NOTE: Orders prohibiting the publication of certain information appear at [17] of this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 499
5396296

	BETWEEN	KELLY PAKARU Applicant
	AND	CHIEF EXECUTIVE BAY OF PLENTY POLYTECHNIC Respondent

Member of Authority:	R A Monaghan
Representatives:	W Reid, advocate for Applicant D France, counsel for Respondent
Investigation Meeting:	23 July 2013 at Tauranga
Submissions received:	23 July 2013 from Applicant 26 July 2013 from Respondent
Determination:	5 November 2013

DETERMINATION OF THE AUTHORITY

A. The Bay of Plenty Polytechnic's action in dismissing Mr Pakaru was unjustified.

B. Mr Pakaru's conduct contributed in a blameworthy way to the circumstances of his dismissal, so that the remedies awarded to him are reduced by 60%.

C. The Bay of Plenty Polytechnic is ordered to pay to Mr Pakaru:

(i) 11 weeks' remuneration less earnings of $2,949.51, reduced by 60%;

(ii) $5,000 as compensation for injury to his feelings, reduced by 60%.

Employment relationship problem

[1] Kelly Pakaru's former employer, the Bay of Plenty Polytechnic (the Polytechnic), dismissed him following complaints about his use of language and aspects of his conduct towards students in his care. Mr Pakaru either denies some of the conduct complained of, or says it does not amount to serious misconduct. He has also challenged the fairness of the Polytechnic's investigation. He says the dismissal was unjustified on these grounds.

[2] Mr Pakaru was employed as a Youth Guarantee Co-ordinator on the Youth Guarantee Programme (the programme) offered by the Polytechnic. The programme was established to assist students aged between 16 and 17 years, and not currently in education, employment or training. Many of the students in the programme came from troubled backgrounds, had left school or been expelled, and found mainstream schooling did not meet their needs. The programme aimed to improve their prospects for further education by nurturing and encouraging positive relationships and social cohesion between them. From such a base, learning would follow. In the interests of achieving this - and in particular of avoiding the appearance of being part of the mainstream system which had proved unsatisfactory for the students - the programme's activities were marae-based or carried out away from the Polytechnic's premises.

[3] Mr Pakaru's job was to promote the efficient co-ordination, liaison, administration and promotion of the Youth Guarantee Programme. He was expected to spend most of his time with the students in a mentoring role, helping and supporting them to maintain their cohesion as a group and to graduate from the courses offered by specialist tutors. It was important for him to keep the students engaged, and to model the behaviour that would be expected of them.

[4] Mr Pakaru reported to Kuao Matangi (Kuku) Wawatai, the Director Education and Maori Development. The employment agreement was stated to be for a fixed term from 20 February 2012 to 30 November 2012, on the ground that the programme was dependent on continued government funding.

[5] On 29 June 2012 Sharlene Henare, the Polytechnic's Group Leader Maori and Community Development met with some of the students in Mr Pakaru's cohort to

discuss concerns about Mr Pakaru's behaviour which had been relayed to her. Some examples were given, although dates and places were not specified. Ms Henare advised Mr Wawatai of the discussion. Mr Wawatai took particularly seriously the need for trust between students and their tutors and co-ordinators, and decided to begin an investigation.

[6] Representatives of the Polytechnic met with Mr Pakaru and his mother on 2 July 2012. Mr Pakaru was told the Polytechnic proposed to suspend him on pay while concerns about his conduct towards some of the students were investigated.

[7] Ms Henare and Anne Brady, the human resources advisor, interviewed students S and T, two other students, a tutor and a second programme co-ordinator working with the same cohort. Written notes of the interviews were prepared, and sent to Mr Pakaru under cover of a letter dated 20 July 2012. The letter said the allegations included:

- during an exchange while on a fishing trip with the students on 28 June 2012 he said to S 'f- off' and 'I'll throw you overboard';
- on the same trip, he took S's fishing rod for his own use, and when S protested he used intimidatory language in response;
- when a student, U, asked Mr Pakaru after the trip to hurry and take the students home because they were cold and wet, Mr Pakaru told U to 'f- up and wait or you can f- walk';
- inappropriate comments were made by text message to female students including,
    - to T asking her to sit next to him in a van because he did not wish to sit next to another student, and
    - messages to some students addressing them as 'babe'; and
- Mr Pakaru had placed his hand on T's knee inappropriately.

[8] There was no suggestion that any of the allegations concerned behaviour which was sexual in nature.

[9] A disciplinary meeting was scheduled for 31 July. Mr Wawatai conducted the meeting.

[10] Mr Pakaru's advocate believed there were inconsistences in the statements available, and that the statements lacked detail. She sought permission to interview the students and staff members directly. The request was declined, but the Polytechnic invited her to provide questions to be put to the interviewees. The advocate later decided she was not in a position to proceed in that way. Instead by letter dated 5 August 2012 she sought more detailed statements from the students and the staff involved. By further letter dated 14 August 2012 the advocate responded to the allegations identified in the covering letter of 20 July, variously denying or putting the allegations into context.

[11] Two further meetings followed. After the next meeting, on 15 August, Ms Henare and Ms Brady decided to conduct further interviews. They re-interviewed one of the students and the two employees, as well as four other students. They did not re-interview S or T.

[12] Written notes were taken of the interviews, and were attached to a further letter to Mr Pakaru dated 29 August. Mr Pakaru's advocate provided a further written response by letter dated 7 September.

[13] A final meeting went ahead on 12 September. The information and the responses were discussed, and an adjournment sought. Mr Wawatai returned to say that he believed Mr Pakaru was guilty of serious misconduct and - taking the evidence into account and bearing mind the vulnerability of the students - summary dismissal was proposed.

[14] In a letter dated 13 September Mr Wawatai accepted that the alleged conduct towards S during the 28 June fishing trip had occurred, and said Mr Pakaru's explanations did not mitigate the underlying seriousness of the conduct. He noted that the allegation in respect of U was admitted, and said the explanation was unacceptable. He did not accept the denials in respect of the text messages and of the behaviour towards T. The letter confirmed that the conduct was considered serious misconduct, and sought Mr Pakaru's comments on whether his employment should be terminated.

[15] There was no further comment from Mr Pakaru.

[16] By letter dated 17 September 2012 Mr Wawatai referred again to the conduct of 28 June, and confirmed the dismissal. The letter said the dismissal was effective from Friday 14 September 2012.

Orders prohibiting publication

[17] I confirm orders made under clause 10, Schedule 2 of the Employment Relations Act 2000 prohibiting the publication of the names of the students concerned or information that may identify them.

Issues

[18] The test of justification for the dismissal is set out in s 103A of the Act. It concerns whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.[1] In applying the test the Authority must consider whether the employer: sufficiently investigated the allegations before dismissing the employee; raised its concerns with the employee before dismissing the employee; gave the employee a reasonable opportunity to respond; and genuinely considered the explanation before dismissing the employee.[2]

[19] The issues are:

(a) did the Polytechnic follow a fair and reasonable procedure in reaching its conclusions, and in particular,
    (i) should it have permitted the advocate to interview students and staff members directly,
    (ii) should Mr Wawatai, as the decision-maker, have heard directly from these witnesses;
(b) was the Polytechnic's finding that Mr Pakaru acted as alleged reasonably open to it, and in particular,
    (i) was its assessment limited to the conduct referred to in the 17 September letter, being the conduct towards S on 28 June,

[1] s 103A(2)
[2] s 103A(3)

(ii) were the findings reasonably open to it on the information it had;

(c) was dismissal the action a fair and reasonable employer could take; and

(d) if not, do the remedies available to Mr Pakaru include, -

(i) the reimbursement of remuneration lost as a result of his personal grievance,

(ii) compensation for injury to his feelings, and

(iii) compensation for the loss of earnings he might reasonably have been expected to obtain if his grievance had not arisen.

Did the Polytechnic follow a fair and reasonable procedure

[20] The Polytechnic said it followed a fair and reasonable procedure in that it:

(i) conducted a sufficient investigation;
(ii) raised its concerns with Mr Pakaru before deciding to dismiss him;
(iii) gave him a reasonable opportunity to respond; and
(iv) genuinely considered the response before dismissing him.

1. Was a sufficient investigation conducted

[21] I have reservations about the investigation which I discuss in the context of whether the findings the Polytechnic reached were reasonably open to it. Here I address Mr Reid's submissions, which were:

- Mr Pakaru should have been given the opportunity, through his advocate, to interview and ask questions directly of the witnesses whose statements were relied on; and
- as the decision-maker, Mr Wawatai should have heard directly from the witnesses.

Opportunity for the advocate to interview witnesses directly

[22] Mr Reid submitted that Mr Pakaru's advocate had a legal right to ask questions of the Polytechnic's witnesses during the disciplinary investigation.

Correspondingly the Polytechnic had no legal right to deny the advocate access to the people it had interviewed during the disciplinary process, in order to question them.

[23] The Authority has dealt before with whether an employee or his representative has a right to question an interviewee - or at least be present at the questioning - during a disciplinary investigation. In one case it concluded:

> *[37] … While a worker is entitled to know everything said about or against him or her and have the opportunity to respond to it, the principles of natural justice as interpreted and applied in our employment law do not generally entitle the worker (or his or her representative) to directly confront or question the complainant during the employer's disciplinary enquiry (unless there is some contractual term which provides for such a procedure). Rather it is the employer who must conduct a full and fair inquiry into the allegation. Generally this will involve the employer interviewing the complainant and then making all the relevant information given or accusations made by that person available to the accused worker and giving the worker an opportunity to provide an explanation. It is an instance subject to the good faith obligations under s 4(1A)(b) and (c) of the Act. In some cases the explanation given may require the employer to seek further information from the complainant or other people who may have relevant information and to give the worker a further opportunity to respond to what is then said. The worker's explanation must be evaluated with an open mind. That evaluation would normally include steps to consider, check and corroborate any information relied on for decisions subsequently made.*[3]

[24] Mr Reid did not materially disagree with what the Authority said about an employer's obligations. Instead he sought to go further, drawing attention to another determination of the Authority. There the Authority found a failure to allow an employee or a representative to question those who were accusing the employee of serious misconduct was not the act of a fair and reasonable employer.[4]

[25] Mr Reid submitted in support that there are strong policy considerations why an employee's legal representative should not be denied access to witnesses (or interviewees) in the course of a disciplinary investigation. He said it is vital to an employee facing dismissal to place before the employer all the information possible. That is the only opportunity the employee has to do so because, in the event of a dismissal and subsequent personal grievance, justification is tested with reference to what the employer knew or should have known in the circumstances at the time. The Authority and the Court cannot displace the employer's findings with their own.

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[3] *McKellow v Transportation Auckland Corporation Limited* [2012] NZERA Auckland 191
[4] *Kolo'ofai v Invercargill Passenger Transport Limited* [2012] NZERA Christchurch 46

[26] An employer who has a business to run is not expected to conduct a formal hearing in the nature of a trial.[5] Instead the harm Mr Reid has identified is addressed by considering the fairness and reasonableness of the employer's investigation. If, for example, the employer's own identification and questioning of witnesses is so flawed that it does not obtain relevant information it should have obtained, the investigation may be found to be unfair and a subsequent dismissal unjustified. The Authority and the Court are not prevented from conducting a direct inquiry into relevant events to identify what information was or should have been available. Moreover doing so, and reaching adverse conclusions about the quality of the employer's investigation, does not in itself amount to a substitution of the views of the Authority or Court for those of the employer on the justification for a decision to dismiss.[6]

[27] I do not believe the question here is framed correctly as whether the Polytechnic had a right to deny the access sought, rather it is whether the Polytechnic's obligation to conduct a fair and reasonable investigation extended to an obligation to grant the access contended for here. On an application of the above analysis, the obligation does not extend that far and I find accordingly.

Should the decision-maker have heard directly from witnesses

[28] Mr Reid submitted that, as the decision-maker, Mr Wawatai should have heard directly from the witnesses questioned during the disciplinary process.

[29] He relied in support on the decision in *Timu v Waitemata District Health Board*[7]. The Employment Court found that the decision-maker had a minimal involvement in the decision-making process – not having spoken to any of the witnesses or heard the explanations Mr Timu gave at three meetings which preceded the meeting he did have with Mr Timu. There was a further difficulty in that the author of a report on which the decision-maker relied had not spoken directly to witnesses either. The finding that the decision-maker was so isolated from the primary evidence as to make it unfair for him to have that role is not surprising on those facts, but does not in itself mean Mr Wawatai was obliged to act as contended.

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[5] *Airline Stewards and Hostesses IUOW v Air New Zealand Ltd* ERNZ Sel Cas 985 (CA)
[6] The judgement of the Court of Appeal on an application for leave to appeal in *Waitemata District Health Board v Timu* [2007] ERNZ 673 is an example of this.
[7] [2007] ERNZ 419

[30] A decision of the Employment Court in *Ioane v Waitakere City Council*[8] is also relevant. The Court acknowledged the ability of an employer to delegate the preliminary investigatory role to others, but said the employer is obliged to allow the employee an opportunity to address the decision-maker directly.

[31] Here Mr Wawatai delegated the preliminary investigatory role as he was entitled to do. He heard directly from Mr Pakaru and his advocate on several occasions, and heard directly from them about what he should make of the interviewees' statements. A concern that there were differences and inconsistencies in the statements was raised during the disciplinary process but I do not accept anything in the circumstances meant that, in fairness, he should have spoken to the interviewees himself to resolve any question of credibility. It was sufficient for these matters to be pointed out, for further interviews to be conducted as necessary to obtain clarification, and for Mr Pakaru and his advocate to make such representations to Mr Wawatai as they considered necessary regarding the result.

[32] For these reasons I do not accept Mr Wawatai was so isolated from the primary evidence as to make his exercise of the role of decision-maker unfair.

2. Raising concerns before deciding to dismiss

[33] The allegations discussed originally with Ms Henare were potentially very serious, although at the time they were broadly-stated and lacking in detail. This does not excuse the failure to advise Mr Pakaru at the time of his suspension of the kind of allegations he was facing or why the Polytechnic was concerned about them. Although no grievance has been pursued in respect of the matter, the failure amounted nevertheless to an unfair step in the investigation process.

[34] The statements subsequently obtained from the interviewees contained a number of allegations similar in kind to those made to Ms Henare, although still lacking in detail. It was not clear from the 20 July covering letter whether Mr Pakaru was to attempt to respond to all of the allegations in the statements which were attached, or merely to the allegations listed in the covering letter. As the advocate pointed out on 31 July, at the time Mr Pakaru did not have *'the full picture'.*

[8] [2003] 1 ERNZ 104

[35] Even so, commencing at least with the advocate's letter of 14 August, the parties' discussion centred on the allegations listed in the covering letter rather than the wider allegations in the statements. The further interviews conducted after the 15 August meeting addressed those allegations together with Mr Pakaru's explanations, and the resulting statements were also available to Mr Pakaru.

[36] There has not been any suggestion that the Polytechnic sought to go beyond the allegations listed in the covering letter when making the decision to dismiss.

[37] I conclude that the Polytechnic raised its concerns with Mr Pakaru before it made the decision to dismiss.

3. Reasonable opportunity to respond

[38] Mr Pakaru had a reasonable opportunity to respond to the allegations listed in the 20 July letter together with the supporting statements, and to the material obtained as a result of the further interviews.

4. Genuine consideration of response

[39] The decision to dismiss was made after a genuine consideration of Mr Pakaru's responses.

Was the Polytechnic's finding that Mr Pakaru acted as alleged reasonably open to it

[40] Mr Reid submitted that:

(i) the conduct on which the Polytechnic could rely in support of the justification for the dismissal was limited to the conduct towards S on the fishing trip of 28 June; and
(ii) the findings about Mr Pakaru's conduct were not reasonably open to it on the information it had.

1. The conduct on which the Polytechnic could rely

[41] There was considerable discussion in the Authority about precisely what conduct was relied on in the decision to dismiss, and what conduct could be relied on.

[42] The question arose because the letter of 17 September 2012, confirming the decision to dismiss, referred expressly to a finding that Mr Pakaru's actions on 28 June amounted to misconduct. The discussion of any more specific conduct on that day was limited to the conduct towards S, and there was no discussion of conduct occurring other than on that day. Thus Mr Reid submitted that justification must be determined with reference only to the conduct towards S on 28 June, and that the remaining allegations cannot be taken into account. The Polytechnic says all of the conduct identified in the 20 July covering letter was relied on - and could be relied on - in the decision to dismiss.

[43] Mr Reid cited the decision of the Employment Court in *Ashton v Shoreline Hotel* [9] where the Court emphasised the importance of holding an employer to the reasons for dismissal as stated at the time of dismissal. It said employers cannot rely on matters which occurred to them later, or matters which were known to them at the time of dismissal but did not weigh with them. It went on to say that, while there may be occasions when the true reasons are misstated, this argument raises such a question of credibility that the safest course is to treat the employer's statement of the reasons as expressing the true reasons. Overall, however, the Court said the inquiry is into what were the reasons for the dismissal in fact.

[44] I accept that an employer cannot be permitted to re-cast or beef up its reasons for a dismissal after the dismissal occurred. It cannot invoke incidents not identified or put to the employee during the disciplinary process - let alone historical incidents not put to the employee and of which it was aware but appeared to have let pass - as happened in *Ashton.*

[45] The facts here are different. The concerns about the text messages and the conduct towards U and T were identified and put to Mr Pakaru as part of the disciplinary process, and were discussed during the disciplinary meetings. The Polytechnic's findings that the conduct occurred, and was inappropriate, were recorded in the letter of 13 September. The letter said the behaviour towards S, as well as the inappropriate conduct towards students, was behaviour constituting serious misconduct. It advised that termination of employment was being considered and requested Mr Pakaru's response to the question of penalty.

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[9] [1994] 1 ERNZ 421 at 427-8.

[46] Mr Wawatai's evidence in the Authority was that all of the allegations were taken into account in making the decision. This is supported by the 13 September letter, in that it commented on all of the allegations before saying the behaviour constituted serious misconduct. I observe, however, that Mr Wawatai's evidence also indicated that the conduct towards S weighed with him most.

[47] There was no evidence of any further representations about, or reconsideration of, the seriousness of any separate allegation before the decision to dismiss was confirmed in the 17 September letter. Although the letter could have been clearer about the relevance of conduct other than that towards S, a combination of: the discussion of the conduct during the disciplinary process; the identification of the conduct as serious misconduct in the letter of 13 September; the absence of any evidence of a change of view between 13 and 17 September; mean I find all of the conduct identified in the 13 September letter was relied on in the decision to dismiss.

2. Were the findings about Mr Pakaru's conduct reasonably open to the Polytechnic

[48] Mr France submitted that it was reasonably open to the Polytechnic to find Mr Pakaru swore at S and intimidated him on two occasions during the 28 June fishing trip, sent inappropriate text messages and displayed inappropriate conduct towards U and T.

Incident with S in the galley

[49] Mr Pakaru accepted during the disciplinary process that he told S to 'bugger off or I'll throw you overboard' but not that he had said 'f- off' or that his behaviour was intimidatory. He said in evidence in the Authority that he said 'piss off', not 'bugger off', but that difference is not material. He also told the Polytechnic that his statement that S would be thrown overboard was not intended to be taken seriously.

[50] The account S himself gave to the interviewers was incomplete and inaccurate, and in particular it did not recognise his own role in the exchange. He should have been re-interviewed regarding the detail of this. However it is unlikely that this affected the outcome because at the time Mr Pakaru was able to explain that S had resisted the instruction to leave the galley. There was no suggestion that Mr Pakaru

had approached S and spoken as he did for no reason at all, or that the fact of S's resistance to leaving the galley was not recognised.

[51] The concern about Mr Pakaru's language and behaviour remained. When concluding the exchange was intimidatory the Polytechnic relied on its finding that 'f-' was used and the acceptance that the words 'or I'll throw you overboard' were used. It also relied on supporting information that, although the galley area was small and there was no apparent need to do so, Mr Pakaru stood up when he spoke to S. Mr Pakaru told the Polytechnic at the time that he was seated when he spoke, but said in evidence variously that he stood up and moved over to S before speaking to him or that he was already standing.

[52] There was no suggestion the incident was intended to be, or was perceived as, light-hearted by anyone present.

[53] Nor was there any suggestion that Mr Pakaru intended to throw S overboard, and I do not accept Mr Reid's submission regarding the need to provide that intention. The Polytechnic's concern was with Mr Pakaru's use of language and his intimidatory behaviour. As Mr Wawatai said in oral evidence, such behaviour was not consistent with the model Mr Pakaru was expected to exhibit for the students.

[54] I conclude it was reasonably open to the Polytechnic to make the findings it did about the language Mr Pakaru used, and about the seriousness of his behaviour.

Incident with S and the fishing rod

[55] S told the interviewers he had prepared a fishing rod for his use when Mr Pakaru took it and put his own bait on it, apparently taking the rod for himself and for no good reason. Again S's account was incomplete and inaccurate and an attempt should have been made to obtain better information.

[56] Additional information obtained during the re-interviews indicated the incident arose out of an exchange about whether S had the skipper's permission to use the rod. There was a consensus among the interviewees to the effect that S had obtained the permission, and that the skipper was busy elsewhere on the boat at the time of the incident. One student said Mr Pakaru told S to stop touching the rod, and S told Mr Pakaru he had permission. Mr Pakaru responded 'don't f- touch that'.

Another student said S was told not to use the rod, but made no mention of any swearing. The second programme co-ordinator told the interviewers he was sitting next to S and Mr Pakaru at the time. He did not remember what Mr Pakaru said to S although he characterised the words as 'not polite', 'snappy' and 'confrontational'.

[57] Mr Pakaru's written response of 7 September pointed out that the original allegation that Mr Pakaru took the rod for his own use was not supported. When the incident was discussed at the 12 September meeting, the parties reached common ground to the effect that S had permission to use the rod, and Mr Pakaru told him to put the rod down. The Polytechnic acknowledged at the time that accounts of what was said next were unclear. The meeting reached a consensus that, for a time, S was prevented from fishing.

[58] Despite this, the 13 and 17 September letters suggest the Polytechnic concluded Mr Pakaru intimidated S by taking the rod for his own use and refusing to allow S to fish with it, then used inappropriate language towards S when S protested.

[59] At best the summary of the discussions of 12 September established no more than that Mr Pakaru told S not to use the rod. Mr Pakaru said in the Authority that he wanted S to wait until the skipper returned. At the time the Polytechnic did not address the content or assess the significance of the exchanges about whether S had permission, or examine Mr Pakaru's actions or motives in wanting S to wait. There was no comment on the fact that Mr Pakaru did not take the rod for his own use. There was no finding on precisely what language was used towards S, and was even an effective acknowledgement that it was difficult to do so. I understood from the evidence in the Authority that the Polytechnic believed 'f-' had probably been used, but the information it had was not sufficient to support that conclusion.

[60] For these reasons I do not accept that it was reasonably open to the Polytechnic to conclude on the information available to it at the time that Mr Pakaru was guilty of misconduct in respect of the incident with the fishing rod.

Swearing at U

[61] Mr Pakaru admitted to the Polytechnic that he said to U after the fishing trip 'f- wait or you can f- walk'. He said he was distracted at the time because he was

sending a text to another staff member, and noted in any event that there was a class contract which allowed swearing.

[62] The interviewers re-interviewed the staff member concerned. The staff member did not recall whether he had received a text message and was not able to produce a record of his messages for that day.

[63] The interviewers also asked students and staff about the class contract regarding swearing. The interviewees agreed there was an informal contract allowing swearing but most said this did not extend to swearing at or being abusive towards individuals. Otherwise there was general comment that swearing occurred among students, but that the other two staff members did not swear in the students' presence.

[64] The Polytechnic did not consider Mr Pakaru's explanation was an adequate explanation of the language he used. In particular while there were variations in the accounts of the content of the class contract, there was nothing to suggest it was acceptable for a person in Mr Pakaru's position to speak to a student as Mr Pakaru did. It was reasonably open to the Polytechnic to find the language Mr Pakaru used exceeded acceptable boundaries.

Inappropriate text messages

[65] Mr Pakaru told the Polytechnic he did not recall sending a text message to T in which he asked her to sit next to him in the van because he did not want another student sitting there. The message itself was not available.

[66] Mr Pakaru told the Polytechnic he denied sending text messages addressing students as 'babe', but said he used the word 'bub' as a term of endearment. Although T said during her interview that she received a text in which she was addressed as 'babe,' again the message itself was not available.

[67] When the Polytechnic conducted its re-interviews it did not pursue whether or when messages addressing students as 'babe' were received, rather it asked whether being addressed as 'bub' would be considered acceptable. There was a range of views in response, most of which were to the effect that such a term was 'over friendly'.

[68] It was not clear what finding the Polytechnic made as a result. In particular it is not clear whether it believed the term 'babe' had been used, although its assertions that it accepted the students' accounts indicated that it reached that conclusion. Alternatively, if the Polytechnic accepted the term 'bub' was used, then it would seem from the 12 September letter that it did not accept the explanation that it was a term of endearment with no sexual connotations.

[69] I find in respect of the text messages that the Polytechnic's conclusions were not reasonably open to it because:

- there was not enough information about the request that T sit next to Mr Pakaru to support any finding on the matter;
- there was not enough information to support a finding that the term 'babe' was probably used; and
- if it accepted the term 'bub' was used, the question had not been one of the existence of sexual connotations and the interviews suggested a lesser question of whether such a form of address was 'over friendly.'

Hand on T's knee

[70] T told the interviewers Mr Pakaru put his hand on her leg once for a few seconds. Two other students said they observed this.

[71] Mr Pakaru told the Polytechnic he could not recall acting in that way, but the Polytechnic preferred the students' accounts.

[72] I consider the accounts available to the Polytechnic were so vague as to date, time and place that the conclusion it reached was not reasonably open to it.

Was dismissal the action a fair and reasonable employer could take

[73] In saying dismissal was the action a fair and reasonable employer could take the Polytechnic relied on the outcome of its investigation, together with provisions in its Code of Conduct. The Code of Conduct identified as serious misconduct: violence, threats of violence or intimidation towards a student; deliberate use of inappropriate language that causes offence to another person; and aggressive, disruptive or argumentative behaviour. The Code of Conduct also expected

employees to provide a positive learning environment, to treat students with respect and to provide them with appropriate feedback.

[74] Mr Wawatai spoke eloquently in evidence of the importance of socialisation of the students on the programme as a precursor to success in education, particularly given the students' backgrounds and their state of disengagement and alienation. In behaving as he did Mr Pakaru was behaving in a way that was all-too familiar to them, and undermined efforts to re-engage them. In the 17 September letter Mr Wawatai pointed out that the students with whom Mr Pakaru had been working were:

> "*vulnerable learners who required learning opportunities of a high and uncompromising level. Trust in these situations must go both ways and only then can the students reach their learning potential."*

[75] However there were a number of flaws in the investigation, beginning with the unfair suspension. I also have a concern that the interview process did not concentrate on obtaining a full and accurate account of the incidents being pursued. Rather, the interviewers tended to discuss aspects of Mr Pakaru's explanations outside of their proper context or to return to generalised complaints about his behaviour. This was at the expense of obtaining accounts of particular incidents on which reliable findings could be made.

[76] The effect is that I have found the Polytechnic had reasonable grounds for its findings about the conduct towards S in the galley, and about the conduct towards U, but that the remaining findings were not reasonably open to it.

[77] When multiple acts of misconduct are relied on to justify a dismissal, it is usually the case that an absence of reasonable grounds for concluding any one or more of the acts occurred will render a dismissal unjustified. This is so even if there were reasonable grounds for the conclusions in respect of the remaining acts. In that respect, even if Mr Reid was correct when he submitted that the Polytechnic was entitled to rely solely on the conduct towards S, there were reasonable grounds for only one of the two relevant conclusions.

[78] For these reasons I find dismissal was not the action a fair and reasonable employer could have taken in the circumstances at the time, and the dismissal was unjustified.

Remedies

[79] Mr Pakaru seeks:

(i) the reimbursement of remuneration lost as a result of the grievance; and
(ii) compensation for injury to his feelings; and
(iii) compensation for the loss of earnings he might reasonably have been expected to obtain if the grievance had not arisen.

1. Reimbursement of remuneration lost as a result of the grievance

[80] Mr Pakaru's employment was terminated 11 weeks before the termination date of 30 November 2012 identified in the parties' employment agreement. He had no earnings in October 2012 but earned $2,949.51 (gross) in November 2012. His remuneration from the Polytechnic was $53,000 for the period of the employment agreement.

[81] The entitlement is to 11 weeks' remuneration, less $2,949.51.

[82] This amount must be reduced if Ms Pakaru was guilty of blameworthy contributory conduct. He was guilty of misconduct in his threatening language and behaviour towards S, and in his admitted swearing at U. The behaviour was at odds with the standard expected of him, and should be reflected in a reduction in the remedy available. The reduction to be applied to the above calculation is 60%.

[83] The Polytechnic is ordered to reimburse Mr Pakaru accordingly.

2. Compensation for injury to feelings

[84] Mr Pakaru gave evidence that he was shocked, bewildered and hurt at what had happened, and suffered a loss of mana.

[85] I would have awarded $5,000 but reduce that by 60%.

[86] The Polytechnic is ordered to make payment accordingly.

3. Compensation for loss of earnings that would have been earned.

[87] Mr Pakaru said he would have been employed in the programme in the 2013 academic year, were it not for the dismissal. He said the programme was becoming well-established and well-regarded, and would have received the required funding.

[88] I am not satisfied that Mr Pakaru would have been employed again in 2013. Although the programme had been praised and more funding was made available, part of the co-ordinator's role was to use personal connections to recruit students for the programme. Programmes were offered in areas where sufficient numbers were recruited. Mr Pakaru acknowledged in evidence that he had struggled to recruit in sufficient numbers. The programme was relocated away from his home area after 2011 because of a lack of numbers, and the second co-ordinator played a significant role in recruiting students in 2012.

[89] There will be no order for compensation for the loss of earnings that would have been earned.

Costs

[90] Costs are reserved.

[91] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs may file and serve a memorandum on the matter by the close of business 28 days from the date of this determination. Any memorandum in reply is to be filed and served by the close of business 14 days after the date of receipt of that memorandum.

R A Monaghan
Member of the Employment Relations Authority