

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Valerio Longone (Applicant)  
**AND** Auckland East Academy Limited (Respondent)  
**REPRESENTATIVES** Valerio Longone In person  
Peter Cullen, Counsel for Respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 30 September 2005  
**SUBMISSIONS RECEIVED** 5 December 2005  
**DATE OF DETERMINATION** 5 December 2005

DETERMINATION OF THE AUTHORITY

**Employment relationship problem**

[1] Valerio Longone was employed as a hospitality tutor by Auckland East Academy Limited (“the Academy”) from May 2003 until his dismissal on 4 February 2005. Mr Longone has many years experience in the hospitality industry. Mr Longone had a written employment agreement which imported the Academy’s code of conduct. The Academy is a wholly owned subsidiary of Academy Group (NZ) Ltd, a tertiary education provider. The campus at which Mr Longone was employed no longer operates. The trainees at this campus were described as generally those seeking a second chance at education or coming from low socio-economic backgrounds.

[2] Mr Longone was dismissed from the Academy following an investigation into an allegation of sexual harassment by a trainee. Mr Longone says his dismissal was unjustified because the behaviour complained of never occurred and the Academy failed to follow a fair and reasonable process in investigating the allegation. By way of remedies Mr Longone seeks a reference, \$15,000 compensation for lost wages and future earnings and \$15,000 compensation for loss of dignity and injury to feeling consequent to his dismissal.

[3] The Academy says Mr Longone’s dismissal was fair and reasonable in all the circumstances. The Academy says Mr Longone was aware sexual harassment was unacceptable and that its processes were followed and fairly applied.

**Non-publication order**

[4] At the investigation meeting an application for non-publication of the names of the complainant trainees was made. Mr Longone opposed non-publication and advanced the alternative argument that non-publication should extend to him.

[5] It is appropriate that a non publication order be issued to apply to the names of complainant trainees. They are not party to this proceedings or witnesses. Their names are not crucial to the determination and will not be used.

[6] Mr Longone's application that any non-publication order should extend to him is declined. He is the applicant in these proceedings and has voluntarily submitted himself to a process which is open to public scrutiny. He has provided no compelling evidence as to why the Authority should take the unusual step of granting a non-publication order to a party.

## **Issues**

### **(i) Grounds for dismissal**

[7] Lynn Leech, the Academy's acting manager, wrote to Mr Longone on 14 February 2005 setting out the following grounds for dismissal:

- (i) that following an investigation into a complaint of sexual harassment it was found that Mr Longone had said to a trainee "You got a cute arse"; and
- (ii) this comment constituted serious misconduct because it was unwelcome verbal behaviour of a sexual nature which had a harmful affect on the complainant trainee's training.

### **(ii) The complaint**

[8] On 8 February 2005 at about 3.30pm Adele Chapman, a tutor, accompanied by a trainee, asked to see Ms Leech in her office. The trainee was upset and crying. She told Ms Leech, with some coaxing, that Mr Longone had touched her hand and told her she had a cute arse. She showed Ms Leech how she was standing when Mr Longone touched her. Ms Chapman told Ms Leech this was not the first time there had been problem between Mr Longone and the trainee concerned and that there had been other incidents of a similar nature with other students. Ms Leech told me she was aware of "whispers" about Mr Longone's conduct towards trainees.

[9] Ms Leech told the trainee if she wished to formalise her complaint she would need to put it in writing. Ms Leech also told Ms Chapman that if the other trainees wished to take their concerns further they needed to put their complaints in writing also.

[10] On 10 February the other trainees Ms Chapman had mentioned to Ms Leech on 8 February meet with Ms Leech. She advised them also that if they wished to take their complaints further they needed to put them in writing.

[11] Later that day Ms Leech received written complaints from Ms Chapman, the first trainee and three other trainees.

### **(ii) Ms Leech's investigation**

[12] Having received the complaints Ms Leech meet with each of the trainees on 10 February to go through their complaints. She said she did this to make sure they were serious and that they understood what they were telling her. She took notes of these interviews.

[13] Ms Leech said having read the complaints and held the interviews with the trainees and Ms Chapman, she formed the view that the complainants were genuine, that if the matters complained of were true they were very serious and that a disciplinary investigation was necessary. She then

sought guidance from Andrew Murray, the general manager, to whom she directly reports. Mr Murray agreed a disciplinary investigation was necessary and faxed Ms Leech the relevant sections of the Academy's standard procedures manual.

[14] On 11 February at 8.15am Ms Leech, accompanied by the new manager, David Wix, meet with Mr Longone to advise him that formal complaints of sexual harassment had been received. She went through paragraph 3.3 of the standard procedure manual advising Mr Longone:

- (i) that complaints of sexual harassment were being investigated;
- (ii) that Mr Longone would have an opportunity to respond;
- (iii) that the allegations would be investigated fairly and impartially;
- (iv) that Mr Longone could bring a support person with him if he wished;
- (v) that Mr Longone should not speak with the complainants or anyone else but his representative because the process is confidential; and
- (vi) as this was a disciplinary process if the complaint was upheld it could result in his dismissal.

[15] At the investigation meeting Mr Longone accepted Ms Leech had raised these issues with him.

[16] Ms Leech said she did not think it was necessary to suspend Mr Longone. She made this decision because Mr Longone did not teach the complainant trainees and they were to be off campus on work experience. She also did not wish to create a subject of gossip by removing Mr Longone from the campus.

[17] The next meeting was scheduled for 9.55am that day. Mr Longone attended with his support person, Mitchell Christie, who was a fellow tutor employed at the Academy. Ms Leech went through paragraph 3.4 of the standard procedures manual. This provided a step-by-step guide for the next phase of Ms Leech's investigation – the putting of the details of the complaints. Ms Leech read out the written complaints to Mr Longone. Mr Longone then told Ms Leech he wished to respond to the complaints then. Ms Leech read out the complaints again and Mr Longone responded to each aspect of the complaints. Ms Leech also read out her notes from the meetings with the complainants on 10 February.

[18] One allegation contained in the first trainee's complaint formed the grounds of dismissal. It is appropriate to focus only on that complaint because that is the complaint which the Ms Leech's investigation upheld as amounting to serious misconduct warranting dismissal. This complaint provides:

"I am putting in writing some concerns that I have regarding Valerio (Hospitality tutor).

Around October November last year of 2004 Valerio would make rude comments eg. always talking about eh (sic) term sex. He also would comment on the types of cloth (sic) we wore.

This year (2005) he made a comment on the 8/2 he said "*you got a cute arse*". I was leaning on the backwards with my hands behind me and he also touched my hands.

Last year in early 2004 around Jan, Feb something like this also happened to me and I had to go into the police for it.

Eugenia and Inna on my behalf went up to Valerio to talk to him about what he has been doing and how I didn't appreciate it, but it still continued. He also would hug and ask me to hold his hand."

[19] The notes of the meeting show Mr Longone said he could not recall whether he said "*you got*

*a cute arse*” to the complainant, that it was probable that he did and that he would not have intended it in a sexual way but rather as a compliment. Mr Longone said he could not recall touching the complainant’s hand but if he had it would have been friendly rather than sexual. Ms Leech had clarified with the complainant that the issue about the police had nothing to do with Mr Longone.

[20] At the investigation meeting Mr Longone disputed the accuracy of the meeting notes. He denied that he said it was probable he would have said “*you got a cute arse*” to the complainant, but that he said it was improbable that he would have said that. Mr Longone confirmed that he signed the meeting notes on the day of the meeting. However, he said his signature did not confirm the accuracy of the meeting notes but rather was a confirmation that the notes had been taken. Mr Longone also said he expressly reserved his position regarding the accuracy of the notes to Ms Leech when he signed them.

[21] Mr Longone had a fair opportunity to consider the notes prior to signing them. The notes are a contemporaneous record of the meeting taken by someone charged solely with that task. I am not persuaded that the notes are inaccurate in the one aspect Mr Longone claims.

[22] At the conclusion of the meeting Ms Leech again went through the code of conduct with Mr Longone and explained the difference between misconduct and serious misconduct. The notes do not show that Ms Leech told Mr Longone she was only investigating one aspect of the first complainant’s complaint or what weight she would give to the remaining complaints.

### **(iii) Ms Leech’s deliberation**

[23] Ms Leech did not take her investigation any further. She began her deliberations as to outcome that afternoon. Ms Leech went over the documents she had and the definition of sexual harassment in the standard procedure manual. Ms Leech then concluded that the complaint was valid and that the conduct complained of amounted to sexual harassment because:

- she thought it was likely Mr Longone had said to the complainant ‘*you got a cute arse*’ because the complainants recollection was clear and Mr Longone’s was not;
- she believed two older students had asked Mr Longone to stop making jokes of a sexual nature with students because the younger members of the class were upset by them.

[24] Ms Leech said in reaching this decision she looked at the conduct in the context of the earlier complaints and concerns:

- the complaint and meeting with a student, Mr Longone and Mr Silcock, the then registrar, in September 2004;
- the complaint from Ms Chapman to Mr Silcock about Mr Longone’s address to her pharmacy class in November 2004;
- that Ms Chapman’s complaint had been drawn to Mr Longone’s attention by Mr Silcock;
- that two older members of the class had spoken to Mr Longone about the complainant being upset by his comments.

[25] Ms Leech convened a meeting with Mr Longone and his support person at the conclusion of the trainees’ day on 14 February. She advised him at that meeting that she had upheld the complaint “*you got a cute arse*” and that he was instantly dismissed for serious misconduct. Mr Longone said he was unhappy about the decision, collected his belongings and left the premises.

## Conclusions

[26] The decision to dismiss Mr Longone was based on Ms Leech's conclusion that Mr Longone had said to the complainant "*you have a cute arse*", that this conduct had had a serious impact on the complainant's training and, based on previous events and the terms of his employment agreement, Mr Longone knew what sexual harassment was and that he knew his conduct was objectionable and despite this continued to do it. Ms Leech also concluded that the Academy had an obligation to the students to provide an environment free from sexual harassment and that, given the past examples of this issue being raised with Mr Longone, she had no confidence it would not occur again.

[27] I do not believe it was reasonable for Ms Leech to rely on the earlier examples of alleged instances of sexual harassment being drawn to Mr Longone's attention to justify the decision to dismiss Mr Longone. In relation to the September incident, there was no evidence the Academy investigated that complaint or formed any conclusions about Mr Longone's alleged conduct. There is no evidence Mr Longone was told his employment would be in jeopardy if such conduct occurred again. The Academy dealt with that complaint by facilitating a discussion between the trainee and Mr Longone. Mr Longone said any misunderstanding between he and the student were cleared up at that meeting. Ms Leech's conclusions about that meeting were not put to Mr Longone. She understood he had apologised to the trainee and she took from that that he accepted a degree of wrongdoing on his part. Mr Longone says the meeting resolved a misunderstanding between himself and the trainee and that he did not apologise. It was not fair or reasonable for Ms Leech not to put her view of Mr Longone's meeting with the trainee in September to him to comment on or to advise him what weight she might put on that meeting in her deliberations to give him an opportunity to comment on that.

[28] Ms Leech did not put to Mr Longone why she believed Mr Silcock had spoken to him about the pharmacy complaint in November 2004. She did not put her tentative conclusions and the basis of those conclusions to Mr Longone to comment. Rather, Ms Leech relied on what Mr Murray and Ms Chapman said they believed Mr Silcock had said to Mr Longone. It was a significant failure of the process to rely on this hearsay evidence and not investigate this issue any further in the face of a clear denial from Mr Longone. Mr Silcock provided a statement to the Authority that he had not spoken to Mr Longone about the pharmacy incident. I accept this was the case.

[29] I accept Ms Leech put to Mr Longone her conversation with two older students to comment on. However, it is very unclear from their complaints and Ms Leech's notes of her discussion with them what they told Mr Longone to stop harassing the complainant. Ms Leech did not put to Mr Longone what her conclusions regarding this discussion were or what weight she would give to them in her deliberation. Again, this was a significant flaw in the process because Mr Longone was denied a fair opportunity to comment on the specific aspects of the allegation.

[30] Ms Leech did not conduct a thorough investigation of the circumstances of the complaint. She did not investigate whether there were any witnesses to the comments, what the complainant's response to the comments were or whether Mr Longone's response that the alleged comment would have been meant as a compliment was reasonable in the particular circumstances in which the comment was made. I received no evidence that Ms Leech asked the complainant how the comments affected her or if they had had a detrimental effect on her studies. There is no evidence Ms Leech discussed with the complainant how she felt about Mr Longone remaining on campus during the investigation or how any accidental meeting would be managed. That Mr Longone was not suspended indicates strongly that Ms Leech was confident any accidental meeting of Mr Longone and the complainant on the campus would not cause undue distress.

[31] While I accept it was inappropriate for someone in Mr Longone's position to make such a

comment to a student for the reasons set out above I find there was no reasonable basis upon which Ms Leech could conclude the decision to dismiss Mr Longone was justified in all the circumstances.

### **Remedies**

[32] Mr Longone seeks reimbursement of lost wages and compensation for hurt and humiliation caused as a consequence of his dismissal.

[33] I am not satisfied Mr Longone has taken reasonable steps to mitigate wages lost as a consequence of his dismissal. He has made little or no effort to find another position. While I appreciate Mr Longone feels the stigma of a dismissal for sexual harassment might hamper his chances of finding another position he has provided the Authority with no evidence to support this claim and indeed told me he was able to secure three weeks employment with the electoral office during the recent elections.

[34] **Mr Longone is entitled to be reimbursed for four weeks lost wages and I so order.**

[35] Mr Longone gave evidence that he has suffered a great deal as a consequence of his dismissal. He said he has avoided situations where he may have to explain his employment status, experienced sleeplessness and difficulties in his personal relationship as a consequence of his dismissal. I accept that his dismissal has had a significant and detrimental impact on Mr Longone.

[36] **Mr Longone is entitled to compensation to the sum of \$5000 pursuant to section 123(c)(i) and I so order.**

[37] Section 124 of the Act requires me to consider what actions, if any, of Mr Longone's contributed to the circumstances which lead up to his dismissal. I have found it is likely Mr Longone did say to the complainant that she had a cute arse and that Ms Leech had reasonable grounds to believe other trainees had raised with Mr Longone that his behaviour upset the younger trainees. To make those comments, as set out in the letter of dismissal to a trainee, notwithstanding that they were made in a public place, was inappropriate and insensitive. Accordingly, all remedies awarded to Mr Longone should be reduced by 50%.

### **Costs**

[38] Mr Longone is entitled to be reimbursed for the costs of the \$70 filing fee incurred in lodging this application with the Authority, and I so order. The parties have leave to apply to the Authority to determine any remaining costs issue.

Marija Urlich  
Member of Employment Relations Authority