreme allegations and apart from the taping incident, largely unsupported by tangible evidence. Further, I can find no direct link between any of these incidents or alleged actions and any term of Mr Burns’ employment contract. The Authority has not been referred to any such nexus in the evidence or submissions for the

applicant. Mr Burns seeks a penalty to be awarded of the sum of \$10,000. While I accept that the behaviour of the employer in relation to the taping incident was unacceptable and that some other conduct was less than ideal, I do not find that the incidents separately or together constitute a breach of any express or implied term of the employment contract, or of s.4 of the Act. But even if I am wrong about this (and I think not), there is a high statutory threshold to be attained before a penalty can be awarded for a breach of s.4, in that a failure to comply with the duty of good faith must be deliberate, serious and sustained or alternatively, intended to undermine an employment relationship.⁸ That statutory threshold has not been attained in the circumstances of this case.

4. Did Mr Burns breach the terms and conditions of his employment contract and if so, is MDS entitled to an award of damages?

[87] In its counterclaim against Mr Burns, it is the position of MDS that by failing to carry out his duties in the manner expected of him, Mr Burns breached the express, implied and statutory terms of his employment agreement. In regard to the respective duties, MDS refers to the following actions or inactions on the part of Mr Burns:

- (a) The deletion of student feedback about himself;
- (b) Withholding student feedback from MDS which was adverse to him;
- (c) Failing to return curriculum material;
- (d) Failing to be well prepared for his lessons and to teach those lessons well;
- (e) Failing to provide a complete teaching curriculum for the Game Development Course; and
- (f) Directing a subordinate employee not to grade student assignments.

[88] MDS claims that as result of the conduct of Mr Burns it has suffered a loss totalling \$62,325. This sum consists of monies paid to a contractor to assist in completing the Game Development curriculum (\$17,000), to MDS employees to finish the curriculum preparation work and grading of a back-log of

⁸ *New Zealand Air Line Pilots Assn Inc and Ors v Jetconnect Ltd and Ors* AC 23A/09, 19 June 2009.

assignments (\$12,400), and the recruitment fee and other costs incurred with the urgent recruitment of a tutor to replace Mr Burns (\$26,125).

[89] The law applicable to this type of claim for damages rests largely on the fulcrum of foreseeability. In *Attorney-General v Gilbert* [2002] 2 NZLR 342 it was held that:

“The loss must be sufficiently linked to the breach of a particular duty to merit recovery in all the circumstances.” And: “Loss of the type suffered will usually be sufficiently linked to the breach if within the contemplation of the parties as the not unlikely consequences of breach. That is how the question of remoteness of damage in contract was addressed by in the context of an employment contract in *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20 at p 37 per Lord Nicholls of Birkenhead:

“...if it was reasonably foreseeable that a particular type of loss of this character [in that case, impairment of employment prospects] was a serious possibility, and loss of this type is sustained in consequence of a breach, then in principle damages in respect of the loss should be recoverable.”

[90] I do not consider that all of the alleged breaches of the employment agreement can be shown to have contributed to the damages claimed. Firstly, MDS say they do not know what was contained in the feedback that Mr Burns deleted. It has been inferred that it was negative to Mr Burns but only he really knows. The withholding of the second student feedback which was adverse to Mr Burns, in itself can hardly be seen to have been the cause of any damages to MDS. The School is probably on sounder ground in regard to the matters pertaining to the curriculum, but the faults were of such a wide ranging nature that it is most unlikely that the costs subsequently incurred by MDS would have been foreseeable or apparent to Mr Burns (or the School) before he engaged in the conduct which eventually culminated in his dismissal. It most probably would not have been foreseeable to Mr Burns that he was likely to be dismissed and that MDS would have to engage a replacement tutor. I conclude that the damages claimed are too remote, particularly given that Mr Burns was dismissed because the cumulative nature of the deficiencies led to a breakdown of trust and confidence, rather than one particular and substantive element of conduct as found, for example, in *Masonry Design Solutions Ltd v Bettany* AC 30/09, 21 August 2009. I decline the counterclaim.

Determination

[91] For the reasons given throughout this determination:

1. I find that the employment of Mr Burns was affected to his disadvantage by an unjustifiable action by his employer. This is the suspension from his employment without consultation or his input. Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, Media Design School Limited is ordered to pay to Mr Burns the sum of \$5,000.
2. I find that the dismissal of Mr Burns was an option which was available to a fair and reasonable employer given all the circumstances. Mr Burns was not unjustifiably dismissed.
3. I find that there was not a breach of any of the terms of Mr Burns' employment agreement or of the good faith provisions of section 4 of the Act.
4. I find that there are not sufficient grounds for the counterclaims advanced by Media Design Limited and the claims are declined.

Costs

[92] The parties are invited to resolve the matter of costs if they can. In the event they cannot, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The Applicants have a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority

