

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Christopher Naughton (Applicant)  
**AND** Vice-Chancellor University of Auckland (Respondent)  
**REPRESENTATIVES** Peter Cranney for the applicant  
David France for the respondent  
**MEMBER OF AUTHORITY** James Wilson  
**INVESTIGATION MEETING** 15 February 2005  
16 February 2005  
**DATE OF DETERMINATION** 11 April 2005

DETERMINATION OF THE AUTHORITY

*As I explained, the (Faculty and Staffing) Committee's view was that you had not met the conditions of your deferral nor had you achieved the standards required of a Senior Lecturer at the University of Auckland.*

*I have given very careful consideration to the views expressed at our meeting ...and to all the documentation relevant to the situation. ...*

*I must, therefore advise you that as you have not successfully achieved the requirements laid down for you, your application for continuation is declined and your employment with the University will terminate as of 30 November 2004.*

[Letter from Professor Sharman Pretty, Dean of Creative Arts, terminating Mr Naughton's employment - 7 September 2004]

*This is a tenurable appointment. Tenure (until the mandatory retirement age) will be granted subject to your successfully completing a four-year initial term. Further details concerning tenure are given in the attached Collective Contract.*

[Letter offering Mr Christopher Naughton a position as Senior Lecturer in Music Education at Auckland University – 5 October 1998]

*New permanent appointments are for an initial term of four years and may be continued thereafter by agreement. ....*

*The procedures for continuation are covered by the Continuation policy. ....*

[University of Auckland Academic Staff Standard Employment Contract 1998 – 2000]

*The normal outcome options of the Continuation review are:*

- *the University offers the staff member an ongoing contract of employment*
  - *the University defers further consideration of Continuation by offering an extension of up to two years to the initial four-year contract*
  - *The University advises the staff member that it does not wish to extend the staff members contract beyond the end of the four-year term*
  - *The staff member advises the University that s/he does not wish to extend the contract beyond the end of the four-year term.*
- [University Continuation policy]

## **The employment relationship problem**

[1] Mr Christopher Naughton was appointed as a Senior Lecturer in Music Education at the Auckland University School of Music in October 1998 and took up his position in February 1999. In 2002 Mr Naughton applied for continuation (as required by the Continuation policy). Following consideration by the Appointments and Continuations Committee Mr Naughton's was advised by the Dean of Arts (Prof Douglas Sutton) that his application for continuation had been deferred until February 2002 and that several processes would need to be completed by that time. These processes were stipulated as:

- *APR (Academic Performance Review) for 2001 and 2002 to be completed fully, and submitted to the Dean.*
- *Demonstration of a viable PhD degree is to be submitted.*
- *PhD registration will need to be finalised as official – past the provisional stage.*
- *Evaluations of your teaching will need to be completed for all courses taught throughout 2002.*

Although unhappy with the process and outcome of this review Mr Naughton has not raised a specific grievance regarding this application or the consequent deferment.

[2] The Appointments and Continuation Committee again considered Mr Naughton's application for continuation in February 2003. Mr Naughton was advised by Professor Sutton (by memorandum dated 21 February and at a meeting on 3 March) that the Committee had recommended that his application for continuation be deferred for a further 12 months (until March 2004) and that Committee had set a further series of requirements to be completed during this time. These new provisions were:

- *Structured supervision to be scheduled with your PhD Supervisor(s)- and copied to the Dean of Arts.*
- *Satisfactory teaching performance evaluations to be achieved throughout 2003 – and evaluation reports provided for all courses taught.*
- *The Chapters of your thesis to be provided to the Dean of Arts as they are completed and reviewed by the supervisor.*
- *Management of the teaching workload should be closer to the Faculty norms - and this must be overviewed by the Acting Director – SCAPA with Head of School of Education.*

Again Mr Naughton has not raised a specific grievance regarding this second deferment.

[3] In April 2003 Professor John Morrow replaced Professor Sutton as Dean of Arts and in early June met with Mr Naughton to discuss his continuation. Both Mr Naughton and Professor Morrow accept that several matters were agreed at this meeting, including:

- A new PhD supervisor (Professor Robin Small) would be appointed.
- Mr Naughton would be granted study leave for the second semester to allow him to focus on his PhD.
- On his return from study leave Mr Naughton's teaching load would be carefully managed.
- Mr Naughton's initial term of employment was to be extended to 1 September 2004 and he would (re)apply for continuation in July/August 2004.

Mr Morrow says that it was also agreed that Mr Naughton would provide a copy of his PhD thesis chapters as they were written.

Following this meeting Professor Morrow wrote to Mr Naughton setting out his understanding of what had been agreed. This memorandum is crucial for two reasons -

1. Mr Naughton says that he never received it and
2. The memo contained a specific timetable for completion of the PhD which Mr Naughton says differs from what he understood had been agreed.

In addition to the items which Mr Naughton accepts were agreed at the meeting, the memo said:

*I would like to ensure that this work (the PhD) will be **guided by a completion timetable that is to be formulated in consultation with Associate Professor Small**. The key date in this timetable will be the submission of a completed draft of the substantive chapters (not necessarily including an introduction and conclusion) **by 31 July 2004**. (My emphasis)*

And:

*In the event that you have not completed your PhD at the time of your application for Continuation, and if the Faculty Staffing Committee were to be satisfied that you have met the other grounds for the University to grant Continuation, you would be provided with a further extension of your initial term, till 1<sup>st</sup> February 2005 to allow time for you to be awarded PhD by that date.*

[4] In January 2004 a new faculty, the National Institute of Creative Arts and Industries (NICAI), was formed and Mr Naughton's department became part of this faculty. Professor Sharman Pretty was appointed Dean. Professor Pretty was briefed on matters relating to appointments and continuations. As part of this process she held discussions with Professor Morrow regarding Mr Naughton's continuation. In particular she says that Professor Morrow explained that he had not received copies of the chapters of Mr Naughton's thesis. In April 2004 Professor Morrow sent Professor Pretty a brief summary on the progress of Mr Naughton's continuation together with all the relevant documentation.

[5] Professor Pretty then sought reports from Mr Naughton's PhD supervisors, Professors Marshall and Small. On 6 July 2004 Professor Marshall wrote to Professor Pretty saying that Mr Naughton had produced a considerable amount of material but that this material was a *very much in draft form* and *could be improved*. On 7 July 2004 Professor Small reported to Professor Pretty. In the light of Mr Naughton's assertion that he did not receive Professor Morrow's memorandum of June 2003, this report reflects Professor Small's understanding of the University's requirements and is, therefore, reproduced in full.

*When I arrived and took over the role of (Mr Naughton's) research supervisor (July 2003), I reviewed the work he had done under past supervision, and made a judgement that its direction needed to be reconsidered. The advice he had apparently been given set as a first priority the construction of an elaborate theoretical framework which would then be brought to bear on issues in music education. He was making very heavy weather of this, and it seemed to me far better to see the music education themes as central to the project, and to employ philosophical concepts as and when needed to inform and open up the treatment of that material. I have been advising him accordingly to move briskly through the preliminaries, concentrate on that main part, and then reconsider what is needed to support its analysis and discussion. I think he has accepted this. The present goal is to have a draft of the entire thesis in hand by the end of the year. That will need both application and opportunities to put working time into research. At the moment his application is fine. The work he submits needs further revision, but is mounting up fairly steadily. The goal set for this year, if it is achieved, will give reason for confidence in expecting a submission in 2005* (My emphasis)

[6] On 10 July 2004 Professor Pretty wrote to Mr Naughton referring to Professor Morrow's memo of June 2003 and asking that the draft of Mr Naughton's PhD be delivered to her office by 30 July. Professor Pretty also asked Mr Naughton to submit his application for continuation to her by the same date. By agreement Mr Naughton's application for continuation was submitted on 2 August 2004. This application was accompanied by the work to date on his PhD thesis.

[7] As is required by the Continuation Policy, Mr Naughton's application for continuation was first considered by the Faculty of Creative Arts and Industries Staffing Committee. That committee met on 11 August 2004 and appointed a subcommittee to interview Mr Naughton. The subcommittee then submitted a report to the full Committee. They advised the Committee that Mr Naughton had told them that he had never received the memo from Professor Morrow of June 2003 and was unaware of the required completion date for his PhD until he had received the communication from Professor Pretty in July 2004. However the subcommittee said they found this statement *rather surprising* and that they *did not feel that Mr Naughton had reached a satisfactory level of performance and research to warrant confirmation of appointment at that stage.*

[8] After considering the sub committee's report and several other, in some cases critical, reports the Staffing Committee recommended to the Dean (Professor Pretty) and that Mr Naughton's employment not be continued.

[9] On 2 September 2004 Professor Pretty wrote to Mr Naughton advising him of the staffing committee's recommendation. She advised that she would now like to meet with Mr Naughton, on 6 September 2004, to enable him to present any further information he thought Professor Pretty should take into consideration before making her final decision. Despite a request from Mr Naughton that the meeting be postponed the meeting was held as scheduled. On 7 September 2004 Professor Pretty advised Mr Naughton that she had decided to accept the Staffing Committee's recommendation and that his employment with the University would therefore be terminated.

[10] Mr Naughton says that the termination of his employment was unjustified and is seeking reinstatement, recovery of lost wages, and \$65,000 in compensation for the hurt and humiliation the University's actions have caused him.

## The Continuation policy

[11] Mr Naughton was appointed for an initial four-year term of employment with his ongoing employment being subject to the procedures set out in the University's Continuation policy. Before discussing the merits or otherwise of Mr Naughton's grievance, it is necessary to outline the relevant sections of that policy. The policy sets out a number of procedures to be followed by the staff member and the Dean of the particular faculty. It outlines the information to be supplied by the applicant and stipulates that the relevant staffing committee is to consider a range of reports before making a recommendation to the Dean. These reports include a Head of Department report and reports from advisers nominated by the applicant and the Head of Department. The policy then goes on to set out the procedures to be followed by the Dean depending on the recommendation received from the committee. In particular the policy says that, if the recommendation is to decline the application the Dean will:

- *Advise the staff member that Continuation may not be approved, and that the Dean wishes to discuss the matter with the staff member before this decision is made.*
- *Advise the staff member that they may be accompanied by an employee representative from the AUS or such other person as may be selected by the employee*
- *Meet the staff member with an HR practitioner present*
- *Provide a copy of this policy to the staff member*
- *Explain the reasons why Continuation may not be approved*
- *Provide the staff member with an opportunity to present any explanation or information that ought to be considered by the Dean*
- *Consider carefully any explanation or information prior to deciding on whether or not Continuation should be approved, deferred or declined.*

The policy then goes on to say:

*Where the approval is not considered appropriate on the evidence, there should have been earlier advice to the staff member about their shortcomings and the staff member should have been given an earlier opportunity to improve. ... ..*

## Legal considerations

[12] Despite the large amount of evidence put before me by the parties, and the longer than usual timeframes canvassed in my investigation, the legal principles applicable in this case are essentially the same as those in any dismissal for poor performance. These principles were clearly spelt out by the Employment Court in *Trotter v. Telecom* [1993] 2 ERNZ 659 and apply equally today. In that case the Judge said:

*It is, of course, not for the Court to be the arbiter of the standards set by the employer or of the employer's judgment of the question whether the employer's standards have been met. The Court can and does, however, exercise judgment on the question whether dismissal for unsatisfactory work performance is fair and that involves reaching a view on a number of questions. Some, perhaps most, of these can be said to be:*

- (1) *Did the employer in fact become dissatisfied with the employee's performance of his or her duties?*
- (2) *If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?*
- (3) *Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of standards requiring to be met?*

- (4) *Was a reasonable time allowed for the attainment of those standards?*
- (5) *Following the expiry of such a reasonable time and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question whether the employee had achieved or substantially achieved what was expected, including:*
- (a) *Using an objective assessment of measurable targets;*
- (b) *Fairly placing the tentative conclusions before the employee with an opportunity to explain or refute those conclusions;*
- (c) *Listening to the employee's explanation with an open mind;*
- (d) *Considering the employee's explanation and all favourable aspects of the employee's service record and the employer's responsibility for the situation that had developed (for example, by not detecting weaknesses sooner or by promoting the employee beyond the level of his or her competence); and*
- (e) *Exhausting all possible remedial steps including training, counselling, and the exploration of redeployment?*

### **What happened to Mr Naughton?**

[13] Mr Naughton does not claim that he has a personal grievance in respect to the earlier deferments of his application for continuation. He would, in any event, be outside the statutory time limit for raising such grievances. It is not necessary therefore to consider those deferments in any detail. It is however necessary to review, in light of the principles outlined by the Employment Court in the *Trotter* case, some of these historical events and in particular the communication between Mr Norton and the various representatives of the University over the 12 months prior to the final termination of his employment.

[14] While Mr Naughton is not pursuing a grievance in regarding the earlier deferments, the records of those proceedings included a number of adverse reports. Although these reports were on file, and theoretically available to Mr Naughton, there was no attempt by the University to draw these to his attention. While I accept that an employee, particularly a relatively senior employee, must take some responsibility for pursuing such matters, it is inappropriate for an employer to assume that an employee would have, or should have, know that they were entitled to see such adverse reports. Except by inference (his application was deferred) Mr Naughton did not know they existed. He had no reason to seek to see reports he did not know existed. These records, including the adverse reports, formed part of Professor Pretty's subsequent consideration of Mr Naughton's ongoing employment.

[15] Also on Mr Naughton's file were two emails, dated 26 February 2003 and 5 March 2003, critical of his actions. While Mr Naughton was aware of these emails he was not aware that they had been placed on his file and therefore, potentially, available to be considered by the Dean when considering Mr Naughton's application for continuation.

[16] On his appointment as Dean, in April 2003, Professor Morrow took steps to ensure that Mr Naughton was fully aware of the expectations of the University regarding his application for continuation. He met with Mr Naughton in order to clarify these expectations and followed that meeting up with a memorandum. Unfortunately Mr Naughton does not recall receiving this memo at that time. However, whether or not Mr Naughton actual received the memo, there were several deficiencies in how the University subsequently communicated with Mr Naughton.

- Even if Mr Naughton did receive it, the memorandum did not spell out in unequivocal language the consequences for Mr Naughton should he not achieve the “agreed” objectives. What it did say was that, if he had not completed his PhD at the time of his application for continuation, but had met the other grounds for continuation, he would be provided with a further extension. The timetable for completion of his PhD was to be guided by a completion of a timetable to be formulated in consultation with his PhD supervisor. It did not say that if he did not meet the agreed timetable his employment would be terminated.
- There appears to have been no follow-up by Professor Morrow or the University until Mr Naughton was contacted by Professor Pretty in July 2004 - 13 months after the original “agreement”. Copies of the chapters of Mr Norton’s PhD thesis were not provided to Professor Morrow (as required by the agreement) but no attempt was made by Professor Morrow or the University to obtain these chapters or to ascertain why they had not been provided. Various drafts of Mr Naughton’s 2003 academic performance review suggest that Mr Norton discussed progress on his PhD with his Head of Department but it appears that no connection was made between this review and the “agreement” made with Professor Morrow.
- Professor Pretty took up the position of Dean in January 2004. In March Mr Naughton wrote to the Continuations Committee saying that he hoped his PhD would be completed in draft by March 2005 – I have no doubt Prof. Pretty saw this report. In April Professor Pretty received a written report from Professor Morrow stating that it was clear *from the reports of Chris (Naughton) and his supervisor that he will not have completed this aspect (his PhD) of the continuation programme*. Professor Pretty then formally requested written reports from Mr Naughton’s PhD supervisors regarding his progress. Despite all of these adverse indications Professor Pretty did not contact Mr Naughton until 10 July 2004. In that email she advised that he should provide the completed draft of his PhD and reapply for continuation by the end of July. Even at this point she did not indicate that he was in danger of his having his employment terminated.

[17] As outlined above (paragraph [7]) the Faculty Staffing Committee considered Mr Naughton’s application for continuation on 1 September 2004 and recommended to Professor Pretty that his employment not be continued. As part of this consideration the committee had before it the report of the subcommittee, advice from the Head of Department and reports from the nominated advisers. As is, apparently, usual practice, Mr Naughton was not advised of the content of these reports. Subsequently, when advised of the committee’s recommendation Mr Naughton was told only that the Committee had recommended that his application for continuation be declined. He was not advised of the detailed information that had been before the Committee or given copies of the various reports. He was advised only that the committee’s recommendation was based on the inadequacy of his research i.e. the non completion of his PhD.

[18] On 2 September 2004, Professor Pretty requested that Mr Naughton attend a meeting on 6 September to be heard on any factors that he thought should be taking into consideration before she made a final decision. Despite a request from Mr Norton that this meeting be delayed the meeting went ahead as scheduled. Mr Naughton was advised that the meeting is to give him an opportunity to be heard *on any factors in addition to the information included in the application for continuation*. As Mr Naughton was not aware all of the information available to the Committee (and therefore available to Professor Pretty) he was unable to properly argue in his own defence.

## Was the termination of Mr Naughton's employment justified?

[19] Taking into account the principles spelt out by Employment Court in the *Trotter* case (para [2] above) the answer to this question must be no!

- Although Mr Naughton was advised that he needed to complete his PhD there was a very least some confusion surrounding the timetable for this completion. No effort was made to follow up the memorandum of June 2003 until the performance of the conditions of that memorandum would have been impossible to achieve. It would have been a simple matter for the University, through the Head of Department, Dean or Human Resources staff, to contact Mr Naughton and ask for a report. Such a request would immediately have revealed the confusion over the receipt or otherwise of the June memorandum. Even when Mr Naughton wrote a report for the staffing committee in March 2004, setting out a completion date which did not meet the requirements of the June 2003 memorandum, no one queried his proposed timetable.
- The June 2003 memorandum said that if Mr Naughton had not completed his PhD *at the time of your application for Continuation, and if the Faculty Staffing Committee were to be satisfied that you have met the other grounds for the University to grant Continuation, you would be provided with a further extension of your initial term , till 1<sup>st</sup> February 2005 to allow time for you to be awarded PhD by that date.* (My emphasis). Professor Pretty says that the reason Mr Naughton's application for continuation was not granted was that he had not completed his PhD ... not that he had not met the other criteria. By implication, and in terms of the June 2003 memo Mr Naughton employment should have been granted an extension until February 2005.
- When the Faculty Staffing Committee considered Mr Naughton's application for continuation they considered reports which Mr Naughton was not aware of and was not given an opportunity to comment on. Mr Naughton was not fully appraised by Professor Pretty of all of the information she had available to her when she made her decision to terminate his employment.

The termination of Mr Naughton's employment was not justified and he therefore has a personal grievance against the University.

## Remedies

### Contribution

[20] I have found that Mr Naughton has a personal grievance against his employer, the University of Auckland. When deciding on what, if any, remedies are to be awarded to Mr Naughton, I am required by the Employment Relations Act (section 124) to consider whether or not Mr Naughton contributed towards the situation that gave rise to his personal grievance and if so, whether any remedies awarded should be reduced accordingly. The situation that led to Mr Naughton's grievance was the failure of the University to properly fulfil its responsibilities, as Mr Naughton's employer, to meet the established legal principles. Mr Naughton cannot be said to have contributed to the University's failure in this regard and did not contribute to the situation that gave rise to his personal grievance.

## Reinstatement

[21] Mr Naughton has requested that he be reinstated. The Employment Relations Act, (the Act) at section 125, requires that where the Authority finds that an employee has a grievance and the employee requests reinstatement, the Authority must provide *wherever practicable, for reinstatement*. The University has not filled Mr Naughton's position but opposes Mr Naughton's reinstatement. The University argue that all permanent academic staff are subject to the continuation policy and that Mr Naughton had not met the requirement for continuation (because he had not completed his PhD in the timeframe required and his research productivity was unsatisfactory.)

[22] I do not accept the University's argument that Mr Naughton's reinstatement is not practicable. On the other hand it would not be appropriate for Mr Naughton to be reinstated to a position of any more permanence than he enjoyed prior to 6 September 2004.. i.e before Professor Pretty declined his application for continuation. **The University of Auckland is ordered to reinstate Mr Naughton to the position of Senior Lecturer in the National Institute of Creative Arts as soon as possible.** His ongoing employment is to be subject to the University continuation policy. Mr Naughton is to apply for continuation in accordance with that policy and according to a timetable to be agreed between the parties. This timetable should be reasonable taking into account Mr Naughton's progress on his PhD and the various extensions and timetable's previously discussed. (In particular I note that Mr Naughton, in his memorandum to the Staffing Committee in March 2004, suggested that he would have completed his draft PhD by March 2005. I understand that he has continued work on his PhD thesis since his employment was terminated). If the parties are unable to agree on a timetable for Mr Naughton's application for continuation they should refer this matter back to the Authority for determination.

## Reimbursement of lost salary

[23] The University of Auckland **is ordered to reimburse Mr Naughton for the salary he would have earned during the period from the time his employment was terminated until he is reinstated to the University payroll.**

## Compensation for humiliation, loss of dignity and injury to feelings

[24] Both Mr Naughton and his partner gave evidence of the distress and humiliation caused to him by the termination of his employment. Mr Naughton says that the decision came as a complete shock and caused him embarrassment and concern regarding how he would be able to provide for his family. I accept that Mr Naughton was deeply distressed by these events. Much of this distress could have been avoided if the University had taken more care to ensure that their expectations had been clearly conveyed to Mr Naughton and that his performance against those expectations properly monitored. Given the nature of Mr Naughton's position and the level of humiliation and distress caused to him, **the University of Auckland is ordered to pay Mr Naughton \$10,000 without deduction**, in terms of section 123(1)(c)(i) of the Act.

## Recommendations

[25] Amendments to the Employment Relations Act which took effect on 1 December 2004 provided that, if the Authority finds that the workplace conduct or practice are a significant factor in a personal grievance, the Authority may make recommendations to the employer concerning the action the employer should take to prevent similar problems occurring. This case is one in which it is appropriate that I make such recommendations.

[26] Although I have not heard argument regarding the appropriateness or otherwise of the University's Continuation Policy the evidence I have heard suggests that this policy should be reviewed to ensure that:

- the procedures set out meet minimum standards;
- the policy is available to and understood by the employees to whom it applies; and
- those charged with its administration understand the policy and their responsibilities in terms of that policy.

I therefore recommend that:

1. The University, in consultation with the Association of University Staff, immediately undertake a review of the Continuation Policy to ensure that the policy and procedures therein meet the minimum standards of natural justice. In particular the policy should ensure that any information considered by a Continuation Review committee must be made available to the applicant for Continuation, and the applicant given an opportunity to comment on such information, before to the committee makes its recommendation. In addition the policy should provide that the Dean, when considering whether or not to accept the recommendation of the committee, should ensure that the applicant has seen, and if necessary commented upon, all such information.
2. The University should not presume that the Continuation policy, and information regarding the policy, is available to staff but should take positive steps to inform the staff concerned. The University should ensure that any staff member who is subject to the Continuation Policy is provided with a copy of that policy, and access to advice and support as to the procedures contained in the policy, both at the time of their appointment and well in advance of an application for Continuation.
3. The University should ensure that all those responsible for administering the Continuation Policy, in particular the Deans of the respective Faculties, are familiar with the policy and are provided with guidance and support regarding their responsibilities in respect to the policy.

## **Costs**

[27] Costs are reserved and the parties are urged to attempt to settle this matter between themselves in the first instance.

James Wilson  
Member, Employment Relations Authority