

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 366
5307257

BETWEEN

BARRY JONES
Applicant

AND

WAIKATO INSTITUTE OF
TECHNOLOGY
Respondent

Member of Authority: K J Anderson

Representatives: M Wilson, Counsel for Applicant
S Hood, Counsel for Respondent

Investigation Meeting: 4 May 2011 at Hamilton

Submissions Received: 11 May 2011 and 9 June 2011 for the Respondent
2 June 2011 and 10 June 2011 for the Applicant

Determination: 19 August 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Pursuant to section 103(1)(a) of the Employment Relations Act 2000 (the Act), the applicant, Mr Jones, claims that he was unjustifiably dismissed on 3rd February 2010. He asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of lost wages and compensation pursuant to section 123 of the Employment Relations Act 2000. Mr Jones also claims that pursuant to s.103(1)(b) of the Act, the actions of his employer caused an unjustifiable disadvantage to his employment, because of the loss of an option to transfer his employment to an outside contractor. Mr Jones also seeks the award of a penalty for a breach of his employment agreement and a further penalty for a breach of good faith. Conversely, the respondent, the Waikato Institute of Technology (Wintec), says that the termination of the employment of Mr Jones, with a payment in lieu of notice,

following a threat to damage Wintec property; was justifiable by reason of redundancy.

Background facts and evidence

[2] Mr Jones commenced his employment with Wintec in 1988. At the time of the termination of his employment, he was employed as an Electrical Technician in the Facilities Department. Mr Jones was employed under the terms and conditions of the Wintec/Tertiary Institutes Allied Staff Association (TIASA) *Allied Staff Collective Employment Agreement* (the CEA).

[3] In November 2009, Wintec commenced a review of the delivery of its electrical services. A proposal was developed whereby Wintec would outsource its requirement for electrical services to independent contractors. As required by the terms of clause 32 of the CEA, TIASA were notified of the potential for the disestablishment (redundancy) of the position held by Mr Jones, if the proposal was to go ahead. Also, a meeting between Mr Jones and the Manager of Facilities, Mr Wayne Elliott, was held to informally discuss the proposal.

[4] On 23rd November 2009, a meeting was held to discuss with Mr Jones, in a formal sense, the proposal to disestablish his position. Present at the meeting was Mr Elliott, Ms Leah Asplin, Human Resources Advisor for Wintec, and Ms Margaret Lawton, the TIASA site representative. The main purpose of the meeting was to present to and discuss with Mr Jones, a document; *Review of electrical service delivery – Facilities*. This document set out the details pertaining to the rationale for the proposed outsourcing of electrical services across Wintec and a proposed consultation period; being from 23rd November to 16th December 2009. The evidence of Ms Asplin is that Mr Jones was “*argumentative*” during the meeting and he was critical of the proposal. The meeting ended with the TIASA representative agreeing to respond to Ms Asplin regarding the acceptability of the consultation period. It subsequently transpired that the consultation period was extended to 29th January 2010; when Mr Jones presented written submissions setting out his response to the Wintec proposal to outsource electrical services.

[5] The evidence of Ms Asplin is that she met with Mr Elliott and the Director of Support Services for Wintec, Mr Patrick Brus, to discuss the submissions presented by Mr Jones and to “*reconsider the proposal*” in the light of those submissions. Nonetheless, it was decided that the proposal to disestablish his position should go ahead. A meeting was held on 2nd February 2010 to advise Mr Jones of this decision and also to give him the appropriate notice required under the CEA (two months). Mr Jones was given a letter of the same date from Mr Elliott. Among other things, the letter records that:

As you are aware, we have been reviewing the electrical service delivery within Facilities. The formal consultation period ended on 29 January 2010. Thank you for the time and effort you put into the review process. As we discussed today, after careful consideration the decision has been made to cease internal electrical delivery within Facilities and outsource this to an external party.

You have the following options:

Option 1 – Transferring to the successful contractor

If you decide to transfer and become an employee of the successful contractor, your existing terms and conditions will form the basis of your employment agreement with them and service will be treated as being continuous. You will be paid any outstanding annual leave and your sick leave entitlements will be transferred to the new employer. Under this option you will not receive a redundancy payment from Wintec. However, please note that if the new employer decides to restructure in the future and you are made redundant, you are still entitled to redundancy payment from [sic] new employer in accordance with your employment agreement.

Option 2 – Not Transferring to the new employer

If you decide not to transfer to the new employer, there are unfortunately no redeployment options available at Wintec which are directly comparable to your existing position and therefore Wintec will declare your position redundant. If you choose this option, you will be given two month’s notice of redundancy, as per your employment agreement, from today 2 February 2010. You will receive a redundancy payment, and you will also be paid any accrued annual leave due. Please note that this does not include accrued sick leave. You are more than welcome to apply for any positions available at Wintec. If you are offered a new role within Wintec, you will not be entitled to a redundancy payment.

You will be given reasonable time to make a choice and will need to notify Leah Asplin in Human Resources of your decision, in writing, at a notified date once a decision has been made about the successful contractor. A redundancy calculation will be available to you tomorrow, 3 February 2010.

The letter concludes by notifying Mr Jones of the availability of support services such as chaplains, counsellors and EAP services.

[6] The evidence of Mr Jones is that while he was “*bitterly disappointed*” about the result of the services review, he was “*comforted by the fact*” that he would still have a job with the new electrical contractor, if he chose option 1. Mr Jones says that he anticipated electing to take this option and transfer to work for the new contractor.

[7] Remarkably, and regrettably, a major mistake was made by Ms Asplin in regard to Mr Jones being informed that Option 1 was available. Ms Asplin acknowledged to the Authority that, in fact, Option 1 was not available to Mr Jones and it should never have been presented to him. Ms Asplin, to her credit, was candid and contrite about this mistake on her part.¹ She also acknowledged that Mr Jones had never been informed at any time, prior to his departure from Wintec, that Option 1 was not available, albeit (astoundingly) Ms Asplin told the Authority that she knew on 2nd February 2010, the day of the first formal meeting with Mr Jones, that this option was not available.² Apparently, the reasons why this option was not available is because there had been no agreement established with an external electrical contractor about any such option; and more particularly, Mr Jones was not a protected employee pursuant to Part 6A (Schedule 1A) of the Employment Relations Act 2000. I will return to this matter in due course.

The concerns of Wintec

[8] The evidence of Ms Asplin is that on 3rd February 2010 she received a phone call from Mr Elliott; he informed that “*it appeared*” that Mr Jones had been “*making threats.*” Upon making enquiries, Ms Asplin ascertained that Mr Wayne Calland, the Maintenance Coordinator in the Facilities Team, had been in conversation with Mr Jones, whereby Mr Jones told Mr Calland of receiving “a couple of months’ notice” in regard to the loss of his position. Ms Asplin says that Mr Calland told her that Mr Jones then said: “*could you imagine the damage I could do over the next couple of months.*” The further evidence of Ms Asplin is that Mr Calland “*mentioned*” that he knew Mr Jones “*often made lewd comments*” but Mr Calland felt that: “*under the circumstances this was different.*”

[9] Ms Asplin then prepared a written statement; thus:

1. Barry Jones had a conversation with Wayne Calland and Carrick Denize outside the Workshop doors and Barry Jones office door.
2. Barry Jones advised Wayne Calland and Carrick Denize that WINTEC had given him a couple of months notice.
3. Barry made a statement that: “Could you image [sic] the damage I could do over the next couple of months.”

¹ Ms Asplin also proffered a personal apology to Mr Jones at the investigation meeting.

² It appears too that Mr Elliott was also aware that option 1 was not available to Mr Jones then.

Mr Calland signed the statement; it is dated 3rd February 2010.

[10] Mr Calland has given evidence to the Authority and this is consistent with the above statement. The germane extract from his witness statement being:

On 2 February 2010 Carrick Denize and I had returned from doing a job and were standing outside the Electrical Workshop talking to Barry Jones. It was during this conversation that Barry said to me "imagine the damage I could do in two months." I didn't say anything to Barry, I thought to myself better to stay away from the topic. It appeared that Barry was unhappy about the redundancy.

The further evidence of Mr Calland is that because he thought that the comment of Mr Jones was "strange" he mentioned it to Mr Elliott. Mr Calland also states that:

What I said to Wayne Elliott was exactly what Barry said to me. I then signed a statement which tells what Barry said to me.

[11] Mr Denize also gave evidence to the Authority. He is employed as a Maintenance Assistant at Wintec. Mr Denize confirmed Mr Calland's evidence in regard to the conversation taking place outside the workshop. However, he could not confirm if the particular word used by Mr Jones was "damage" or "mischief." Mr Denize says that it was: "one or the other – the message was same." Mr Denize also opined that it was: "A bit of a silly thing to say" and that Mr Jones was "a little pissed off at the time about losing his job." Mr Denize said that didn't think that Mr Jones was going to "sabotage" Wintec.

[12] Upon the signing of the statement by Mr Calland, Ms Asplin and Mr Elliott discussed with Mr Brus, the comment that Mr Jones was alleged to have made. The evidence of Ms Asplin is that:

We talked about whether it was a joke but discounted this because of Barry's personality and the fact that he was visibly upset and angry at having been made redundant. We also talked about Wayne Calland's makeup. He is a very well respected employee and is a man of few words. When he does speak, he generally has something to say that is well worth listening to. We felt that the person who reported the threat was of great importance. If it had been a person known to gossip, we would have treated it differently. Wayne Calland was the type of man who would not gossip.

The further evidence of Ms Asplin is that:

We felt that Barry had the potential to carry out the threat and that it was important to take reasonable steps to prevent him from damaging Wintec property. We were particularly conscious about this because of a previous incident where someone, presumably a Wintec employee, had tampered with electrical equipment, causing around \$30,000 in damage to Wintec.

[13] In regard to the matter of the damage to Wintec equipment referred to by Ms Asplin, the evidence of Mr Elliott is that:

I felt with my past experience dealing with Barry, he would be capable of doing something that could endanger people and buildings as he was a volatile person and had been aggressive and threatening towards me when I worked for ITs a few years earlier.

When asked to explain his written evidence, Mr Elliott referred to an altercation involving him and Mr Jones “*three or four years ago.*” Mr Elliott says that he was warned by Mr Jones that: “*You had better watch out I’ll get you for that.*” Mr Elliott also attested that Mr Jones could have been responsible for the \$30,000 cost of damage to equipment referred to by Ms Asplin, but then he acknowledged that there was no proof to “*back it up.*” Mr Elliott also acknowledged that this matter had never been discussed with Mr Jones.

[14] The further evidence of Mr Elliott is that upon hearing from Mr Calland in regard to the alleged comment made by Mr Jones, he spoke to Ms Asplin and he explained that he was worried about student safety if: “*this threat was carried out.*” Mr Elliott says that after having discussed the matter with Mr Brus, it was decided that “*...the risk to student health and safety was too great and decided to see if we could get Barry to leave immediately. Leah worked on this.*”

[15] There is some inconsistency in the evidence of Mr Elliott, compared with that of Mr Calland, in regard to where Mr Calland was when he heard the comment that Mr Jones is alleged to have made. The evidence of Mr Elliott is:

As I remember Wayne [Mr Calland] told me he was in the staff room in The Hub when he heard Barry say, “You could do a lot of damage in two months.”

When this inconsistency was put to Mr Elliott for his response, he attested that he could not remember “*exactly*” where Mr Calland said he was when he heard the alleged comment from Mr Jones.

The meeting on 3rd February 2010

[16] The evidence of Mr Jones is that just before 12:00p.m. on 3rd February 2010, he received a phone call from Mr Elliott; he informed Mr Jones that he was required to attend an urgent meeting. Mr Elliott did not convey to Mr Jones why he was

required to attend this meeting. When Mr Jones arrived at the meeting venue, he was met by Mr Elliott and Ms Asplin. Also present was Ms Lawton, the TIASA site representative. Mr Jones says that he didn't know why he had been called to a meeting or why Ms Lawton was present, but assumed it was related to his redundancy calculations.

[17] The overall evidence about what transpired at the meeting on 3rd February is reasonably consistent. The evidence of Mr Jones is that at the beginning of the meeting, Ms Asplin asked him if he had made a decision regarding the two options set out in the letter of 2nd February 2010 and he responded that he had not yet decided and was to see a lawyer on 4th February. Mr Jones says that Ms Asplin informed him that it had been "*reported to them*" that he had decided to accept Option 2. Mr Jones denies this and states that he had not made any decision at that point.

[18] Ms Asplin then informed Mr Jones of the "*threat*" that it was alleged that he had made. Mr Jones denied this and his evidence is that he responded:

You have to be nuts lady. Do you think that after all I have put into this place that I would sabotage Wintec?

The further evidence of Mr Jones is that;

In the 22 years that I have worked at Wintec I have never been in trouble with my employer in any serious way. I have not damaged property or received any warnings for serious misconduct. I am a responsible adult, I take my job very seriously and strive to do the best job I can. My life depends on maintaining safety standards.

Mr Jones says that he was told by Ms Asplin that Wintec considered the threat to be serious and she referred to the statement signed by Mr Calland, albeit Ms Asplin refused to give Mr Jones a copy of it when he requested this; nor was Mr Jones told who the statement was from.

[19] Mr Jones attests that he explained at the meeting that he had made a comment "*in jest*" in the lunch room and that this was in the context of a general conversation about redundancies at Wintec and the two month notice period. Mr Jones says someone had commented that two months was a long notice period and he responded in "*a light hearted manner: Imagine the mischief idle hands could get up to in that time.*" Mr Jones says that it was an attempt at humour and was "*definitely not in any way meant to be a threat.*" Mr Jones says that there were "*about*" four other people present when he made the comment. Mr Graeme Teesdale, an employee working in

the electrical engineering department at Wintec, gave evidence to the Authority about being present at “*the other end*” of same table in the lunch room as Mr Jones on 2nd February 2010. Mr Teesdale recalls that there was a conversation about redundancy but he was unable to provide any reliable evidence in regard to anything that Mr Jones may have said.

[20] The outcome of the meeting on 3rd February 2010 is that Mr Elliott informed Mr Jones that Wintec could not take the risk that Mr Jones might carry out the threat that had been attributed to him. There is some lack of clarity in the evidence in regard to what happened from there, but the notes taken at the meeting record that Mr Jones responded to the effect that “*What so you want me to go then?*” and Ms Asplin informed Mr Jones that Wintec would pay him his redundancy compensation and pay in lieu of notice, that night. Ms Asplin attests that Mr Jones “*appeared to agree to this.*” The notes of the meeting record that Mr Jones said: “*Yeah I can go today*” and then he handed over his keys and left.

[21] The meeting was held on the second floor of a Wintec building and the evidence of Mr Jones is that when he got out of the lift on the ground floor, he was met by two security guards who escorted him back to the workshop where he turned off his computer and then left the Wintec grounds. Via a letter from his solicitor dated 27th April 2010, Mr Jones raised a personal grievance.

The basis of the claims of Mr Jones

[22] Firstly, it is argued by Mr Jones that Wintec was not entitled to pay him in lieu of working out his notice period. The attention of the Authority is drawn to subclauses 3.1(c) and (d) of the CEA. At subclause 3.1(c) it is provided that:

The employer may, before the expiration of any notice given under subclause (b)³ of this clause and with the employee’s consent pay to the employee concerned the salary he/she would have earned during the unexpired portion of that notice; and the termination shall take effect immediately.

And at subclause 3.1(d):

Where the employment is to be terminated because of redundancy, the employee shall receive not less than two months notice.

³ This refers to the parties being able to agree to a variation to the period of notice.

[23] It is submitted for Mr Jones that because he did not consent to being paid in lieu of the two months' notice he was entitled to, Wintec was not permitted to make a payment in lieu and terminate the employment of Mr Jones within the notice period. And by doing so, Wintec breached his employment agreement. It is further submitted that Mr Jones was misled by Ms Asplin when he was told (at least twice) that Wintec had the right to pay him in lieu of notice, hence he handed over his keys on the basis that he believed, at the time, that Wintec had the right terminate his employment on the ground of redundancy and pay him in lieu of notice. Mr Jones says that it was not his intention to agree to be paid in lieu of working out his notice, and he did not resign.

[24] A parallel argument for Mr Jones is that because Wintec did not have the right to pay him in lieu of notice and because he did not resign, then the actions of Wintec in forcing him to leave his employment on 3rd February 2011, were not the actions of a fair and reasonable employer in the circumstances; hence the dismissal of Mr Jones was unjustifiable. It is submitted for Mr Jones that if Wintec had genuine concerns about what he is alleged to have said and his associated actions, he could have been suspended from his employment while a proper investigation took place. In support of this proposition, the attention of the Authority is drawn to the *Wintec Principles and Procedures: Staff Discipline* policy and procedures (the document). This is a comprehensive document but the relevant extracts, applicable to the circumstances of Mr Jones, are:

Section A – Principles and Procedures

1.0 Principles

1.1 The disciplinary process will include the following essential elements

1.11 Procedural Fairness

1.11.2 Notice of the Allegation

The staff member should be informed of the allegation which is to be investigated and told of the consequences if the allegation is sustained, i.e. a warning.

1.11.3 Full Investigation

The Manager should make all reasonable efforts to establish and confirm the facts.

1.11.4 Right of Representation

The staff member must be offered the opportunity to have a representative with them during the process. The representative may be a family member, union representative, legal advisor, etc, as chosen by the employee.

1.11.5 Opportunity to Explain

The staff member must be given every opportunity to explain or justify his/her actions before any decision is made.

1.11.6 Full Consideration

Upon the completion of the investigation, which may include interviewing the staff member concerned, the manager should give fair, full and unbiased consideration to the facts and any explanation provided. There should be no element of predetermination in the process.

[25] Then at clause 2 of the document, procedures to be followed in the event of disciplinary matters are provided. Of particular relevance is the process set out in clause 2.3.5 **Serious Misconduct – Summary Dismissal**. The various subclauses cover in more detail the principles set out clause 1 of the document (above), as follows:

2.3.5.1 Suspension

As soon as the Manager is made aware of the allegation, the staff member may be suspended with or without pay or be temporarily placed in other duties while an investigation is taking place. (Refer Suspension 2.3.6)

At subclause 2.3.6 it is provided that:

A staff member may be suspended in the course of disciplinary proceedings if the staff member's continued presence in the workplace could inflame the situation, be likely to hinder the investigation or is such that work simply cannot continue until the allegation against the staff member is refuted. Suspension under these circumstances is not of itself disciplinary action. It is a step to ascertain if disciplinary action is to be taken. Salaries are therefore generally paid for any period of suspension unless an employment agreement/contract stipulates otherwise. The Manager will: [There then follows a detailed process relating to suspension.]

[26] Returning to the provisions of clause 2.3.5, the following provisions are relevant:

2.3.5.2 Investigation

The Manager should conduct a through investigation into the allegations being made against the staff member to ascertain the facts. The investigation may involve talking to staff, students, reviewing documentation, sourcing documentation, etc.

2.3.5.3 Notice of Meeting

The Manager will arrange a meeting with the staff member. The notice of meeting should refer to:

- a. The nature of the concern, including all allegations together with any correspondence to which the staff member must provide an explanation.
- b. The time and place of the meeting.

- c. The staff member's right to attend the meeting with a representative, who may be a family member, union representative or legal advisor.
- d. The attendance of a Human Resource Advisor.
- e. The possibility of the staff member being dismissed if the allegations are substantiated.

2.3.5.4 The Meeting

The Manager will put all allegations to the staff member, including the findings of the investigation. The staff member will be given a real opportunity to comment on or explain the action or behaviour. The meeting will be adjourned.

2.3.5.5 Consideration

The Manager will objectively consider the explanation provided by the staff member, and the information obtained by the staff member, and the information obtained during the investigation. In some instances it may be necessary to investigate further or confirm information provided by the staff member.

2.3.5.6 Decision

The Manager will reconvene the meeting to advise the staff member of the decision. Either:

- a. If the Institute is satisfied that serious misconduct has occurred the staff member will be dismissed and advised in writing the reasons for the dismissal. The dismissal will be confirmed in writing, clearly stating the reasons for the dismissal. Copies of documentation will be placed on the staff member's personal file. The Human Resource Advisor will advise Payroll to calculate the final pay and finalise the departure process.
OR
- b. If the allegation is subsequently found to be without substance the staff member will continue their position, or resume the position from which they may have been suspended and will be reimbursed for any loss of pay.

[27] Finally, Mr Jones claims that he was disadvantaged in his employment by an unjustified action by his employer. I understand that the basis of this claim is that having been offered the option of working for an external contractor, his sudden termination of employment deprived him of that possibility. However, it seems to me that this claim should be viewed in the light of the overall circumstances pertaining to the termination of his employment and addressed accordingly.

The Issues

[28] The first issue for determination is whether Wintec was entitled to pay Mr Jones two months' pay in lieu of working out the notice he was entitled to. I find that

Wintec was not entitled to do this as there is no contractual right to do so without consent. That then raises a second and associated issue: Did Mr Jones give his consent to be paid in lieu of notice pursuant to clause 3.1 c) of the CEA?

I conclude that he did not. Rather, I find that in reality, Mr Jones was presented with a *fiat accompli* at the meeting on 3rd February 2010 and while he made a comment about Wintec requiring him to leave and then handed over his keys, this cannot be seen to be “consent” or a resignation emanating from Mr Jones.

[29] This finding leads to the next issue to be determined: Was Mr Jones dismissed and if so, was the dismissal justifiable? Given that I have found that Mr Jones did not consent to being paid in lieu of his entitlement to continue working for a further two months, and he did not resign, this leads to the obvious conclusion that he was dismissed.

Was the dismissal justifiable?

[30] The test to be applied is at s.103A of the Act. This provides that the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would⁴ have done in all the circumstances at the time the dismissal or action occurred.

[31] The “actions and how the employer acted,” pertaining to the dismissal of Mr Jones, have largely been set out above and can be summarised as follows:

(a) Without any prior notice or warning, Mr Jones was summoned to what turned out to be a disciplinary meeting. It is submitted for Mr Jones that he was “ambushed” with “serious allegations” and I accept that this is a fair summation of the circumstances that Mr Jones faced on 3rd February 2010. The evidence of Ms Asplin is that Wintec considered warning Mr Jones of the purpose of the meeting but chose not to, because of the “*possibility*” of the threat being genuine. The further evidence of Ms Asplin is that Wintec were concerned that prior notification of the meeting would give Mr Jones time to: “...*implement steps to damage Wintec property.*” Ms

⁴ Given that the dismissal of Mr Jones took place before 1 April 2011, it is the test that applied prior to that date, i.e. the word “would” applies rather than “could.” The latter being introduced by the *Employment Relations Amendment Act 2010* and effective from 1 April 2011.

Asplin also says that there was a concern that Mr Jones may refuse to attend the meeting and use the time to copy his keys, though for just what purpose was not logically explained.

But I conclude that there is no tangible evidence to suggest that Mr Jones would have refused to attend a meeting. Neither is there any evidence to suggest that Mr Jones had any intention of carrying out any of the actions that Wintec had assessed as being possibilities. Indeed, I find that there was an unwarranted reaction by Wintec in regard to the statement that had been attributed to Mr Jones. While I find the evidence of Mr Calland to be credible and reliable and hence acceptable, in regard to what Mr Jones said to him (and where), I conclude that given that Mr Jones had just been informed of the loss of his employment after 22 years' of service, and given his apparent tetchy personality, the comment made by Mr Jones should have been treated for what it probably was. That is, a comment made in the frustration of the moment and without any apparent substance. Indeed, the evidence of Mr Calland is that he didn't know at the time if Mr Jones was serious or not but believed the comment was "*strange.*" Mr Denize also opined that he didn't think that Mr Jones was going to "sabotage" Wintec.

(b) Upon his arrival at the meeting on 3rd February 2010, Mr Jones was firstly asked if he had made a decision about the two options that had been presented to him on 2nd February, albeit one of those options was never available. Upon receiving his response, Wintec then presented Mr Jones with the allegation regarding the statement he was alleged to have made. While Wintec was in possession of the statement signed by Mr Calland, Mr Jones was denied the opportunity to view it and he was not told who had made it. The evidence of Ms Asplin is that the involvement of Mr Calland was kept from Mr Jones, at the request of Mr Calland, for confidentiality reasons, as he was concerned at having to work with Mr Jones for a further two months.

But I conclude that given the seriousness of the allegation against him, and the fact that Wintec was contemplating the early termination of the employment of Mr Jones, he was entitled to see the statement. As was found by the Employment Court in *Vice-Chancellor of Massey University v Wrigley*,⁵ in regard to a finding that the University was obliged to provide employees with access to disputed documents:

A factor we have taken into account in reaching this conclusion is that employers have other obligations to provide employees with access to information. One we have already mentioned is that a fair and reasonable employer will not rely on information adverse to an employee to dismiss him or her without making that information

⁵ [2011] NZEmpC 37, 18th April 2011, at para [129].

available to the employee for comment. That obligation is part of the wider duty of good faith embodied in s 4 of the Act and particularised in the 2004 amendments.⁶

(c) Mr Jones was not given notice of the meeting on 3rd February 2010 and the allegation against him, as required by subclause 2.3.5.3 of the *Wintec Principles and Procedures: Staff Discipline* document. Nor was he given the opportunity to have a representative “chosen by the employee.”⁷ While it is accepted that Ms Lawton was there in her role as the TIASA site representative, apart from the fact that Ms Lawson played a passive (if not detached) role in the proceedings, Mr Jones did not have advance notice that she would be present. And while Mr Jones did not object to the presence of Ms Lawton, given the serious nature of the allegation he was required to respond to, it is likely that had he been given advance notice of the meeting and the allegation, he would have chosen to have a “legal advisor” present.

(d) At the meeting, the allegation pertaining to Mr Calland’s statement was put to Mr Jones for his response. He gave the explanation set out above (at para [19]). Wintec did not accept that explanation; I do not either. As stated earlier, I find that the evidence of Mr Calland is more probable and that Mr Jones did use the word “damage” and not “mischief.” And while the investigation conducted by Ms Asplin was somewhat less than “thorough” as required by subclause 2.3.5.1 of the policy document, I find that it was sufficient in the circumstances in regard to putting an allegation to Mr Jones for his response. However, I conclude that there was a substantial departure by Wintec from subclause 2.3.5.5 of the policy document. This requires that: “The Manager will objectively consider the explanation provided by the staff member and the information obtained during the investigation.” And at subclause 1.11.6 of the document a fundamental principle is that: “... the manager should give fair, full and unbiased consideration to the facts and any explanation provided. There should be no element of predetermination in the process.”

It is clear from the evidence of Ms Asplin and Mr Elliott that regardless of any explanation that Mr Jones may have offered, it had been predetermined that he would leave the workplace that day. Given the evidence of Mr Elliott in particular, it is clear that there was not a “fair, full and unbiased consideration given to the facts and any explanation offered.” On the contrary, a decision had already been made that the outcome of the meeting would be that Mr Jones would no longer remain in his

⁶ Employment Relations Act 2000, s.4 at (1A)(c).

⁷ Subclause 1.11.4 - Right of Representation

employment. And as further evidenced by the immediate presence of the security personnel, prior arrangements had been made to escort Mr Jones from the Wintec premises; post-haste.

[32] I find all of the above actions of Wintec were not what a fair and reasonable employer would have done in all the circumstances applying to the dismissal of Mr Jones. Having said that, I confirm that it is more probable than not that Mr Jones did make the statement as reported by Mr Calland, and I accept that Wintec had an obligation to act to ensure that appropriate actions were taken to investigate the circumstances and take proper steps accordingly. However, I do not accept that the circumstances were such that Wintec was entitled to breach its contractual obligations to Mr Jones under the terms of his employment agreement and the associated policies and procedures. This is particularly so given that there is no evidence that Mr Jones would have been an immediate (or perhaps any) threat to the Wintec premises. In any event, it would have been a relatively simple matter for Wintec to have followed its policies and procedures and implemented a fair suspension of Mr Jones from his employment, while a full and fair investigation of all the circumstances was carried out. Had Wintec done this it may well have substantiated the grounds to dismiss Mr Jones, or perhaps, reached an agreement with him for him to cease his employment earlier than contemplated. But given that it did not act fairly and reasonably in the circumstances, I am bound to find that the dismissal of Mr Jones was unjustified and he has a personal grievance.

Remedies

[33] Given that I have found that Mr Jones has a personal grievance, I turn to the remedies available to him in the circumstances. In regard to his claim for reimbursement of wages, the circumstances are that Mr Jones had been given two months' notice of the termination of his employment on the ground that his position had been made redundant. And as was held in *Forever Living Ltd v Kruesi*:⁸

There is nothing novel or legally unsound in the proposition that an employer can unjustifiably dismiss an employee who has given and is working out the contractually agreed period of notice

⁸ (Unreported) 27 September 1995, AEC 100/95, Colgan J.

In *Kruesi* the employee had resigned but the circumstances pertaining to Mr Jones are analogous in that there was a mutual expectation that he would work out his contractual period of notice, but he was dismissed during that period. But as was stated in *Kruesi*, the damages which can be claimed are likely to be limited because of the necessarily finite nature of the employment. For Mr Jones his continued employment was only for a further two months and he was paid in lieu of working for that period, albeit he did not consent to such. It has been submitted for Mr Jones that he would have had the option of working for an external contractor and that Wintec did not make a mistake in regard to offering him that option. It is submitted that Wintec only acknowledged the mistake after Mr Jones had raised a personal grievance and that this acknowledgement was only made in the light of a potential wages reimbursement liability, should Mr Jones obtain a successful outcome in regard to his grievance. While I accept that it is astonishing, and remarkably careless, that Ms Asplin, as an experienced human resources practitioner, should make such a fundamental mistake and then not divulge such immediately, I accept Ms Asplin's evidence that this was indeed the case; this is also revealed by her obvious contrition and embarrassment. Therefore, because the continuing employment of Mr Jones was for a finite period, that is, a further two months, for which he has been paid, he has no entitlement to any further reimbursement of wages.

Compensation

[34] In regard to the claim of Mr Jones for compensation pursuant to s.123(1)(c)(i) of the Act, it is submitted that an appropriate award would be \$20,000 and that the Authority should consider the following factors pertaining to the circumstances:

- (a) He had been employed at Wintec for 22 years and was 58 years old at the time of his dismissal and he had a "clean" employment record.
- (b) The manner of Mr Jones' dismissal was "brutal" happening as it did just one day after he had received notice of the loss of his position.
- (c) He was asked to leave the premises immediately and suffered the indignity of being escorted off the premises by security personnel.
- (d) Mr Jones was denied the opportunity of being able to work out his notice period and say goodbye to his colleagues in a dignified manner. And he left Wintec "under the cloud" of being accused of an intent to damage Wintec property.

- (e) He did not receive a reference, which in a safety sensitive industry, is crucial and he has been unable to find alternative employment.
- (f) Mr Jones described feeling as though there had been “a death in the family” and he subsequently received medication for depression.

[35] It is submitted for Wintec that Mr Jones should not be compensated as the loss of his position was inevitable in any event, and Mr Jones received redundancy compensation for the loss of his position. The Authority has been referred to *Stams v New Zealand Rennet Company Ltd*⁹ in that a grievant is only entitled to be compensated for “injury to his feelings and distress” over and above that which would have been caused when the inevitable loss of employment “came to pass.” I accept that this is so. Nonetheless, I find that there remains substantial merit in the submissions for Mr Jones as to the affects of the sudden termination of his employment and the manner in which it was carried out. I am also cognisant of the finding in *Simpsons Farms Ltd v Aberhart*¹⁰ where the Chief Judge of the Employment Court held that an award of \$15,000 was at the higher end of discretionary awards for non-economic loss where a genuine redundancy is carried out in a procedurally unfair manner. Also the circumstances pertaining to Mr Jones do not involve a dispute about the loss of his position due to redundancy per se. Rather, the grievance relates to the sudden, unexpected and unfair termination of Mr Jones’ employment during a contractual notice period and the affects of this. I conclude that an award of \$12,000 is appropriate; subject to a reduction that recognises that Mr Jones made a substantial contribution to the circumstances from which the grievance arose.

Contribution

[36] Pursuant to s.124 of the Act the Authority is obliged to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, reduce the remedies that would otherwise be awarded accordingly. The submissions for Wintec urge that the statement made by Mr Jones was of such seriousness that his contribution should be assessed at 100%. Wintec submits that the statement made by Mr Jones should be viewed as something approaching a criminal matter and treated accordingly.

⁹ [1991] 2 ERNZ 487

¹⁰ [2006] ERNZ 825

However, I do not accept that there was any identifiable intent and I believe the circumstances regarding the loss of long term employment, leading to some initial anger, could be seen as an understandable human reaction for some people. Nonetheless, I find that the statement relating to possible damage to Wintec assets is a serious matter and Wintec were obliged to treat it as such. Indeed, Mr Jones appeared to recognise that his statement was irresponsible.

[37] I consider that Mr Jones contributed substantially to the situation that gave rise to the personal grievance and a 50% reduction to the award of compensation is warranted.

[38] Mr Jones also seeks that a penalty be awarded pursuant to s.4 of the Act on the basis that due to its overall actions Wintec failed to act in good faith. This claim is advanced on two fronts. Firstly, regarding the actions pertaining to the unfair dismissal and secondly, relating to misleading Mr Jones that there was an option available to obtain employment with an external contractor. However, I find that the former has been addressed in the finding that a personal grievance exists and the associated remedy. And I find that Wintec did not deliberately mislead or deceive Mr Jones in regard to offering the option in question. Rather, I find that it was an unfortunate, albeit inexplicable, mistake.

Determination

[39] For the reasons set out above, I find that the actions leading up to and the implementation of the sudden and unexpected termination of the employment of Mr Jones were not what a fair and reasonable employer would have done in the circumstances and his dismissal was unjustified.

[40] Pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000, the Waikato Institute of Technology is ordered to pay to Mr Jones the gross sum of \$6,000 as compensation (\$12,000 less \$6,000 for contribution).

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the outcome and that the investigation meeting was completed within one day. In the event a resolution cannot be reached, the applicant

has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority