

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 176/10
5277854

BETWEEN SUZETTE MARTIN
Applicant

AND NORTHLAND EDUCATION
TRUST INC
Respondent

Member of Authority: R A Monaghan
Representatives: R Harrison, counsel for applicant
J Phipps, advocate for respondent
Investigation Meeting: 2 and 3 March 2010
Additional information provided: 4, 5, 8, 9, 17 and 23 March 2010
Additional submissions provided: 25 and 29 March 2010
Determination: 19 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Suzette Martin says her former employer, Northland Education Trust Inc (NETI) dismissed her unjustifiably.

[2] NETI says Ms Martin had used unapproved material in her classroom, breaching an obligation in the employment agreement. The dismissal was justified.

Background

[3] NETI is part of a wider organisation which operates the Westmount registered private schools nationally, being itself the operator of the Westmount School in

Northland. The Northland school has a campus at Kerikeri, where Ms Martin was employed as a teacher of English to year 9 - 13 students.

[4] Westmount schools adhere to the principles of the Exclusive Brethren Church. Further to this the third schedule of the parties' written employment agreement - the 'ethos and guiding principles of the school community' (the ethos) - provided:

"1. The trustees are committed to a way of life which is governed at all times and in every detail by the Holy Bible. It is the duty of the trustees to ensure that all aspects of school life are in accord with the Holy Bible. The conduct of the students, staff and parents must reflect Bible values. The trustees have absolute discretion in determining what conduct or activity is in accord with the Bible."

[5] Regarding the requirement for approval which NETI says Ms Martin breached, the ethos provided:

"4. Only literature approved by the trustees may be brought onto the school premises. ...

7. Only teaching programmes approved by the Northland Education Trust will be implemented at Kerikeri. The trustees reserve the right to review the teaching practice at Kerikeri. The trustees desire that students be educated to tertiary education entrance level. Any activity that would promote interest by students in higher education (university or college) would be viewed very unfavourably."

[6] The trustees are members of the Exclusive Brethren, while in general teachers are not. The ethos addressed this as follows:

"13. ... All teachers employed by the trust are employed on the basis that they will in all ways respect the deeply held feelings and conscience of the trustees and members of the community whilst engaged in employment for the trustees."

[7] By clause 11 of the employment agreement the employee acknowledged that the ethos reflected the Christian conscience of the trustees and their fellowship, agreed always to respect that conscience, agreed to comply with the ethos and agreed not to do anything that might bring students into conflict with it. A breach of clause 11 was included in the acts amounting to serious misconduct, set out in clause 15.

[8] There was little disagreement about the facts, which I now set out.

[9] Ms Martin has tertiary qualifications in English Literature. She commenced her permanent position at the school in February 2007. Also in 2007 a year 13 class was made available for the first time at the school.

[10] In 2008 Shakespeare's King Lear was included in the English programme. The play is one of a specified set of plays on the curriculum for year 13 students of English whose programmes include Shakespeare. Several publishers publish the text of the play. For the most part the publications are distinguished by the nature and content of their glossaries or annotations published alongside or as footnotes to the original text.

[11] Not only was approval required for the inclusion of King Lear in a teaching programme at the Westmount schools, but approval of the particular publication to be used was also required. Considerable time would be spent ensuring the contents were suitable in terms of church principles. The version of King Lear considered suitable for teaching in Westmount schools, and approved by the trustees for teaching in Northland, was published by Longman. Its layout comprised the original text on the right hand side of an open page, with a glossary and limited additional commentary on the left hand side.

[12] Ms Martin said she struggled with the Shakespearian text, and had problems translating the language for herself and her students. Her difficulties were such that she abandoned the teaching of King Lear in 2008, but made another attempt in term 2 of 2009 when the play was again included in the year 13 English programme.

[13] On or about 6 May 2009 Ms Martin approached Daryl Maden, a trustee of NETI and the chief executive officer, to express concern about the lack of approved supporting material for King Lear. Mr Maden told her she could get material she felt she needed, but was to obtain his approval of it before showing it to students.

[14] Part of the supporting material Ms Martin believed was missing was a unit planner for King Lear. Susan Corbett, the Northland campus co-ordinator, raised a concern about the lack of unit planners for year 13 students with Margaret Lees, the education manager at the Westmount Education Trust (WET), in an email message dated 28 May 2009.

[15] The WET co-ordinates and manages Westmount school campuses. Ms Lee's role included managing curriculum leaders, in association with others. Curriculum leaders developed courses and teaching materials, with individual schools deciding on how the material would be applied locally. I sought copies of supporting material, particularly unit planners. The material provided was thin and would not have assisted Ms Martin.

[16] A Head of Department (HOD) for English was based at the school's Kaipara campus. His role included working with members of the Exclusive Brethren community (known as subject liaison officers) to decide on the texts and resources to be made available in each curriculum area.

[17] It appears there was disagreement at that level regarding unit planners, with the HOD being said to have expressed the view that teachers did not want them. Ms Corbett was said to hold a different view. Neither the HOD nor Ms Corbett gave evidence. However in response to my request for copies of the support material available on the Kerikeri campus, particularly unit planners, the Northland school was not able to find anything. Having said that, I acknowledge Ms Martin's evidence that some material had been available but it was not sufficient to assist.

[18] Another of Ms Martin's difficulties was that she did not have material to assist her in going beyond the words of the text to encourage students to understand theme and character in the play. Demonstrating such understanding was essential in the examinations. At year 13 level appropriate supporting material might include academic writings on the text, and suggested activities to enhance understanding of theme and character. There was a Ministry of Education website from which such material could be obtained, but it required the use of an access code which Ms Martin did not have.

[19] In her attempts to obtain supporting material Ms Martin made enquiries and accessed a website known as sparknotes.com. The site is considered acceptable by the body which contracts to the Ministry of Education to provide curriculum support in schools. On that site Ms Martin located a complete text of King Lear, together with a full and detailed modern English translation. During May 2009 she downloaded the entire translation.

[20] Although she met with Mr Maden some three times during May, Ms Martin overlooked the requirement for approval of the modern translation. She distributed and used the downloaded text in her year 13 class.

[21] The content of the translated text made at least one student uncomfortable. The student's parent raised the concern with Mr Maden in June 2009.

[22] One of the passages which caused concern was expressed in the original text as follows:

“Edmund:

This is the excellent foppery of the world, that when we are sick in fortune – often the surfeit of our own behaviour – we make guilty of our disasters the sun, the moon and the stars; as if we were villains by necessity, fools by heavenly compulsion, knaves, thieves, and teachers by spherical predominance, drunkards, liars and adulterers by an enforced obedience of planetary influence, and all that we are evil by a divine thrusting-on. An admirable evasion of whoremaster man, to lay his goatish disposition to the charge of a star! My father compounded with my mother under the dragon's tail, and my nativity was under Ursa Major; so that it follows I am rough and lecherous. Fut! I should have been that I am, had the maidenliest star in the firmament twinkled on my bastardising. (Act 1, Scene 2)”

[23] The modern translation was blunt and to the point. It made the meaning of that passage, and certain others in the play, quite unmistakable although not gratuitously so with reference to the original. The corresponding passage in the Longman publication was accompanied by a glossary which provided synonyms for some of the words in the passage, but did not come near to making the overall meaning as clear as it was in the modern translation.

[24] Mr Maden forwarded to Ms Corbett a request for an explanation. Ms Corbett asked Ms Martin whether she had taught King Lear to the students and had approval to do so. According to Ms Martin that is when it dawned on her she had not obtained the necessary approval to use the modern translation. However she also said she did not consider the language in the translation would be unacceptable.

[25] During a visit to the school on 30 June Mr Maden spoke to Ms Martin about the translation. Ms Martin acknowledged she had downloaded it and had been using

it without his approval. She explained that she needed to compare the 'old' English with the modern version so that the students could understand the language.

[26] After the discussion Ms Martin ceased using the modern translation in her class and had the students return their copies. She also said she had edited parts of it she perceived to be causing discomfort to the students, although it is not clear when she did so.

[27] On 14 July 2009 Ms Martin was asked to attend a disciplinary meeting. The letter seeking the meeting pointed out that approval for making the modern translation available to the class had not been obtained, and said the translation was considered embarrassing, corruptive and morally defiling to the development of the students.

[28] The disciplinary meeting went ahead on 16 July. Mr Maden and another trustee, Donald Cottle, attended together with Ms Martin and her support person, Katherine Brown.

[29] At the meeting Ms Martin acknowledged that Mr Maden had instructed her to obtain his approval before presenting the material to her students. She explained that, when she looked at the modern translation she did not consider it very different from the original text. When asked why she had not sought approval, she said she was too busy, and had not had enough time to get copies to Mr Maden.

[30] In response Mr Maden pointed out to Ms Martin that she had spoken to him on some three occasions about other matters during the relevant period. She had not taken opportunities she could have to provide him with the material. Ms Martin's explanation during the investigation meeting was that her focus was on particular but unrelated matters which had prompted the approaches.

[31] I digress to say that Mr Maden visited the Kerikeri campus once a week on Tuesday, and on other occasions if there was a specific purpose. Ms Martin's teaching schedule was arranged so that she taught 6 classes every day except Wednesday, when she did not teach any classes. Inevitably, limited time was available to her for a face to face approach. Having said that, I accept Mr Maden's evidence that he encouraged approaches when he was on campus, and would remain

as long as was necessary to address matters raised with him. I also accept that his full contact details were available to the staff.

[32] Messrs Maden and Cottle adjourned to consider Ms Martin's response. They considered parts of the modern translation were offensive and repulsive, and the use of the material was inexcusable. The failure to obtain approval was a clear breach of the ethos. They took the breach very seriously and concluded that it amounted to serious misconduct.

[33] When the meeting resumed Messrs Maden and Cottle advised that Ms Martin's explanation was not accepted. She was summarily dismissed the same day.

Determination

[34] This was a very unfortunate dismissal. Ms Martin impressed me as a conscientious teacher, who holds Christian beliefs herself, and who was motivated by a genuine wish to equip her students as well as she could for success in the relevant NCEA examination. Aside from her failure to obtain the necessary approval, she took a careful approach to identifying and accessing support material and to ensuring the source was credible.

[35] Her efforts in the above respects were hampered in that she had drawn to her employer's attention her difficulties over the lack of supporting material, with minimal success.

[36] In addition, discussion at the investigation meeting showed that even certain passages in the original text - including the one set out in this determination - were considered objectionable by at least some NETI trustees. Despite this, the original text of the play had been approved.

[37] I take NETI's point that it was not for Ms Martin to determine whether the modern translation was objectionable, but I do not believe she took quite that approach. She failed initially to recognise the difficulties likely to be caused by her unapproved use of the modern translation because the meaning of the two versions was the same. Both versions contained the subject matter considered objectionable in

that it was embarrassing, corrupting and morally defiling. Further some of the language even in the original text was of concern when the matter was discussed at the investigation meeting. Accordingly I do not consider it fair to say Ms Martin wrongly took it upon herself to make a judgement about the modern translation which she was not entitled to make.

[38] All of these factors should count in Ms Martin's favour in considering her actions in their proper context, assessing her culpability, and deciding on the appropriate disciplinary response.

[39] On the other hand, Ms Martin did not seek the approval she knew was required before distributing the modern translation to her students. On its face Ms Martin's explanation of her failure to obtain approval was weak. Her realisation that she should have obtained approval before using the modern translation came too late.

[40] I also consider that Ms Martin's failure to recognise that the bluntness of the language in the modern translation would cause difficulties was an error of judgment, even if the meaning of the two versions was the same.

[41] Last, NETI's values and its special requirements of its staff were spelled out in the employment agreement and other material, and it was entitled to require Ms Martin to adhere to the associated obligations. The element of approval regarding the use of literature on the school premises was important in ensuring the special nature of the school was observed and preserved. In saying this I am not condoning restrictions of a kind some might criticise, nor am I criticising the restrictions for my own part. In the present circumstances I simply accept the right of the school to impose them.

[42] In weighing all of the above, I take into account that the test of justification for a dismissal is whether the decision to dismiss was an action a fair and reasonable employer would have taken in all of the circumstances at the time.

[43] On that test I would be likely in general to have found that the factors in her favour meant Ms Martin's dismissal was not an action a fair and reasonable employer

would have taken in all of the circumstances at the time. I would also have found that Ms Martin was guilty of some contributory conduct.

[44] However the circumstances here are outside the general range in that the employer is a school of special character based on particular religious beliefs. That is not to say the school is excused from its obligations of fairness and reasonableness in its treatment of its employees, or that the religious beliefs on which it is founded can be acted on in contravention of these obligations. For example in similar circumstances, including the special character of the school but without an obligation to seek approval which was known and breached, I would probably still have found a dismissal of this kind unjustified.

[45] As matters stand overall, Ms Martin's failure to seek approval was more significant in the circumstances because of the importance known to be attached to the school's ethos, and the role of trustee approval in supporting adherence to the ethos. NETI was entitled to attach the significance it did to the failure.

[46] After careful consideration, my decision turns on this point. Accordingly I find the dismissal was justified.

Costs

[47] Costs are reserved.

[48] 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