PR947653

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.170CE application for relief in respect of termination of employment

Ann Hart

and

Kangan Batman TAFE
(U2003/4581)

DEPUTY PRESIDENT LEARY HOBART, 7 JUNE, 2004

Termination of employment.

DECISION

[1] This is an application pursuant to s.170CE of the Workplace Relations Act, 1996 (the Act) by Ann Hart (the applicant) alleging that her termination of employment by Kangan Batman TAFE (the respondent) was harsh, unjust or unreasonable.

[2] Sworn evidence was presented by the following witnesses:

The applicant;
Andrew Stuart Ferguson, Australian Education Union Organiser;
Josephine Bennett, Trainee Program Co-ordinator;
Terrance McNamara, Manager, Administrative Services Dept;
John Parish; Director;
Geoff Mackay, Human Resources Manager;
Margaret Balsillie, Human Resources Co-ordinator;
Richard Turnbull, General Manager, Resource Management Group;
Andrew Hamilton, Manager, Security and Public Safety Department, Transport and Logistics Department;

[3] The applicant claimed that her termination was harsh, unjust and unreasonable and that she was denied procedural fairness in her attempts to challenge the termination and respond to allegations made against her.

[4] She claimed that there was no valid reason for the termination and that the reasons provided were not sound or defensible and were ill founded.

[5] Further it was submitted by the applicant that even if it were found that a valid reason existed for the termination that the process was harsh, unjust and unreasonable.

[6] The applicant seeks reinstatement to her former position.

[7] The applicant was employed by the respondent from 11 January, 1990, until her termination for serious misconduct effective 13 June, 2003. The letter of termination dated 12 June, 2003, said *".....you were informed that your poor work performance appeared to constitute serious misconduct as it may cause serious damage to the reputation, liability or profitability of the Institute."*[1]

[8] The applicant was a classroom teacher until some time in 2000 when she undertook both classroom and trainee students. The trainees were visited and/or contacted by their trainer at their places of work.

[9] The applicant was employed by the respondent in the Administrative Studies Department.

[10] The termination was effected by decision of the Director of the Institute, Mr Parish, who said in his statement that:

> *"...Mr Mackay spoke to me about terminating Ms Hart's employment.... He recommended termination on the basis of the report by Mr Turnbull and Mr Hamilton, which showed improper recording by Ms Hart in her traineeship files. The inconsistencies in Ms Hart's records were a serious issue because of the potential damage to the reputation of the Institute, and obligation to reimburse OTTE for the hours over claimed, had they been discovered in an audit by OTTE.*
>
> *Mr Mackay told me that Ms Hart had refused to participate in the investigation of her traineeship records and was on sick leave. However, he said that she had been given numerous opportunities to respond to the findings. I considered the decision regarding the termination of Ms Hart's employment, and agreed it should proceed on the basis of her serious misconduct."*

[11] The applicant unsuccessfully pursued an internal appeal challenging the respondent's decision to terminate her employment.

[12] The Roll Audit day was held on 10 and 11 December 2002 and all staff were required to attend. The applicant testified that she did not think she was required to attend for the whole of the session and sought clarification from Mr McNamara, Manager, Administrative Services Department. She claimed that

Mr McNamara never responded so she attended for part of the session only and then undertook some prior commitments with trainees.

[13] On 19 December, 2002, the applicant was required to attend a meeting with Mr McNamara to respond to a *"number of complaints from other staff"* members alleging that she had abused and yelled at Ms Knight, the Result Co-ordinator, on roll audit day. Renus Burke, the Program Co-ordinator for the Department was also in attendance at the meeting.

[14] The applicant denied the allegations and claimed she had been given no prior notice as to the purpose of the meeting. Nevertheless she noted in her statement that she *"undertook to speak with Ms Knight and apologise to her."*[2]

[15] On 23 December, 2002, and following the meeting of 19 December, 2002, the applicant lodged a verbal complaint with Mr Mackay, the Human Resources Manager, against Mr McNamara alleging bullying. She then filed a *Harassment and Victimisation Complaint* against Terry McNamara and Renus Burke in respect to ongoing issues about the events of Roll Audit day.

[16] The applicant testified that her *Harassment and Victimisation Complaint* was confirmed by email to Mr Mackay on 6 January, 2003. However Mr Mackay testified that he had never received the email. The applicant has no record of forwarding the email on that date and said *"The computer I had at the time is no longer there. I did that - just to clarify it wasn't on my laptop, it was on the computer at home."* And *"The computer is there. The actual - everything on it, the hard disk was corrupted so it has gone."*[3]

[17] In January, 2003, Josephine Bennett, the Trainee Program Co-ordinator, had reviewed the staffing requirements for trainees for 2003. She said this was a departmental requirement to ensure funding and financial arrangements and she relied on information found on the database known as the QLS. It was whilst undertaking this process that she discovered *"some significant anomalies with figures"* concerning the applicant's files.[4]

[18] After discussion between Ms Bennett and Mr McNamara the respondent removed trainee responsibilities from the applicant and allocated her to full time classroom duties.

[19] At a meeting with Ms Bennett and Mr McNamara on her return to work on 5 February, 2003, the applicant was informed that her teaching responsibilities for trainees had been removed due to discrepancies having been found in her trainee files. Ms Bennett testified that *"The justification was that there were very serious matters, things that looked to me like fraud and they needed to be examined immediately and there wasn't sufficient time at the start of the year which started on the Monday and in fact the timetables had to be issued on the*

Friday because that was the orientation so we needed to act quickly. It wasn't our preferred course of action."[5] The applicant said she had not been provided with details of the alleged discrepancies nor was she given an opportunity to respond to the allegations. Ms Bennett said that the purpose of the meeting was *"really to inform Ms Hart that we had discovered irregularities, and to give her a chance to get a representative so that she could discuss it in detail at a meeting set up at the convenience of her and the people involved....."*[6]

[20] Later that day the applicant informed Mr McNamara, by email, that *"In light of the current situation, and issues that have been going on with your management practice, this is causing me considerable distress and, as a consequence, I feel unable to continue appropriately in my work at this point. I wish to advise that I will be on sick leave from 2.00pm today onwards - I will let you know further tomorrow after seeing my doctor, however don't anticipate returning to work this week. I wish to emphasis (sic) that even if I'm on sick leave I will attend the meeting on Monday."*[7]

[21] The next day the applicant was diagnosed as having a stress related condition and did not perform any further work for the respondent prior to her termination on 13 June, 2003.

[22] On 6 February, 2003, the applicant provided Mr Mackay with a copy of the 6 January email and advised that she wished *"to broaden my complaint to include the recent behaviour of Terry McNamara."* She advised Mr Mackay that she believed the behaviour amounted to *"constructive dismissal as well as harassment and victimisation"* which eventually resulted in a workers' compensation claim for work related stress.

[23] Mr Andrew Ferguson, an Organiser with the Australian Education Union (AEU), acted as the applicant's representative and testified that the applicant was concerned about the lack of action during January in respect to the allegations she had made against Mr McNamara *"when she expected it to"* be addressed. The applicant was on leave during January, 2003.

[24] The respondent agreed, at the request of the applicant, to deal with the allegations she had made against Mr McNamara prior to a consideration of the traineeship files and the respondent's concerns about those files.

[25] Mr Ferguson's evidence was mostly based on what the applicant had advised him and he was not familiar with the issues of concern to the respondent in respect to the applicant's trainee files.

[26] He discussed the panel, which included a representative from the AEU, created to investigate the applicant's complaints against Mr McNamara. Mr

Ferguson generally agreed that the investigation, held over two days in March, 2003, and with some thirteen witnesses, was a fair and reasonable process.

[27] On 18 March, 2003, the investigating panel advised that it had come to a unanimous view that the allegations made by the applicant against Mr McNamara were unsubstantiated. The panel found that *"there was no evidence to suggest that there was any linkage between the action taken concerning the 2003 timetabling arrangements and the events surrounding the Roll Audit Session ....and the Results Day..... On the basis of evidence presented to the panel the decision was based on statistical results and data for 2002."* The panel also found that *"there was evidence to suggest that there needs to be a full examination of the Traineeship records for which Ann Hart was responsible during 2002."*

[28] The panel recommended that:

> *"5.2 A full investigation take place into the basis on which Ms Hart's teaching duties were reallocated. Should this investigation reveal that concerns of the program co-ordinator and the department manager are able to be addressed to their satisfaction then Ms Hart may be returned to the traineeship duties."*

[29] And further:

> *"5.4 That there is no reason why Anne Hart should not return to scheduled duties effective immediately, on the basis that subject to the findings and 5.3 above, she may be reallocated traineeship duties as from commencement of semester 2."*

[30] The applicant advised the respondent that she was not satisfied with the findings of the investigation of her harassment allegations and claimed that the panel had not addressed a number of her areas of complaint.

[31] There is conflict between the evidence of the applicant and the other witnesses as to the events surrounding her complaints of harassment, victimisation and constructive dismissal against Mr McNamara. However for the purposes of the application before me I do not think such conflict is of relevance and I do not need to address it.

[32] I disagree with the applicant's view that *"....they had raised issues and were - had turned the investigation of my complaint into a complaint about myself."*[8]

[33] I am of the view that the applicant's claims of harassment, victimisation and constructive dismissal are not relevant to my determination as to whether

her termination was harsh, unjust or unreasonable. Her termination was effected due to issues of work performance related to the state of her traineeship files which were discovered by Ms Bennett in January 2003. The applicant's written or formal allegations of harassment by Mr McNamara were not received by the respondent until February, 2003, albeit the applicant claimed to have emailed her complaint in January, 2003. In any event the investigation of those allegations by an investigation panel found that those allegations were unsubstantiated and were unrelated to the concerns raised by the respondent about the state of her trainee files. Other than the coincidence of time and the recommendation of the investigation panel that *"a full investigation take place into the basis on which Mr Hart's teaching duties were reallocated"* I see no relationship between the two issues.

[34] I now address the work performance issues which, it was submitted, were the reason for the termination of the applicant.

[35] I note that there do not appear to have been any performance issues prior to those which are the reason for the termination. Mr Mackay commented in a statement prepared for an investigation undertaken by Murray Phillips & Associates, Investigation Consultants, that *"it would appear that she worked to a satisfactory standard and I am unaware of any adverse performance and/or discipline issues."*[9]

[36] The applicant was answerable to Mr McNamara in her job description although Ms Bennett was her immediate co-ordinator and the person to whom she reported. Mr McNamara stated that the applicant's *"work performance was satisfactory and I had no apparent discipline problems with her. I can only remember speaking to her on a couple of occasions over the past seven years about minor student complaints."*[10]

[37] Mr Mackay's statement indicated that there were two issues which involved the applicant. The first was an *"apparent conflict situation"* between the applicant and other members of the Administration Studies Department, which had been addressed, and the second issue was the discovery of *"inconsistencies and inaccuracies with the recording of visiting students at their respective workplaces, when in fact they had left the organisation."* This second issue, in the view of Mr Mackay, indicated that the applicant *"may have, prima facie, committed serious misconduct involving the falsification of records."*[11]

[38] It was the evidence of the applicant that when she started working with trainees she had prepared a procedural manual as there were no procedural guidelines and it was difficult for trainers to know *"exactly what had to be done."*[12] The applicant agreed that there had been changes to procedures and practices since she had prepared her guidelines.

[39] In general terms funding is provided to the respondent once a trainee commences training and the teacher enters that information into the QLS data system. Training is undertaken at the trainee's worksite over a pre-determined period following an assessment by the teacher; once competency is reached and is assessed, the outcome is recorded in the QLS data base. A record is entered when training commences for a module of competency and entries denote whether competencies have been attained or whether a trainee is still undergoing training for that competency.

[40] There should be no *'blanks'* shown on the QLS as a result for each student was required to be recorded. The QLS system indicates funding entitlements for the respondent. The applicant testified that sometime in April or May 2002 the respondent introduced a system of Monthly Activity Reports (MARs) to ensure that no trainee could *"fall through the cracks,"* there is also a contact journal which records when training has started, visits, assessments and all *'running'* information about the trainee.[13] The MARs are forwarded to Ms Bennett.[14]

[41] It was the evidence of the applicant that she kept her contact journal information and *"most of the documentation"* on her personal laptop computer provided by the respondent. The information on the laptop was not accessible by the respondent. The applicant conceded that it was policy and requirement that all information be recorded and maintained on the trainee's individual file and said that *"everything should be on that file."*[15] Ms Bennett referred to the procedural manual prepared by the applicant as being an *"...internal department documentation that Ms Hart put together for our own personal convenience in the department."*[16]

[42] Contact journals prepared by the applicant on her laptop were not in the trainee files but were presented at the hearing. Ms Bennett acknowledged that the applicant maintained information on her laptop and said that the requirement for signatures to be obtained on the contact journal was not complied with by the applicant as she had said she could not print them out to get the signatures. Ms Bennett said she had accepted the explanation although Ms Hart was aware that she wished for the signature to be obtained. Ms Bennett said: *"However, she considered her argument a superior one.....that she didn't need to put signatures there. In fact she was saying that OTTE had issued the laptops for the purpose of flexible training and she felt that was a better....."*.[17] Ms Bennett testified that she had not counselled Ms Hart about her preference to not obtain signatures even though it was against procedure and Ms Bennett's wishes.

[43] Internal and external audits of trainee activities and records are undertaken twice a year and the applicant said that files are selected at random for examination. She said she had never been counselled about her files in respect to audit and that the MARs were not produced for audit.[18] The applicant claimed to have a higher work load in respect to trainees as compared to other

teachers. This was challenged by the respondent and the applicant agreed[19] that her workload was consistent with her allocation of 36 trainees but as she had continued to record trainees who had ceased their employment her workload figure was misrepresented. It was the applicant's evidence that the trainees remained on her list as being active trainees *"because there was still all of the paper work and so on to be completed."*[20]

[44] The respondent claimed that the trainee records kept by the applicant were unsatisfactory, bordering on fraud and related to incomplete information, incorrect information and inaccurate and misleading recording of information. It was submitted that the applicant was incompetent and did not comply with policy and procedures, it was claimed that the trainee records did not reflect the applicant's workload, were inaccurate and misleading. Further it was claimed that due to the inaccuracies found in the records the respondent could have incorrectly claimed government funding.

[45] In April, 2003, the respondent formed a second panel to investigate the applicant's traineeship files as recommended by the first investigation panel. Richard Turnbull, General Manager, Resource Management Group, and Andrew Hamilton, Manager, Security and Public Safety Department, Transport and Logistics Department, undertook the second investigation. The Executive Summary of their examination, dated 15 April, 2003, recorded the following:

"There were 15 cases examined relating to 19 students.
We examined the 'Traineeship Monthly activity reports' produced by Ann Hart for the 2002 year.
We examined 19 student files. [The reference to 19 student files was amended to 18 student files during examination]

Our findings and recommendations are:

There are major inconsistencies between the traineeship activity reports, produced by Ann Hart, and the student files. In particular there were dates recorded against student visits and phone calls for students that had previously left their employ. Ie. There is proof that the student had left the employer in April 2002 but there are recorded visits by Ann Hart in July, August and October, 2002. This major inconsistency has occurred in most of the 15 cases examined.
There is one student who was assessed in 14 competencies on the one day and on that same day Ann Hart visited 3 separate workplaces. This, logistically, needs to be further explained.
That Ann Hart be given a copy of this document and the opportunity to respond to each of these matters."

[46] The applicant claimed that in preparation for the investigation into her trainee files she sought copies of all relevant documentation, she noted that the MARs were not in the files and that one file was missing.[21]

[47] The allegations made against the applicant in respect to her trainee records were the subject of lengthy and detailed evidence from a number of witnesses. The applicant presented evidence over three and a half days and addressed, in the minutiae, the systems, procedures and practices which applied to the training and assessment of trainees. She also discussed in detail the content of the files and the documentation found therein.

[48] The respondent provided a number of documents outlining the procedures and practices associated with trainee records which were discussed and examined. The applicant acknowledged those procedures and practices but under cross examination claimed not to understand or have little or no recollection of the requirements. When discussing finalisation of files the applicant said *".....there has been over the time much confusion on what goes where...."*[22] and *"....it was actually discussed many many times because there was lots of confusion as to where the different things - and again it was something that changed fairly often."*[23]

[49] I do not intend to address each and every instance raised by the respondent about the applicant's record keeping of trainee files. In general terms the respondent alleged that the applicant had falsified records in her care which revealed a consistent pattern of inadequate file maintenance.

[50] The respondent alleged that an examination of the applicant's traineeship files had revealed a number of anomalies and discrepancies.

[51] Amongst other concerns it was alleged that:

- the applicant had claimed that she had visited or contacted trainees who had ceased employment with their nominated employer.

[52] The respondent submitted that a traineeship is a contractual relationship between the trainee and the nominated employer and that once the employment relationship has ended a new traineeship with another employer is required. The applicant agreed that the traineeship did not continue if the employment ceased but testified that a number of her trainee files remained active although the employment relationship no longer existed. It was her evidence that the files remained active as the trainees wished to continue their traineeship. The respondent argued this was not possible unless they became flexible learning or classroom students. None of the trainees to which the applicant referred became flexible learning or classroom students.

[53] It was alleged that:

- the applicant had failed to inform the respondent when trainees had ceased to be active.

[54] Daryl King, Nathan Smith and Blaize King were trainees with the employer Xavier Care. Daryl King commenced training in 2001 but was not enrolled until 2002 and the applicant acknowledged that *"that one slipped through without me doing the results at the end of the year."*[24] Blaize King and Nathan Smith ceased employment with Xavier Care on 5 June, 2002, however the applicant's records reveal telephone contact to each trainee on 30 July, 2002, 28 August, 2002, 19 September, 2002 and 31 October, 2002. The applicant concedes that her records for Blaize King and Nathan Smith were incorrect as *"this was a situation where there was more than one trainee with the same employer and I would have made the entry at the same time as I made the entries for the other trainees with that employer."*[25]

[55] The respondent rejected the applicant's explanation submitting that it was improbable and unlikely that the applicant would overlook the fact that two of the trainees were not present at the workplace when she visited or made contact. The applicant testified that she recorded telephone calls on *post -it* notes, she also testified that the information was taken from her diary and then she transferred the detail to the MAR. The diary was not tendered during proceedings.

[56] It was the applicant's evidence she had been advised by the National Apprenticeship Centre (NAC), and documentation in one of the trainee files supported the fact, that the process required the traineeship to be cancelled when a trainee was no longer employed. In respect to trainee Gonul Uyaniker she said she could not recall having done so nor did she inform Ms Bennett or Student Records that the trainee was no longer employed.[26]

[57] It was alleged that:

- the applicant listed on her MAR two trainees as active trainees for a period of three months after their employment had ceased.

[58] It was the evidence of the applicant that she had not been able to confirm whether two of her allocated trainees were still employed despite the fact that another employee, also a trainee, had told her they were no longer employed. The respondent said that the applicant was able to contact the employer to confirm the information but did not do so and the two trainees were recorded as active trainees until Ms Bennett sought their removal.

[59] It was alleged that:

- by not returning trainee files once the traineeship had finished the applicant was misrepresenting her workload.

[60] Trainee Clare Karunanithy commenced training in May, 2001. She left her employment in mid 2001 but remained on the applicant's MAR until mid 2002. Results were recorded on the QLS despite there being no evidence of any contact with the trainee and no training was conducted over the period. It was raised during proceedings that the trainee Karunanithy was employed in a business run by the Applicant's husband. It was found in a statement tendered that the applicant spent time working in her husband's business however the respondent denied that it was a reason for the termination. That issue is of no relevance to the application before me and has not been considered.

[61] The respondent said that the applicant was aware that files were to be returned once the traineeship was completed and had failed to finalise a number of files albeit her evidence indicates she understood such was the procedure. Of the eighteen files investigated it was found that at least nine involved trainees no longer active, this, it was submitted by the respondent, was a misrepresentation of the applicant's workload.

[62] It was alleged that:

- the misrepresentation of workload resulted in other teaching staff being required to assume a greater teaching burden to ensure that the teaching requirements for trainees was met and affected the budget requirements of the department.

[63] It is noted that the issue of workload was not a matter raised in the initial list of complaints by the respondent. Whilst the applicant submitted that she did not have the opportunity to respond to the allegations, and there is some validity in that claim in respect to the issue of *'underloading,'* she did not deny the claim made by the respondent that she had maintained as active students a number who were no longer employed. In so doing her records were incorrect and misleading in respect to both data and workload.

[64] It was submitted by the respondent that the applicant was a professional and worked largely unsupervised. The respondent's Code of Conduct required that the applicant *"..always act with honesty and integrity in all aspects of her work..."* and *"...perform work diligently, impartially and responsively...."* The Code of Conduct also provides that *"Staff who breach the standards of this Code will be subject to disciplinary action which for serious breach could involve summary dismissal, and in the case of suspected criminal act(s) may involve reference of the matter to the relevant law enforcement authority."*[27] The respondent submitted that the applicant had failed to comply with the

requirements of the Code of Conduct by misrepresenting her workload and the status of her traineeship files.

[65] It was the evidence of the applicant that one reason for her non attendance at the Roll Audit day in December, 2002, was that she was under pressure to reach her target hours. The nominal target hours for each trainer impact on individual workload, however the applicant testified that by December, 2002, she had done just over 13,000 hours, which was in excess of her target hours of 12,090, and she advised Ms Bennett accordingly.

[66] When questioned why she said she was under pressure to reach target having testified that she had already done so, the applicant responded:

> *"I don't know that - I don't know the exact figure so I am not exactly sure how many over I am, but again, at that point I hadn't done the final calculations. When I had done the previous calculations I knew I was going to be close to the target and I wasn't, you know, it could have been either way and that is - so if I hadn't done those visits in December then I may not have reached the target."*[28]

[67] The incorrect record keeping had caused the respondent to claim funding to which it was not entitled. It was noted by the respondent that no penalty was imposed but, it was submitted, that was due to it taking remedial action and informing the funding body once it was aware of the discrepancies found in a number of the applicant's files.

[68] It was alleged that:

- the delay in returning completed or withdrawn trainee files to administration varied from between 3 months to 20 months when policy required that course completion or withdrawal was required to be reported much earlier.

[69] The applicant testified that *"The file does get returned, but it is not an immediate situation. Again common practice with that is that the file is retained by the trainer for a period of time, usually several months, and the reason for that is so that if there are any questions or queries that come up in the next little while, it is easily accessible and invariably the queries come to the trainer anyway so you can answer the queries without having to go out and get the file from the storage area."*[29]

[70] A memo to all trainers from Jill Favero, dated 21 January, 2002, attached relevant extracts from the 2002 Performance Agreement which addressed Administrative Practices, Delivery Practices, Communication and Recording Practices and Reporting Requirements. The Reporting Requirements section

refers to specific time periods for notification under particular circumstances.[30] Ms Bennett referred to a number of files where there had been no work done by the applicant for, in some cases six months or more, but for which time was claimed by the applicant.[31]

[71] The applicant agreed that the Apprenticeship and Trainee Kit included a copy of the Performance Agreement although she claimed she did not recall receiving it but conceded there was a copy of the kit on her desk.[32]

[72] It was alleged that:

- the applicant had enrolled trainees against policy and in the knowledge that completion of training would not be achieved in the relevant time period.

[73] It would seem that the applicant had a different view as to procedure to that of the respondent, she testified to a different understanding of the practice.[33] The applicant claimed she had a number of discussions with Ms Bennett about procedural matters and inferred in some cases agreement existed to support her particular idea or procedure, however, Ms Bennett generally disagreed with that submission. She did not recall discussions with the applicant in respect to any arrangements not to comply with policy or procedures although she testified that she had discussed with the applicant the requirement to obtain signatures from employers. A number of emails were exchanged between the two in respect to matters of procedure which were presented during the proceedings.

[74] It was alleged that:

- the applicant failed to contact trainees each month and visit as required and that these requirements were well known to the applicant who had compiled a traineeship procedures kit.

- the applicant has now claimed that she had recorded contacts with trainees on *'post it'* notes which were then stuck on the relevant files. The respondent said that there had been no mention of *'post it'* notes until the time of the hearing, there was no reference in the applicant's statement and none of the other witnesses were aware of or had sighted the *'post it'* notes.

[75] The applicant claimed that there had been problems with Student Records about enrolment and some trainees had not been enrolled or entered on QLS however she agreed that it was the responsibility of the trainer to ensure a trainee was enrolled.[34] Ms Bennett also testified that it was the responsibility of the trainer to ensure that trainees were enrolled.[35]

[76] It was the evidence of the applicant that Ms Bennett had agreed that it was not necessary for signatures to be obtained on documentation as she recorded information on her laptop and she was not able to print those documents out at the employer's premises for them to sign as was the policy requirement.[36] Ms Bennett's evidence seemed to be more that she did not pursue the issue with the applicant as the applicant *"considered her argument a superior one..."* to the procedure required by Ms Bennett.

[77] The applicant generally had difficulty remembering dates and events. She '*clarified'* much of her evidence in cross examination. She was unable to recall the dates of her absence on sick leave in November, 2002, or annual leave in January, 2003, she could not recall dates of alleged conversations with Ms Bennett or whether she received certain emails or not. She claimed to be unaware of procedures and practices although the evidence reveals she was responsible for creating a procedures manual which she conceded had changed over the period of her employment with trainees. Emails also supported her being involved in discussions in respect to changed practices and procedures. Ms Bennett testified that the applicant had received a memo *"describing the 2002 performance agreement and then attached to it are the parts of the performance agreement that are relevant to the traineeships"* which was distributed to all trainers in early 2002 and was the subject of discussion at meetings. The applicant testified she had a copy of the Performance Agreement but that she did not recall receiving it.[37] Minutes of meetings, which the applicant attended, also referred to discussions about policy and procedures.

[78] S.170CG(3) of the Act requires the following considerations:

> *(a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service;*

[79] The applicant, according to the respondent, had failed to properly ensure that students were enrolled prior to undertaking training, failed to properly complete the contact journal on a number of individual student files and had failed to complete student files once the traineeship had been completed. The evidence of the applicant supports the claims by the respondent that particular trainee files were incomplete, misleading and misrepresented the status of trainees and the applicant's workload.

[80] The applicant, in a statutory declaration dated 26 June, 2003, attested *"I believe that the only inaccurate statements are those statements on the monthly activity reports which I have conceded are incorrect. In a few other cases, I have conceded that some files were incomplete. I do not accept that any of the incorrect statements or my failure to complete the files would have had any*

impact on reports made by the Institute to State and Federal Governments. My understanding is that the only information which is reported to State and Federal Governments is that which is taken from the student's record which is retained in the QLS system. The only references to the QLS system in the allegations set out above are references to students who have not been enrolled or where results have been entered as references to students who have not been enrolled or where results have been entered as WNA's. In the case of the students not enrolled, I believe, in each case, this is the responsibility of Student Records. In relation to the WNA's, I believe that there has been a correct recording."[38]

[81] It was the evidence of the applicant that the state of the files was as a result of a number circumstances. She testified that enrolment forms had been mislaid by the student records department; documents and/or files had been given to Ms Bennett; dates on files were incorrect; *'post it'* notes on which she had recorded contact details were missing; in respect to one trainee forms were sent by the Administration department to an incorrect address but the applicant agreed she had not notified the Department of the change of address; information was maintained on her personal computer but not transferred to relevant trainee files; problems with the office printer; failure of employers to provide notice of termination of a trainee; excessive workload and a high level of administration requirements.

[82] The applicant did not accept that the discrepancies found in her traineeship files were serious matters. She testified that she did not consider the misrepresentation of her workload by including reference to trainees who were no longer employees as being active trainees was a serious matter.[39]

[83] The applicant said that the concern of the respondent that trainees, who were no longer employed and received no actual training and who were recorded by her as active trainees, was not a serious matter.[40]

[84] Trainees who were not recorded as being enrolled by the applicant and for whom no funding was received by the respondent was not a serious matter according to the applicant.[41]

[85] Funding being claimed where there was no evidence of any training having been undertaken was an error by the applicant. She said: *"In the overall scheme of things, that obviously is a concern but everybody does make mistakes and I don't consider that any more serious than anybody else making the same mistake."*[42]

[86] There was evidence that the applicant had assessed trainee Michelle Bailey in 14 competencies in a single morning, as well as assessing another trainee at the same time. Ms Bennett 's evidence was that it was not possible to assess so

many competencies in such a short period of time. An assessment document[43] would seem to support Ms Bennett's evidence.

[87] The applicant did not consider, in respect to Ms Bailey, that the *"....short amount of time* [in which she carried out the training] *in comparison to the number of hours the institute is actually funded..."* was a serious issue, she claimed it was not an issue and was common practice.[44]

[88] The non finalisation of documentation in accordance with procedures was not a serious issue in terms of impact according to the applicant.[45]

[89] The evidence suggested that the applicant regularly departed from the prescribed procedural requirements of the respondent. In many cases she said she was unaware of the requirements, did not understand what was required, had a different understanding of procedures to that of the respondent and claimed that procedures changed regularly. When questioned about the practice when a trainee had completed training the applicant said:

> *"I don't know if it is in the policy. As I guess we indicated in the last couple of days, I haven't read the policy in detail. so I am not sure if it is actually there in the policy."*[46]

[90] Her evidence in respect to various files and entries and/or lack of information therein was inconsistent, however she did concede that on occasions her recording of information was incorrect.

[91] His Honour Senior Deputy President Lacy in a decision in *J. Aresca v Qantas Airways Limited*[47] referred to the decision of Gamble J in *W.R. Knott v Carlton and United Breweries Ltd*[48] where he discussed the word *serious* in the context of *serious misconduct*:

> *"The word 'serious' is the measuring rod for the gravity of the misconduct. All the elements of the conduct called in question must be taken into account including the probable effect of the conduct upon the safety and well being of the employer's business, his property and other employees, the fact that the conduct is in breach of a regulation, an award or determination and also the subjective elements such as the knowledge and skills which the worker ought reasonably to have possessed and the motivation and general state of the mind of the worker at the time."*

[92] The respondent submitted that the behaviour of the applicant represented serious misconduct inasmuch as:

"Her conduct had the potential to irreparably harm the reputation and good standing of the respondent among students, employers and government;
She personally benefited from her serious misconduct, in that she was paid as a full-time employee when in fact she was not engaged in full-time duties;
She was well aware that she was responsible for informing the respondent of her actual workload so that new trainees could be allocated to her;
Other teachers were, by definition, being required to work harder as a result of the applicant not assuming a full trainee workload;
Her conduct was deliberate and wilful."[49]

[93] In a decision of the Supreme Court of Victoria in *Rankin v Marine Power International Pty Ltd*[50] His Honour Justice Gillard states:

"The cases establish that an employee may be dismissed summarily for incompetence in carrying out his duties, and also be dismissed for negligently performing his duties.
The cases involving incompetence are those where the employee holds himself out as having a particular skill, but when entrusted with the job, clearly does not have that skill. That is not relevant in the present proceedings.
On the other hand, there is good ground for the dismissal of an employee if he is negligent in the course of his employment. However, it would indeed be a very grave case of negligence, causing substantial damage, to justify dismissal for a single act of negligence. As a general proposition, the neglect would have to be habitual."

[94] The applicant is a professional teacher responsible for teaching the trainees she was allocated. However it seems ironical and extraordinary that a teacher of *administrative studies* has conceded that she was responsible for many, if not most, of the administrative mistakes and errors in her traineeship files. Likewise, in respect to some issues, she testified to not having read or being familiar with policy. Whether the mistakes and errors are as a result of incompetence, negligence or were deliberate is impossible to determine, nevertheless she has agreed they have occurred.

[95] I am of the view that there existed a valid reason for the termination of the applicant's employment. The evidence reveals that she has failed to comply with the policies and procedures of the respondent on a number of occasions and was not able to provide explanations, acceptable to the respondent, for such non compliance. She also displays a cavalier disregard for the serious impact of her failure to comply.

[96] *(b) whether the employee was notified of that reason;*

[97] The applicant was informed on 5 February, 2004, when she returned from leave, that there were queries with her traineeship files. Further, the respondent indicated its concern by relieving her of traineeship duties effective from that time. The applicant was aware that an investigation was to be undertaken into her records and files however she requested, and the respondent agreed, that her claims of harassment against Mr McNamara be addressed prior to dealing with the work performance issues related to the traineeship files.

[98] She was aware that it was a recommendation of the panel investigating her allegations of harassment against Mr McNamara that there be a full examination of the applicant's traineeship records.

[99] The applicant in her witness statement noted that the email from Mr Mackay on 21 May, 2003, *"was the first time that I had received any indication that my employment was threatened by these allegations."*[51]

[100] I am satisfied that the applicant was aware and had been informed of the reason for her termination. She had been advised that there were problems with her traineeship files which suggested serious misconduct

[101] *(c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and*

(d) if the termination related to unsatisfactory performance by the employee-whether the employee had been warned about that unsatisfactory performance before the termination;

[102] I deal with ss 170CG(3)c) and (d) together.

[103] A panel was set up to investigate the applicant's traineeship files and a report of the findings was provided to the applicant on 30 April, 2003. A meeting was scheduled for 6 May, 2003, to allow the applicant the opportunity to respond to the findings. That date was extended as the applicant claimed not to have received all of the documents and material she had requested. She was advised when the documents were ready and available for her to collect or view.

[104] On 19 May, 2003, the AEU informed the respondent that the applicant would not respond to the allegations and findings until cleared by her doctor and psychologist.

[105] The respondent again sought a response and informed the applicant that there was a prima facie case to suggest serious misconduct. No response was forthcoming and the respondent advised the applicant in writing that her employment was terminated.

[106] The applicant was provided the opportunity to respond to the allegations made against her and to the findings of the investigation panel. The respondent provided her with the report of the panel and copies of the documents and files she had requested to enable her to respond, dates were set for meetings and those dates were extended at the request of the applicant.

[107] The Act requires that the applicant be provided the opportunity to respond to any allegations made, it is the choice of the applicant as to whether to accept that opportunity. In this matter the applicant was provided with all of the information, documentation and material she had requested, she was able to view the files at the respondent's premises but never did provide a response to the allegations made.

[108] A Full Bench of the Commission in *Crozier v Palazza Corp Pty Ltd*[52] said:

> *"For the reasons we have set out in relation to s.170CG(3)(b) we think that the 'opportunity to respond' referred to in s.170CG(3)(c) is a reference to any such opportunity which is provided before a decision is taken to terminate the employee's employment."*

[109] It was submitted that the applicant had not been afforded an opportunity to address any allegations of shortcomings. Accordingly it was claimed that the applicant had not received a *"fair go"* as addressed in the decision of Wilcox CJ, as he then was, in *Nicolson v Heaven and Earth Gallery Pty Ltd*.[53]

[110] I reject that submission, the evidence of the applicant as well as other witnesses reveals that the applicant was afforded the opportunity to respond but declined to do so. The applicant contacted the respondent on a number of occasions prior to her termination, collected documentation and looked at files. She was able to seek an extension of the time initially set by the respondent as she claimed not to have all the necessary documentation. In a lengthy letter dated 24 March, 2003, the applicant referred to the findings of the first investigation panel stating that she was of the view that the panel had not fully addressed her complaints against Mr McNamara. She commented in that letter that *"Accordingly, I will not be able to attend the planned discussion about my performance until the issues outlined above have been properly addressed."*[54]

[111] In an email dated 5 May, 2003, she sought a replacement tape of an earlier meeting and commented *"I have been working on this over the weekend to try and work it through to get it resolved."* On 9 May, 2003 another email sought copies of files and documents, she noted *"I am keen to resolve any concerns about my performance in the hope that the Institute will properly*

address the harassment claim I have lodged against my manager." In those two emails the applicant indicated her intent and that she was *keen* to resolve the respondent's concerns about her trainee files. By letter from the AEU on 19 May, 2003, it was suggested to the respondent that due to the ill health of the applicant she should not be required to respond to the issues raised about her trainee files at the time requested by the respondent. On 26 June, 2003, after her termination, she provided a Statutory Declaration responding to the allegations made by the respondent.

[112] *(da) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and*

(db) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination;

[113] The respondent is a large employer and has a dedicated Human Resource function. As such it would be expected that proper procedures would be effected in respect to the termination of an employee. I am of the view that the respondent's procedures provided appropriate processes for both the investigation of the claims by the applicant and the allegations raised by the respondent.

[114] *(e) any other matters that the Commission considers relevant.*

[115] A letter was provided by the applicant from a Medical Practitioner which indicated that *"a return to this particular workplace is now irretrievable."* However the applicant indicated that she considered the reason for such comment was *"..the issues of the harassment complaint, the bullying situation and the way that the institute had been handling all of the issues...."*[55] She said that *"If the Commission were to find that yes, the procedures were not followed correctly and the dismissal hadn't occurred correctly, then that would allow a return to work, yes."*[56]

[116] The applicant agreed that it would be impossible for her to carry out her job in the Administrative Studies Department.[57]

[117] Much was made of the process by which the discrepancies in the applicant's files were discovered; there were inconsistencies in the evidence as to who gave what files to whom and how and when certain procedures occurred, however the applicant did not deny that the discrepancies and anomalies did in fact occur and exist. Her own evidence is contradictory.

[118] The applicant laid blame for certain discrepancies at other staff, for example she blamed the enrolment section for those employees not enrolled but agreed that it was her responsibility, she claimed that there had been discussion with Ms Bennett in respect to a number of issues and she had been approved to do things outside accepted policy (e.g. not to get employer signatures as required by policy). This was denied by Ms Bennett. The applicant also claimed not to have been informed of changes or alterations to procedures or practices but agreed she would have received such information.

[119] In cross examination the applicant acknowledged the issues raised about her files however she did not agree that the discrepancies and errors were serious.

[120] I have previously noted that the applicant's harassment allegations against Mr McNamara are unrelated to her termination, likewise the respondent has testified that it did not rely on the fact that the applicant performed work in her husband's business as a reason for the termination; the evidence supports the reasons for termination as being the unsatisfactory state of the applicant's traineeship files.

[121] Both parties relied on a large number of authorities and I have not addressed all of them in this decision; they have all been considered.

[122] I am satisfied that the termination was not harsh, unjust or unreasonable, it was submitted that the applicant was not guilty of the misconduct on which the employer acted albeit the applicant did not deny the conduct but disagreed that it was of a serious nature. I am satisfied that the applicant was given a number of opportunities to respond to the allegations made against her and that the conclusions reached by the respondent in respect to the state of the applicant's files was reasonably open to it. It was the applicant's choice not to respond to the allegations despite having indicated in her emails that she was *keen* to resolve the maters raised.

[123] The application is dismissed.

BY THE COMMISSION:

DEPUTY PRESIDENT

Appearances:

S. Jones, of Counsel for the Applicant.

J. Firkin, of Counsel for the Respondent (1, 2, 3, 4 December, 2003).

J. D'Abaco, of Counsel for the Respondent (12, 13, 14, 16 January and 24 February, 2004).

Hearing details:

2003

Melbourne:

December, 1, 2, 3, 4.

2004

January, 12, 13, 14, 16

February, 24.

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[1] Exhibit A2, Attachment A
[2] Exhibit A2, para 13
[3] Transcript at paragraphs 2755, 2756
[4] Exhibit A2 Attachment S

[5] Transcript at paragraph 4731
[6] Transcript at paragraph 5945
[7] Exhibit R13
[8] Transcript at paragraph 3048
[9] Exhibit A2, Attachment S
[10] Exhibit A2, Attachment S
[11] Exhibit A2, Attachment S
[12] Transcript at paragraph 201
[13] Transcript at paragraph 260
[14] Transcript at paragraph 772
[15] Transcript at paragraph 792
[16] Transcript at paragraph 3717
[17] Transcript at paragraph 4078
[18] Transcript at paragraph 269
[19] Transcript at paragraph 1140
[20] Transcript at paragraph 1137
[21] Transcript at paragraph 292
[22] Transcript at paragraph 1184
[23] Transcript at paragraph 1195
[24] Transcript at paragraph 1407
[25] Exhibit A2, Attachment P
[26] Transcript at paragraph 1765
[27] Exhibit R11
[28] Transcript at paragraph 1581
[29] Transcript at paragraph 1102
[30] Exhibit R20
[31] Transcript at paragraph 5834
[32] Transcript at paragraph 822
[33] Transcript at paragraph 1098
[34] Transcript at paragraph 1338
[35] Transcript at paragraph 4370
[36] Transcript at paragraph 377
[37] Transcript at paragraph 5902
[38] Exibit A2, Attachment P
[39] Transcript at paragraph 2985
[40] Transcript at paragraph 2986
[41] Transcript at paragraph 2987
[42] Transcript at paragraphs 2989, 2993
[43] Exhibit R19
[44] Transcript at paragraph 2997
[45] Transcript at paragraphs 2999
[46] Transcript at paragraphs 2522
[47] Print PR911692
[48] *W.R. Knott v Carlton and United Breweries Ltd* (1958) 13 IIB 212

[49] Exhibit R25, para 45
[50] *Rankin v Marine Power International Pty Ltd* 2001 VSC 150 at 265-267
[51] Exhibit A2, para 39
[52] *Crozier v Palazza Corp Pty Ltd* 98 IR 137
[53] *Nicolson v Heaven and Earth Gallery Pty Ltd.* (1994) 126 ALR 233
[54] Attachment G, Exhibit A2
[55] Transcript at paragraph 3006
[56] Transcript at paragraph 3008
[57] Transcript at paragraph 3017