

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 377  
5297376

BETWEEN

JOHN CONAGLEN  
Applicant

AND

THE VICE CHANCELLOR  
UNIVERSITY OF  
AUCKLAND  
Respondent

Member of Authority: R A Monaghan

Representatives: H Waalkens QC, counsel for applicant  
S Wilson, counsel for respondent

Investigation Meeting: 7 and 8 December 2010

Determination: 30 August 2011

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] Dr John Conaglen says his employer, the Vice Chancellor of the University of Auckland (the university) caused him disadvantage in his employment by its unjustified action. The action followed the university's determining that a complaint about Dr Conaglen disclosed misconduct on his part. Dr Conaglen was to be: required to apologise to the three complainants; issued with a formal written warning; and subjected to evaluation in a manner Dr Conaglen says was different from that to which his academic colleagues were subject.

[2] Dr Conaglen seeks the quashing of the finding of misconduct, a decision quashing the associated penalties, and compensation for injury to his feelings.

[3] The university says it conducted a full and fair investigation into the complaint and was justified in finding that misconduct occurred, and that the penalties imposed on Dr Conaglen were fair and reasonable.

## Background

[4] Dr Conaglen is a registered medical practitioner, is also registered as a specialist in internal medicine, and practises as a consultant endocrinologist. Commencing in October 2001, the university employed him as an associate professor in the School of Medicine in the faculty of Medicine and Health Sciences (FMHS) under a sharing arrangement with the local district health board. At relevant times Dr Conaglen was based at the Waikato Clinical School (WCS), a division of the School of Medicine.

[5] In this determination I refer to him as Dr Conaglen because he indicated that was a satisfactory form of address.

[6] The complaint against Dr Conaglen was prompted by his conduct of a tutorial on 22 October 2008. The tutorial group comprised 7 fourth year medical students. The subject matter that day was the taking of medical histories from patients, and the teaching method included a role playing exercise. Dr Conaglen played the role of a particularly unforthcoming patient. The students' concerns were not with the content of the role play, rather with Dr Conaglen's approach to the role playing exercise.

[7] The complaint was put in writing and handed to Dr Susan Hawken, Phase Director, on 19 January 2009. It took the form of a petition signed by 5 students, expressing in general terms that:

- a. Each have experienced or witnessed unfair, offensive or humiliating treatment of medical students by Dr Conaglen, and*
- b. Believe that the actions we witnessed or experienced were not isolated events but part of a pattern of bullying of students by Dr Conaglen, and*
- c. Are concerned that such behaviour may adversely affect the quality of teaching of future medical students at Waikato Hospital, and*
- d. Ask that the school consider reviewing Dr Conaglen's suitability as a clinical teacher at Waikato Clinical School, and*
- e. Are each willing to discuss with the School of Medicine the specific nature of our experiences or observations in point 1 above ...*

[8] Attached to the petition was a document detailing the concerns about the 22 October role play.

[9] According to that document, Dr Conaglen began the role-play by asking the students to nominate the shyest member of the group to play the part of the doctor. The students were reluctant to respond, and Dr Conaglen asked expressly for the shyest student. Dr Conaglen himself played the part of the patient. He instructed the other students to write down the things the student did badly during the role-played interview with the 'patient', but indicated he did not want to hear about the things the student did well. During the role play he stopped intermittently to ask questions about what was being done wrong. The role play included inappropriate sexual suggestions on the part of the 'patient'. The student 'doctor' became uncomfortable and uncertain of what to do. Dr Conaglen commented that the student handled that matter badly too, and went on to describe how such situations should be handled. He was said to have ended the exercise by saying 'how bad was she?' and embarking on a further detailed criticism. The student began to cry for which she was again criticised, although the writer of the document went on to comment that Dr Conaglen then sought to reverse his previous statements by saying: 'I really don't think you were that bad ... do any of you guys think she did badly?'

[10] Lastly, the writer of the document noted that he approached Dr Conaglen subsequently to discuss the matter, suggesting to Dr Conaglen that Dr Conaglen sought deliberately to humiliate the student. Dr Conaglen's response was said to have been to deny the suggestion, to say the student cried because of her cultural background, and to say that a 'Kiwi girl' would not have cried.

[11] Dr Hawken passed the material to Associate Professor Phillipa Poole, the Associate Dean (Medical Programme). By letter dated 22 January 2009 Associate Professor Poole forwarded the petition and its attachment to Professor Iain Martin, Dean of Faculty of Medical and Health Sciences. According to Professor Martin, the letter was forwarded directly to him because Associate Professor Poole believed the circumstances were serious enough to warrant that action rather than referring the material to the Head of Department.

[12] Indeed the letter itself commented that concerns had been raised from a number of sources over the past four months, and Associate Professor Poole expressed the view that:

*As I mentioned to you late last year I am concerned for student wellbeing and the safety of learning environments at this site. As this poses considerable risk to the FMHS and its students, I believe timely intervention is required to mitigate this risk. As whistleblowers it is important that students presenting the petition need to be protected.*

[13] Although no further details of these concerns were discussed at the time Professor Martin considered that, if substantiated, the allegations made by the students were potentially serious. He noted in particular that the students alleged there had been a pattern of bullying. Since bullying could amount to serious misconduct if the allegation was upheld, the serious misconduct provisions in the applicable disciplinary procedure would have to be followed if the matter was to be pursued. Professor Martin asked the university's mediator and harassment officer to speak informally to some of the students who had presented the petition in order to confirm whether they wished to proceed with a formal complaint, and consulted with the officer on the outcome. He formed a preliminary view that the matter was a case of potential serious misconduct.

[14] By letter dated 10 February 2009 Professor Martin advised Dr Conaglen that a complaint had been received regarding his conduct during teaching-related activities. The letter advised that the allegations were considered serious, and would be investigated under cl 8, Schedule 3 of the Academic Staff Collective Agreement (the cea). Professor Martin handed the letter directly to Dr Conaglen.

[15] Professor Martin also provided the petition and its attachment to the University's Vice Chancellor, with whom he discussed his preliminary view that the matter was one of potential serious misconduct. Although Associate Professor Kolbe had contacted him in December 2008 in respect of some examination-related concerns, Professor Martin maintained in evidence that his decision to refer the matter to the Vice-Chancellor was based on the petition and the letter. I found nothing in the evidence to suggest the university's approach to that material was influenced by the issue Associate Professor Kolbe had raised.

[16] By memorandum dated 12 February 2009 the Vice Chancellor appointed Professor Gregor Coster (Dean of Graduate Studies) and Associate Professor Joanna Manning (Faculty of Law) as his delegate for the purposes of the disciplinary procedure. The memorandum referred to the receipt of an allegation of serious

misconduct, details of which were contained in the attached papers (namely the petition and the account of the 22 October tutorial). It defined the role of delegate as:

*to investigate the allegations, conduct a disciplinary meeting should you consider that appropriate and make a finding as to whether serious misconduct has occurred, and if so the disciplinary option that is to be taken. Because the allegation is one of serious misconduct clause 3.4 (and hence clause 8) apply in this case.*

## **Relevant provisions in the cea**

[17] Relevant provisions in the cea read:

### *Clause 5.4 Disciplinary Guidelines*

*If the employer considers the employee's performance of his/her duties to be unsatisfactory the current Disciplinary Guidelines for Academic Staff will apply (Schedule 3)*

...

### *Schedule 3: Disciplinary procedures for academic staff*

#### *1. Introduction*

*1.1 ... Unsatisfactory performance or misconduct by a staff member may occasion disciplinary action including termination of employment.*

*1.2 ....*

*1.3 The rules of natural justice apply under these procedures.*

#### *2. Definitions*

##### *2.1 In these Procedures:*

*"Delegate" means a member or members of the University staff to whom the Vice Chancellor has delegated the authority to discipline the staff member by virtue of a general or specific delegation.*

...

*"Misconduct" means:*

*(a) the failure of a staff member in their employment to maintain proper standards of integrity, conduct and concern for the public interest or the well being of the students ...; or*

...

*"Performance" means the performance by a staff member of his or her duties and includes matters referred to as grounds for dismissal on notice in the applicable employment agreement...*

*"Serious misconduct" means Misconduct which is so serious as to warrant summary dismissal and may include, but is not limited to, sexual harassment, assault, theft, fraud, misappropriation, wilful negligence, wilful disobedience, wilful misconduct, failure to disclose a conflict or breach of the University's policy against harassment or otherwise conduct warranting dismissal without notice as set out in the applicable employment agreement.*

...

### 3. Application of procedures

3.1 *These procedures apply where, in the course of employment of a staff member there is a concern about the standard of his or her conduct or performance.*

#### *Exceptions*

...

3.4 *Only Section 8 of these procedures applies where serious misconduct is alleged against a Staff Member.*

### 4. Initial meeting

4.1 *Where the Head of Department considers that the performance of a staff member is unsatisfactory or that the behaviour of a staff member amounts to misconduct, the Head of Department will arrange a meeting with the staff member to discuss in an informal and constructive manner the aspects of performance or behaviour that are perceived to be unsatisfactory. The staff member may be accompanied by a representative. Support to achieve the standards required will be provided where applicable.*

4.2 *At that meeting the Head of Department will:*

- (a) *Identify the perceived shortcomings and invite any explanations for them.*
- (b) *Outline the standards of performance or behaviour that are required and explain the ways in which improvement is needed and the period for the staff member to attain those standards.*
- (c) *In the absence of a satisfactory explanation by the staff member, give an oral or written warning to the staff member ...*

### 5. Subsequent meeting

5.1 *If the Staff Member does not attain within the period set under 4.2(b) the required standards of performance or behaviour the Head of Department will report, through the Dean, to the Vice Chancellor who will appoint a Delegate who will then arrange a subsequent meeting.*

5.2 *In the arrangement of that meeting the Staff Member will be notified in writing:*

- (a) *of the matters of concern to be discussed at the subsequent meeting; and*
- (b) *That the staff member may be accompanied at the meeting by a representative.*

5.3 *The meeting which will be chaired by a delegate will be attended by:*

- (a) *The Staff Member;*
- (b) *Any representative of the Staff Member (at the discretion of the Staff Member);*
- (c) *The Head of Department;*
- (d) *A representative of the Head of Department.*

*Note: A legal representative may be brought to the meeting by either party at the discretion of the parties.*

5.4 *At the meeting:*

*[matters of concern to be raised and commented on]*

5.5 *Following the meeting:*

- (a) *[outcome if necessary improvement in performance or behaviour has occurred]*
- (b) *If the Delegate considers, after hearing the Staff Member's comments or explanation and any other discussions at the meeting, that the necessary improvement in the performance or behaviour of the Staff Member has not occurred and there has been no satisfactory explanation, the Delegate will:*
- (i) *outline the standards of performance or conduct that the staff member must attain and the improvements necessary to attain those standards. Support to achieve the standards required will be provided where appropriate;*
  - (ii) *In the case of unsatisfactory performance, specify a time period within which the staff member is required to improve, or in the case of misconduct, require the staff member not to engage in further misconduct;*
  - (iii) *Warn the staff member that failure to make those improvements within the specified time or that repetition of the misconduct will result in disciplinary action that could include termination of employment.*

5.6 *As soon as practicable after the meeting the Delegate will notify the staff member in writing of the matters referred to in 5.5(a), 5.5(b)(i – iii).*

#### 6. *Further misconduct*

*[procedure where further misconduct occurs after a warning has been received under cl 5 in respect of misconduct]*

#### 7. *Further unsatisfactory performance*

*[procedure where a warning has been received under cl 5 in respect of poor performance]*

#### 8. *Summary dismissal*

8.1 *A staff member may be dismissed without notice for serious misconduct.*

8.2 *Where there is an alleged case of serious misconduct the staff member may be suspended on full salary from his or her duties while an investigation is carried out.*

8.3 *The delegate will conduct an investigation into the serious misconduct and will call a meeting at which the staff member shall be entitled to bring a representative and will give the staff member an opportunity to comment on the alleged serious misconduct.*

8.4 *If the delegate is satisfied that the staff member has committed serious misconduct the delegate may terminate the staff member's employment, giving reasons for doing so.*

8.5 *The delegate will notify any decision in writing to the staff member.*

### **The disciplinary process**

[18] The delegate advised Dr Conaglen of its appointment in a letter dated 24 February 2009. The letter advised that the delegate was investigating an allegation of serious misconduct and referred to schedule 3 of the cea. The letter described the procedure to be followed during the investigation and said the allegation being investigated was:

*... of unfair, offensive, humiliating and/or bullying conduct by Associate Professor Conaglen in relation to medical students in the course of his teaching duties at the Waikato Clinical School and the Department of Medicine in October 2008 (emphasis added).*

[19] On that formulation the investigation could be expected to focus on the complaint about the 22 October tutorial. The letter went on to advise that the delegate would decide whether the alleged case of serious misconduct had been made out, whether a lesser case of misconduct had been established, or that neither had occurred. If serious misconduct had occurred, disciplinary action may include the termination of employment under clause 8.4 of schedule 3.

[20] In the period from 3 March – 19 April interviews were conducted with: Associate Professor Poole; Associate Professor Warwick Bagg (the other Phase Director); Dr Hawken; Associate Professor Kolbe; Professor Ross Lawrenson (Head of Waikato Clinical School); Raewyn Wooderson (Manager, Waikato Clinical School) and three of the students who signed the petition.

[21] During her interview Associate Professor Poole said the impressions giving rise to the concerns in her 22 January letter were anecdotal and based on matters reported to her by members of the academic staff. Dr Hawken was one such staff member. During her interview Dr Hawken referred in a general way to reports by students of feeling belittled, as well as to one particular concern to that effect which had been raised with her the previous year. Associate Professor Bagg, said in his interview that during the course of an anonymous survey he had conducted the previous year three students had commented on feeling put down by Dr Conaglen. Associate Professor Kolbe spoke during his interview of having raised concerns with Dr Conaglen after receiving an informal complaint about a comment made to a student during an examination, and of deciding not to include Dr Conaglen as an examiner in 2008.

[22] In addition two of the students present during the 22 October tutorial - including the author of the complaint - gave their versions of the tutorial and made other comments about Dr Conaglen's teaching technique. The third student commented in a similar vein on his experience of Dr Conaglen's teaching techniques. The student who played the 'doctor' was not interviewed.

[23] Professor Lawrenson spoke in support of Dr Conaglen and expressed confidence in him. Ms Wooderson told the delegate she had been made aware of the 22 October incident shortly after it occurred because Dr Conaglen had contacted her after the subsequent visit by the author of the complaint. When she had occasion to seek feedback from the students, the concern that Dr Conaglen was a bully was raised. Among other things Ms Wooderson sought to address the concern by explaining her understanding of what Dr Conaglen sought to achieve. She told the students that Dr Conaglen's clinic and attachment would be one of the most valuable learning experiences they would have in medicine. Ms Wooderson expressed to the delegate that she was supportive of Dr Conaglen and viewed his approach to teaching as seeking to bring out the best in students, not to distress them.

[24] Through counsel Dr Conaglen was provided with copies of the statements taken at the interviews. In a letter dated 8 July 2009 Dr Conaglen set out his response in detail. He went on to express his regret at the distress that had been caused, and to say he had reviewed his teaching style. He was disappointed that some of the concerns about him had not been raised directly with him, and expressed concern about Associate Professor Kolbe's role. He also provided eight statements of support from colleagues and former students.

[25] Dr Conaglen spoke to his response during a meeting of the parties also held on 8 July. He said he did not intend to be unfair, offensive or bullying. He explained his philosophy of seeking in tutorials to replicate clinical practice and situational experiences as much as reasonably possible. On 22 October he had asked for the shyest student to be the 'doctor' because he believed shy people tend to hide at the back of a group and not participate. After the role play he asked the other students for feedback about how well the 'doctor' had done. He believed the students were reluctant to critique the student's history-taking, and was concerned that the group had difficulty with history-taking. Accordingly he told the students the history was poor, and he set about deconstructing the issues so the students would learn the components of good history-taking. At the end of this the student dissolved into tears. Dr Conaglen said he tried to reassure her, and that he told her to stop crying as he believed this was inappropriate behaviour for a young doctor in a professional setting.

[26] Dr Conaglen's response also addressed the statements taken during the interviews with the delegate. He denied additional allegations made by the students, particularly in that they concerned alleged remarks of his which were culturally insensitive, and expressed a further concern about Associate Professor Kolbe's motivation as well as about the failure to raise with him at the time they occurred matters that were mentioned to the delegate.

[27] The delegate set out its decision in a document dated 6 August 2009, and forwarded the decision to counsel under cover of a letter dated 10 August 2009.

[28] The decision began by summarising the delegate's jurisdiction with reference to clause 8 in particular, then summarising the terms of the delegation. It went on to set out the allegation of serious misconduct and said:

*5. If the delegate finds that Serious Misconduct is not established, it may also consider whether a case of Misconduct has occurred. "Misconduct means" [definition quoted]*

*If after its investigation the Delegate finds that neither a case of Serious Misconduct or Misconduct has occurred, it will dismiss the complaint.*

[29] The delegate recorded its principal finding in these terms:

*13. ... we are not satisfied that Associate Professor Conaglen has committed Serious Misconduct. However we are agreed that he has committed Misconduct. Our reasons are as follows.*

[30] In discussing its finding the delegate acknowledged that Dr Conaglen disagreed with parts of the students' account of the 22 October tutorial, for example that he was unwilling to hear about positive aspects of the student's performance. Otherwise it considered that he confirmed its overall accuracy. For its part it accepted the account as accurate.

[31] It went on to note Dr Conaglen's view that not enough tutorials of the type in question were available to students, and that to be worthwhile the tutorials should at times reflect some of the robustness and challenges which occur in real life. At times Dr Conaglen 'challenged' his students in endeavouring to replicate real life experience. The delegate found that in doing so he did not intend to be unfair, offensive or bullying.

[32] The delegate then turned at para 22 of its decision to some of the other incidents that had been raised during its investigation. It began with incidents relating to Dr Conaglen's conduct during teaching. It found that on other occasions culturally insensitive statements had been made to the student who prepared the account of the tutorial. It also noted informal complaints and concerns about Dr Conaglen's behaviour during examinations, one of which Associate Professor Kolbe had raised with Dr Conaglen in an annual performance review. It went on to say:

*24. We received other information about incidents which if true reflected adversely on Associate Professor Conaglen's teaching. Almost all of these were second hand and not witnessed by the person to whom we spoke. As such it would not be fair to Associate Professor Conaglen to rely on them, and we have accordingly placed little weight on them.*

[33] The precise extent of the matters covered by that comment was not clear. For example one of the students questioned by the delegate, R, described another tutorial at which he was present, and during which Dr Conaglen was again strongly critical of the performance of a student playing the role of a doctor taking a medical history. R also made more generalised comments about Dr Conaglen's behaviour towards students. Another student, D, also described Dr Conaglen's strongly negative criticisms of students' performance at which he was present, before going on to raise concerns about his own interactions with Dr Conaglen and criticising Dr Conaglen's approach to teaching. He also mentioned other alleged incidents, the accounts of which were acknowledged to be second hand.

[34] Dr Conaglen's reply to the delegate was to note that R was not present and to refer to the otherwise second-hand nature of the accounts R gave. However R was alleging he was present at the tutorial. As for the tutorial D described, Dr Conaglen acknowledged to the delegate that the tutorial went badly. Dr Conaglen also explained the interactions he had with D himself.

[35] The delegate's view of the 22 October tutorial was that the tutorial provided strong evidence of an approach Dr Conaglen had used as a regular teaching practice. It went on to say:

*27.... The key facts of this tutorial and the teaching technique used in it are acknowledged. We find that it is an inappropriate teaching method and the students' reaction to it was reasonable and not overly sensitive. It is not acceptable in 2008/9*

*to use a teaching method based principally on generating fear in students and making an example of them. This is an outdated approach to teaching which is no longer acceptable or effective. We accept the validity of Dr Conaglen's teaching goal, and that it is important for students to gain experience from and be prepared for the sometimes difficult, uncommunicative and challenging patients they will encounter in clinical practice. However we do not accept the validity or appropriateness of this teaching method to achieve that goal. We consider his manner to have been overbearing and overly aggressive. We also consider it inappropriate for a staff member to role-play the patient, most especially if sexual boundaries are to be raised, because of the potential for misunderstanding by students. It is preferable that an actor be used instead.*

[36] The delegate considered the conduct amounted to 'a failure to maintain proper standards of integrity, conduct and concern for the ... well being of the students' so fell within the definition of misconduct in clause 2.1 of schedule 3. It could not condone this unacceptable form of teaching, and reached a finding of misconduct.

[37] While the delegate accepted Dr Conaglen did not intend to bully or humiliate the student who played the 'doctor', it found his conduct was likely to have had that effect. It acknowledged Dr Conaglen was genuinely apologetic about his behaviour, had shown insight into his conduct and was prepared to make any necessary changes in his teaching method.

[38] The decision ended by inviting Dr Conaglen and counsel to meet with the delegate and make submissions on what if any disciplinary action should be taken, or address it in writing if that was preferred. The covering letter said the penalties being considered were:

- . the issue of a written warning;
- . that Dr Conaglen be required to issue a written apology; and
- . until 31 December 2010 student evaluations would occur at the end of each run, with the outcome to be reported to Professor Lawrenson who would in turn report on a six-monthly basis to the Head of the Medical School and copy to Associate Professor Kolbe.

[39] Dr Conaglen replied in a letter dated 14 August. He said that in the light of his assurance that he would not repeat the behaviour, or use that style of tutorial in the future, he did not agree that a warning was necessary. Secondly he had already expressed his remorse, and he attached written apologies to be made available to the

students. Thirdly he did not consider the proposed evaluation procedure was necessary. He would accept a discreet evaluation in the interests of maintaining his teaching standards at a high level, but did not consider this necessary as part of a penalty mechanism. Finally he urged the delegate to consider: the positive references he had provided; that a finding of misconduct was excessive; and that the proposed penalties were unfair and unreasonable.

[40] By agreement there was no further meeting. In a supplementary decision dated 1 September 2009 the delegate advised there would be disciplinary action in the form of:

- . a requirement for formal written apologies, which had already been provided;
- . a written warning under cl 5.5 of the cea, to remain in place for 12 months;
- . an evaluation and reporting procedure, to continue until the end of semester 1 2010.

[41] The delegate was aware that Dr Conaglen had applied for a position as a professor/associate professor of medicine at the Waikato Clinical School. It referred to the matter in its decision by saying it considered the process irrelevant to its investigation except to the extent that it sought to investigate and decide the allegation against Dr Conaglen as expeditiously as possible.

[42] However by letter dated 2 September 2009 Professor Martin advised Dr Conaglen that he would be unable to recommend Dr Conaglen's appointment while Dr Conaglen was on a warning as a result of a finding of misconduct. Professor Martin asked Dr Conaglen to consider whether to continue with the application. Dr Conaglen elected to proceed, and was one of three applicants. According to a file note of the shortlisting committee he was not shortlisted because, for reasons which were recorded, his CV did not reach the level required for a professorial appointment. The reasons were unrelated to the existence of the warning.

### **Whether the warning was justified**

[43] Dr Conaglen says the university has not acted as a fair and reasonable employer would have done in all of the circumstances.

[44] The heads of argument identified in the introductory paragraphs to the submissions for Dr Conaglen were:

- (i) it was wrong and unreasonable to characterise the complaint as one of serious misconduct;
- (ii) the university breached the disciplinary procedures in schedule 3;
- (iii) there were other significant process defects and irregularities;
- (iv) the substantive decision was unreasonable; and
- (v) the penalty decision was unreasonable.

### 1. Characterising the complaint as serious misconduct

[45] Mr Waalkens addressed the heads of argument in a different order when speaking to his submissions, but the order as set out illustrates a weakness in the structure of the disciplinary procedure itself.

[46] The weakness is that on its face the procedure requires a commitment at the outset either to follow the steps for addressing less serious misconduct as set out in clauses 4 – 7 of Schedule 3, or the steps for addressing serious misconduct set out in clause 8. That is the effect of clause 3.4, and the context for the submission that it was wrong and unreasonable to characterise the complaint against Dr Conaglen as one of serious misconduct. Further, the commitment to follow one set of steps or the other must be made on the basis of untested allegations, and there is no provision for a change once the commitment has been made.

[47] Here Dr Conaglen's circumstances concerned an allegation of serious misconduct, when the conduct was subsequently found to amount to misconduct. Clause 3.4 obliges the parties to follow the procedure in 'section 8' when serious misconduct has been alleged, and by saying 'only' that provision applies when serious misconduct is alleged it prevents the parties from utilising the procedures in the remaining clauses. In particular clause 8 makes no provision for conduct which - although alleged at the outset to be serious misconduct - is found following investigation to amount to misconduct. As a result an employee who was only ever guilty of misconduct at most may not receive the benefit of the procedures for addressing concerns about misconduct which is less than serious misconduct.

[48] The question of whether the clause 8 procedure itself allowed for a finding of misconduct rather than serious misconduct was debated with Associate Professor Manning when she gave her evidence. This arose with particular reference to the delegate's letter of 24 February and paragraph 5 of its decision.

[49] It was put to Associate Professor Manning that the delegate could make a finding of serious misconduct or, in the absence of such a finding, the disciplinary process would have to start again under the procedures for addressing allegations of misconduct. Her answer was that she did not interpret the cea in that way, and that implicit in the ability to make a finding about the existence of serious misconduct was the ability to make a finding of misconduct. As she put it, the lesser was incorporated in the greater. Associate Professor Manning also pointed out that any obligation to start again would be tough on an employee and a very inefficient use of time. Finally, she said she had acted as a delegate and made a finding of misconduct rather than serious misconduct before, and there was an indication in the university's submissions that such an approach was not unusual.

[50] I agree with the comment about the practical effect of any requirement to start again. However I consider clause 3.4 to be unambiguous. I also consider it relevant that the clause was an agreed provision in a cea, and not for example part of a unilaterally-created policy. The parties through their negotiators must have turned their minds to why it might be desirable to have separate disciplinary processes for addressing allegations of misconduct and serious misconduct respectively, because they went on to agree on the detailed content of such processes.

[51] Mr Waalkens made further submissions about why a reasonable employer would not have characterised the complaint as serious misconduct at the commencement of the disciplinary process.

[52] Regarding the test for conduct that could amount to serious misconduct, in addition to the definition in clause 2.1 of the disciplinary procedure it is useful to bear in mind the once frequently-quoted description of 'serious misconduct' in *Northern Distribution Union v BP Oil*:<sup>1</sup>

---

<sup>1</sup> [1992] 3 ERNZ 483, 487

*... Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*

[53] In general the question of degree cannot be assessed until an investigation has been completed. To the extent that a preliminary view must be formed for the purposes of the present disciplinary procedure, more care than might otherwise be the case must be taken with the preliminary assessment.

[54] However, even if I am wrong about the dual nature of the disciplinary procedure, I consider that special care must also be taken when dealing with broadly-stated allegations of discrimination, harassment or bullying for example. Although such conduct can undoubtedly amount to serious misconduct, the words 'discrimination', 'harassment' and 'bullying' are often used emotively. When the details of the conduct being characterised as bullying, for example, become available they can place the conduct in a different light and may mean that the conduct did not fit any definition of bullying at all.

[55] Here, the broad allegations about Dr Conaglen's conduct as set out in the petition could appear to be very serious. However only one incident was identified in support, namely the role play of 22 October. If the account of that incident was accepted then the conduct described in the account could amount to misconduct, but on its own the conduct may not meet the test for serious misconduct in the *BP Oil* case.

[56] If the university's concern about Dr Conaglen's conduct was prompted by broader statements in the petition such as the belief that there was a 'pattern of bullying' - together with the other general allegations set out in points (1) and (2) - then better identification of the additional incidents forming the pattern should have been undertaken before even a preliminary view was reached as to the seriousness of the conduct. Without that, the alleged 'pattern of bullying' rested on only one identifiable incident.

[57] Indeed the students seemed to have invited a further approach at (5) of the petition. However the university's policy was to not involve students in its employment issues, and beyond involving the harassment officer it did not seek to

press the students further. Its observation of that policy did not excuse it from or reduce its obligations to Dr Conaglen.

[58] Similarly to the extent that the concern about Dr Conaglen's conduct was influenced by Associate Professor Poole's comments in her 22 January letter, more specific information should have been obtained from her before a preliminary view of the nature of the conduct was reached.

[59] Last, the university was influenced in its view of the seriousness of the allegations by its view that it was unusual for students to voice concerns in the way these students had. Even if that is so, it is important not to allow such considerations to outweigh a need to focus on the nature and quality of the conduct alleged.

[60] For these reasons, and in the particular circumstances created by the structure of the disciplinary procedure, I conclude that a reasonable employer would have obtained more specific information before making a preliminary characterisation of the conduct as serious misconduct. I consider the failure to do so amounted to such a fundamental failure that the disciplinary procedure was fatally flawed.

## 2. Breach of the disciplinary procedure in schedule 3

[61] Mr Waalkens submitted that the university breached clauses 4 – 7 of the disciplinary procedure.

[62] In the circumstances discussed above, the clauses were not followed at all. A finding of misconduct was made after following the procedure in clause 8.

[63] The result was that Dr Conaglen lost the opportunity to have the concerns about his conduct put to him at the relatively lower and less formal level contemplated by clauses 4 - 7. In particular he did not have the opportunity first to have the matter addressed by, then subsequently to obtain input from the head of department as contemplated by clauses 4 and 5 respectively.

[64] I find this loss of opportunity was significant, and was unfair to Dr Conaglen.

[65] The above conclusions form the basis for my finding that Dr Conaglen has a personal grievance on the ground that he has been disadvantaged in his employment by unjustified actions of his employer. Having made that finding, it is not strictly necessary to address the remaining submissions on the justification for the university's actions. However in that the next two sections bear on Dr Conaglen's conduct, I discuss several (but not all) of the matters raised in submissions in the light of their possible relevance to the remedy available for the personal grievance.

### 3. Other defects and irregularities

[66] Mr Waalkens' submissions under this heading included a submission about the basis on which the university formed its preliminary view that serious misconduct may have occurred. I do not address the submission in detail, in part because I have already set out my findings on that point. I do, however, add that Professor Martin was entitled at least to note the fact that some of Dr Conaglen's colleagues were expressing concern, and I do not accept that Associate Professor Kolbe's view had the unfair influence Professor Martin's thinking which Dr Conaglen contended.

[67] Mr Waalkens also submitted that any incidents of concern should have been raised with Dr Conaglen at the time they occurred, and not have been permitted to 'build up'. He referred in support to a determination of the Authority in *Gorman v General Distributors Limited t/as Countdown Johnsonville*<sup>2</sup>. In general this submission concerns the exercise of an employer's judgment at the time any incident occurs, with the quality of the judgment as to whether or when the incident should be raised formally with an employee often being assessed with the benefit of hindsight. I do not accept that the facts here indicate there was such a failure to raise concerns in a timely way that the subsequent warning was unjustified.

[68] Considerable attention was given to whether the delegate's investigation was sufficiently full. The submissions focussed in particular on whether the delegate should have further investigated disagreement Dr Conaglen expressed with parts of the account of the 22 October tutorial. Key aspects requiring further investigation were said to include whether Dr Conaglen said during the tutorial that he wanted to hear both the good and the bad regarding the 'doctor's' approach, whether he asked

---

<sup>2</sup> ERA WA1/07, 3 January 2007

'how bad was she' or stated that she had done badly, and whether adverse comments he did make were prompted by the students' saying they thought she had done well.

[69] These matters arose in the context of Dr Conaglen's expressed concerns that the group was reluctant to critique the 'doctor' and that the group had difficulty with history taking, and his explanation of the way he responded in the light of those concerns. That is, given the students' responses he considered it necessary in the interests of teaching good history-taking to identify what was wrong with the 'doctor's' history-taking and to correct it.

[70] However there is an acknowledgement in the explanation Dr Conaglen gave that he directed his comments to the poor aspects of the 'doctor's' performance, and I find he did not balance that approach with any positive acknowledgment of the 'doctor's' performance. Indeed his own description of his approach was that he told the students the history-taking was poor and he set about deconstructing the issues.

[71] A concern was also expressed in submissions about the delegate's failure to speak to the student who played the 'doctor' and to speak to another student, M, who was present at the tutorial and took a different view of it.

[72] M gave evidence in the Authority. He was a credible witness, although his evidence was concerned principally with his view of the nature and quality of Dr Conaglen's conduct during the tutorial. He had a different point of view from the one presented by the students who made the complaint, and he did not believe Dr Conaglen had acted inappropriately. Even so, questioning of him regarding what Dr Conaglen had actually said during the tutorial yielded answers consistent with the accounts already available. For example, he agreed that Dr Conaglen stopped the role play at times to ask what the 'doctor' was doing wrong.

[73] I consider it likely that, at the very least Dr Conaglen used words and phrases of the kind attributed to him, he consistently drew attention to the 'doctor's' poor performance and sought to elicit critical comments from the students.

[74] It was submitted that the delegate failed to take into account the excellent references which Dr Conaglen furnished. It is true that Dr Conaglen furnished a

number of excellent references, and for my part I have noted their contents. However the authors of the references were not in a position to comment on Dr Conaglen's conduct of the tutorial in question. The references were relevant to Dr Conaglen's general reputation and standing, and some were from students giving positive accounts of their experience of Dr Conaglen as a teacher. I consider the real disagreement is with the weight the delegate was perceived to have given to them. For my part I acknowledge that Dr Conaglen may be held in high regard but that does not change the nature and quality of his conduct during the tutorial in question.

[75] Finally, there was considerable discussion about the delegate's treatment of other incidents referred to. The approach I have taken means it is not necessary to resolve those matters, but I find there was some uncertainty about precisely which of the various incidents involving Dr Conaglen were taken into account, and on what basis. For example it appears from para 24 of its decision that the delegate did not take into account the acknowledged second-hand information imparted by D and R for example, although it is less clear whether it took the same view of incidents recounted by Dr Conaglen's colleagues. On the other hand in that the delegate also made an adverse finding about the approach Dr Conaglen had used as a 'regular teaching practice', it did take into account the descriptions of D and R of other tutorials at which they were present.

[76] D and R did not give evidence in the Authority. For that reason, in the context of remedies I do not take into account the additional incidents and address only the 22 October tutorial.

#### 4. Reasonableness of the substantive decision

[77] One of the approaches Dr Conaglen took in evidence was to associate the delegate's substantive decision with a finding that the use of role play itself was not an appropriate teaching technique. That was not the delegate's finding. Its concern was with the way in which the role play was conducted, and its decision was made on that basis.

[78] Not only was that apparent from the evidence, but I read the references to 'teaching style' and 'teaching method' or 'technique' in the delegate's decision as

references to its description of conduct occurring during the tutorial rather than as references to the use of role play. In turn the delegate referred to Dr Conaglen's reason for engaging in such conduct, namely that tutorials should reflect some of the robustness and challenges that occur in real life and that he would challenge his students in an attempt to replicate real life. Read in that light the finding in para 27 of the delegate's decision in particular is not a reference to the use of role play, but to conduct which amounted to a teaching approach or method based on generating fear in students and making an example of them. In turn the delegate found that conduct to be overbearing and overly aggressive.

[79] A short written brief of evidence of Dr Robert Walker - Professor of Medicine and a senior lecturer at the Dunedin School of Medicine - contained certain comments on the conduct of the disciplinary process which were not within the scope of the evidence he was qualified to give. Dr Walker had also been briefed on the basis that the university's concern was with the use of role play itself, which was not the case. However the oral discussion during the investigation meeting about the use of role play as a teaching tool was helpful.

[80] In that Dr Walker's evidence turned to address the proper way to conduct a role play, it tended to support in a general way the view the delegate took of the inappropriate nature of Dr Conaglen's method although Dr Walker was not willing to embark on any specific criticism of Dr Conaglen. I find that Dr Conaglen was unnecessarily destructive in the way he addressed the negative aspects of the 'doctor's' performance, particularly if he also considered – but did not make clear – that the 'doctor' had done well given her level of experience. Further, although attempting to encourage quieter students in particular to participate in role play is not in itself unacceptable, Dr Conaglen's technique of requiring the shyest student to play the doctor was unacceptable in the context of the overall approach he had taken. Finally Dr Conaglen acknowledged that when the student cried he told her it was unprofessional to cry, which in the context of his conduct overall was not acceptable.

[81] Dr Conaglen considered his approach suitable because he was seeking to teach a robust response to difficulties the students might encounter when they became practitioners. In a similar vein it was submitted on his behalf that this was a matter

of an over-sensitive reaction on the part of the student, with M having given evidence in support of that view.

[82] M said he believed the ‘doctor’ was being over-sensitive. Evidence of that kind is evidence only of M’s view, and does not determine the matter. For my part I accept that the ‘doctor’s’ reaction was at the sensitive rather than the robust end of the scale, but on the other hand the ‘doctor’ was acknowledged to be a shy person, whose performance was being put in the spotlight in a detailed and negative manner in front of a group of her peers.

[83] There can be a fine line between discussing difficulties or flaws in a performance in order to enhance learning, and focussing on difficulties or flaws to the extent that the learning experience becomes overwhelmingly negative. An over-sensitive reaction would be one exhibiting an unwillingness to accept valid and constructive criticism. However it is not a sign of over-sensitivity to react adversely to criticism that is simply destructive. The delegate believed Dr Conaglen overstepped the line and his criticism was destructive. That is also my conclusion.

#### 5. Reasonableness of the decision on penalty

[84] I construe the vice-chancellor’s memorandum to the delegate as an authority to proceed under clause 8 but not as an authority to proceed under any other provision. Clause 8 does not provide for penalties of the kind imposed by the delegate here, although in comparison a delegate appointed to act under clause 5 of the disciplinary procedure could be given the authority to impose such penalties. However since only clause 8 was cited in the memorandum I would have said that the delegate exceeded its delegated authority in imposing the penalties it did.

### **Conclusion**

[85] For the reasons discussed in response to Mr Waalkens’ first two headings, as well as the fifth heading above, my overall finding is that Dr Conaglen’s employment was affected to his disadvantage by an unjustified action of his employer and he has a personal grievance as a result.

## **Remedies**

[86] The remedies for a personal grievance are statutory and are contained in sections 123 – 128 of the Employment Relations Act 2000. These remedies do not include the quashing of the finding of misconduct and the associated penalties which Dr Conaglen said he sought. Rather, as was acknowledged, the Authority can make a finding as to whether the employer's action was justified or not.

[87] Of the remedies available under the statutory scheme, compensation was sought under s 123(1)(c)(i) of the Act.

[88] Dr Conaglen said the day he received the warning was the worst day of his life, and I accept he has experienced strong feelings of humiliation and upset. These feelings were aggravated by the letter from Professor Martin suggesting that he consider whether to continue with his application for an appointment as a professor.

[89] On the other hand, s 124 of the Act obliges the Authority - having determined that an employee has a personal grievance - to consider when determining remedies the extent to which the actions of the employee contributed to the situation that gave rise to the grievance. If those actions so require, the Authority must reduce the remedies that would otherwise have been awarded accordingly.

[90] For the reasons discussed under the third and fourth of Mr Waalkens' submissions, I find that Dr Conaglen's conduct of the 22 October tutorial contributed to the situation that gave rise to his grievance, and that it contained the necessary element of blameworthiness. I reduce the amount I would otherwise have awarded accordingly.

[91] The university is therefore ordered to compensate Dr Conaglen for injury to his feelings in the sum of \$10,000.

## **Costs**

[92] Costs are reserved.

[93] The parties are invited to agree on the matter. If they seek a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority